Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

September 7, 2001

GSBCA 15613-RELO

In the Matter of KATHLEEN M. LEWIS

Kathleen M. Lewis, Silver Spring, MD, Claimant.

David R. Petak, Director, Division of Accounting, Food and Drug Administration, Rockville, MD, appearing for Department of Health and Human Services.

NEILL, Board Judge.

Kathleen M. Lewis, claimant in this case, is an employee of the Food and Drug Administration. In August 2000, she undertook a permanent change of station move to Rockville, Maryland. She asks that we review her agency's denial of certain costs she incurred in purchasing a residence in the area of her new permanent duty station (PDS). We grant her claim in part.

Background

In early 2001, Ms. Lewis entered into a contract for the purchase of a residence in Silver Spring, Maryland, which is close to her new PDS. The contract provided that, at the time of settlement, the seller would credit Ms. Lewis with the sum of $4000 toward the purchaser's settlement costs. A special addendum to the contract indicated that Ms. Lewis planned to use FHA (Federal Housing Administration) financing and that the seller would not pay lender's fees.

A letter from Ms. Lewis' broker explains in detail some of the circumstances leading to the purchase of her home. The broker states that with FHA financing, a seller may pay up to six percent of the sale price toward the buyer's closing costs. In a seller's market, however, there is always the distinct possibility that a competing purchaser will offer to pay all of his or her closing costs and thus be favored by the seller over another purchaser who is asking for credit on closing costs. Ms. Lewis' broker further explains in his letter that Ms. Lewis initially offered $155,000, but, to cover the seller paying $4000 of the purchaser's closing costs, she increased her final offer to $159,000. Thus it became clear that, when the seller paid $4000 toward Ms. Lewis' closing costs at settlement, this would represent money ultimately coming from the purchaser rather than the seller.

The Department of Housing and Urban Development (HUD) settlement statement for the purchase of Ms. Lewis' home shows that she did receive a "credit" of $4000 from the seller at closing. In the seller's column is an explicit credit to seller of $1858 (line 213 in the HUD settlement statement), a loan origination fee of $1542 (line 801), and a loan processing fee of $600 (line 808).

Following settlement, Ms. Lewis sought reimbursement for various costs associated with the purchase of her new home. Although a good portion of her claim has been paid, Ms. Lewis remains in disagreement with the agency on a few remaining items. The agency has denied her claim for reimbursement of the loan origination fee of $1858 and the loan processing fee of $600 on the ground that these were shown on the settlement sheet as seller's costs. In addition, a claim of $350 for the cost of a radon test and a home inspection was also denied. The agency considered that the test and inspection were solely for the benefit of the employee and not a requirement for obtaining financing. Finally, the agency has refused to pay more that $150 of the $650 Ms. Lewis sought for the cost of a survey. The agency contends that the type of survey Ms. Lewis sought was more detailed than the customary survey which normally costs $150. It is these denials which Ms. Lewis has asked us to review.

Discussion

We turn first to Ms. Lewis' claims for reimbursement of the loan origination fee of $1858 and the loan processing fee of $600. It is of course true, as the agency itself acknowledges in its report to the Board on this case, that, under certain circumstances, an employee may be reimbursed for some closing costs associated with the purchase of a residence at the employee's new duty station when it can be demonstrated that these costs were intentionally included in the cost of the house. This, however, requires a showing that: (1) the closing costs were clearly discernible and separable from the price paid for the house, (2) both the seller and the purchaser regarded the costs as having been paid by the purchaser, and (3) documentation establishes the amount of the closing costs and the purchaser's liability for them. See Jacquelyn B. Parish, GSBCA 15085-RELO, 00-1 BCA ¶ 30,605 (and cases cited therein).

On occasion, notwithstanding this type of agreement between the parties, the final settlement statement may still show the seller as paying these closing costs when, in reality, the purchaser has actually paid them as part of the purchase price. In such cases, however, like the General Accounting Office, which was our predecessor in deciding cases of this type, we require the employee who purchased the house to provide a statement from the seller, a real estate agent, or some other person with knowledge of the transaction, confirming that the costs were actually paid by the purchaser as a part of the purchase price. Jacquelyn B. Parish, 00-1 BCA at 151,114.

Ms. Lewis has provided us with a copy of the contract for the purchase of her home and a detailed letter of explanation from her broker. Based upon the information contained in these documents, we find that the requirements outlined in our Parish decision have been met. Indeed, the listing of the loan origination fee of $1858 and the loan processing fee of $600 as costs to be paid by the seller only convinces us the more that the seller was well

aware that the purchase price was increased for the specific purpose of defraying these costs. Otherwise, the seller would undoubtedly have invoked the contract provision which expressly stated that the purchaser would not pay lender's fees. We, therefore, find that the claimant can receive some reimbursement for the loan origination fee.

There is a limit, however, on the amount of that reimbursement. The Federal Travel Regulation (FTR) lists a number of miscellaneous expenses which are reimbursable to an employee in connection with the purchase of a residence in the locality of the new PDS. One of these expenses is a loan administration fee, which is defined as "a fee paid by the borrower to compensate the lender for administrative type expenses incurred in originating and processing a loan." 41 CFR 302-6.2(d)(1)(ii) (2000) (FTR 302-6.2(d)(1)(ii)). The same provision generally limits reimbursement of a loan administration fee to one percent of the loan amount. The provision states that the agency can exceed the one percent limit if the claimant demonstrates that a higher rate of reimbursement for such expenses is customarily charged in the locality where the residence is located. Id. No such showing has been made here, however. The HUD settlement statement indicates that the principal amount of Ms. Lewis' loan was $156,500. She is entitled, therefore, to reimbursement for the loan origination fee not to exceed $1565.

This same one percent limit on reimbursement of the loan origination fee likewise precludes reimbursement of the $600 which Ms. Lewis seeks for the loan processing fee. The FTR provision quoted above includes the cost of "processing a loan" as one of the administrative-type expenses included in the loan administration fee. Since we have already determined that the claimant is not entitled to more than $1565 for the loan origination fee, nothing more can be paid to her for loan processing -- one of the services already included under that category of costs. Daniel H. Coney, GSBCA 15506-RELO (Aug. 15, 2001).

Another type of miscellaneous expense for which reimbursement is authorized for an employee in connection with the purchase of a residence in the locality of the new PDS includes fees for environmental testing and property inspection. This provision, however, states that reimbursement is permissible only if such testing and inspection are required by federal, state, or local law, or by the lender as a precondition to purchase. FTR 302-6.2(d)(1)(xi).

Ms. Lewis believes that the radon testing and formal inspection of her new home were, in fact, required by the lender. She explains that among the papers she was given to sign, as borrower prior to getting her loan, was one relating to home inspection. She has provided a signed copy of this document for the record. The document is a preprinted form (HUD 92564 CN). At the top of this form is printed in bold letters: "**For Your Protection: Get a Home Inspection**." A space follows for the name of the buyer and the property address. There follow several explanatory paragraphs. The buyer is advised that, while the FHA insures the loan for the lender, it does not guarantee the value or condition of the buyer's new home. The buyer is, therefore, urged to ask a qualified home inspector to inspect the potential new home so that a wise decision can be made. The buyer is further advised that the lender's appraisal is not an inspection and that the appraisal is for the lender while the home inspection is for the buyer. Following some additional paragraphs outlining in detail what a home inspection should include, the document concludes with a declaration and

a signature line for the borrower. The declaration reads: "I understand the importance of getting an independent home inspection. I have thought about this before I signed a contract with the seller for a home."

Ms. Lewis did in fact provide for an inspection of her potential home in the contract which she signed for its purchase. Nevertheless, notwithstanding the fact that she was asked to give written assurance to the lender that she did so, we are not convinced that her arranging for a home inspection was a precondition imposed by the lender for the purchase of the house. The document she was asked to sign certainly encouraged her in the strongest terms to arrange for a home inspection. At the same time, however, it carefully distinguished between an appraisal and an inspection and expressly provided that the latter was for the lender while the former was for the purchaser. We, therefore, remain unconvinced that in this case the testing and inspection for which Ms. Lewis seeks reimbursement were actually imposed by the lender as a condition to her purchasing her new home. The agency properly denied reimbursement of these costs.

The final item for which Ms. Lewis seeks reimbursement is the $650 cost of a property survey. The agency initially questioned this cost as unusually high and made inquiry of Ms. Lewis' settlement company. An agency official was then told that the survey in question was a "boundary survey," which was more detailed than the customary survey which normally costs $150. Ms. Lewis argues that the regulations which authorize reimbursement for the cost of a survey make no reference to the specific type of survey. She contends that the survey she ordered for her property was simply that required to establish the perimeter and configuration of her property necessary for financing or recording its sale.

The FTR provides that certain legal and related expenses, such as the cost of making a survey, are reimbursable with respect to the purchase of a residence in the locality of a transferred employee's new PDS. There are, however, two conditions which must be met before the employee can be reimbursed. The first condition is that these costs must customarily be paid by the purchaser. The second condition is that the amount paid must not exceed the amounts customarily charged in the locality of the residence. FTR 302-6.2(c). The agency's objection in this case goes to the second condition. It does not believe that the $650 charge is customarily charged for a required survey. As part of this objection, the agency of course questions whether the so-called "boundary" survey is customarily required in the locality of the claimant's residence. Given the amount sought by Ms. Lewis, the agency's concern is understandable.

When questions of local custom arise, the burden is on the claimant to show why she or he should prevail. 48 CFR 6104.4(c); Ernestine S. Canty, GSBCA 15541-RELO (Aug. 22, 2001); Anna M. Wharton, GSBCA 15258-RELO, 00-2 BCA ¶ 31,011; Byron D. Cagle, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903; Sara Blanding, GSBCA 14493-RELO, 98-2 BCA ¶ 29,790; Pierre S. Ware, GSBCA 14150-RELO, 97-2 BCA ¶ 29,061; Christopher L. Chretien, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701 (1996). Ms. Lewis has provided us with very little so far as the cost and need for a boundary survey in her locality is concerned. She simply writes that the purpose of the survey was to comply with the requirements for recording or financing. As evidence that the $650 charge was customary for the locality, Ms. Lewis had provided us with nothing more than a price quote of $650 recently prepared for her by what is apparently a local survey company. We find that this document and her

unsupported statements fall short of the claimant's burden of proving why she should prevail on this aspect of her claim. We affirm the agency's determination not to reimburse her for more than $150 of the cost of the survey.

Of the expenses on which Ms. Lewis and her agency remain in disagreement, we find that she is entitled to payment of no more than $1565 for her loan origination fee. All remaining items of her claim are denied.

EDWIN B. NEILL
Board Judge