Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

July 2, 2002

GSBCA 15669-RELO

In the Matter of SANDRA L. WILKS

Sandra L. Wilks, Austin, AR, Claimant.

Michael J. Kennedy, Civilian Personnel Officer, Air Force Reserve Command, Department of the Air Force, Westover Air Reserve Base, MA, appearing for Department of the Air Force.

HYATT, Board Judge.

Claimant, Sandra L. Wilks, is a civilian employee of the Air Force. She accepted a permanent change of station (PCS) from Westover Air Reserve Base in Chicopee, Massachusetts, to Little Rock Air Force Base in Arkansas. The transfer took place in August 2000. Incident to this transfer she sold her home in Belchertown, Massachusetts, in March 2001. Since she had left the area, Ms. Wilks left much of the responsibility for sale of the house in Belchertown in the hands of her realtor. Ms. Wilks submitted a voucher for reimbursement of the allowable costs of selling the house. The Air Force disallowed certain costs claimed by Ms. Wilks in connection with sale of the house in Massachusetts, including buyer's closing costs, overnight mail and courier fees, and the cost of repairs paid for by her agent because required by the lender. She has sought the Board's review of the disallowance of these expenses.

Buyer's Closing Costs

In selling her home in Massachusetts, Ms. Wilks agreed to assume $3000 of the purchaser's closing costs. It appears from the Department of Housing and Urban Development (HUD) settlement statement that claimant agreed to pay $3000 of the loan discount fee charged by the mortgage company, Wells Fargo. The purchaser obtained a Federal Housing Administration (FHA) loan. Ms. Wilks maintains that it was common and customary at the time she sold her house for the seller to absorb a portion of the buyer's closing costs when the buyer obtained an FHA-approved loan. The Air Force disagrees, concluding that while it may be common for the seller to contribute to the buyer's closing costs, and may well be a matter for negotiation between buyer and seller, this does not mean the practice has become customary within the meaning of the applicable provisions of the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR).

Under the FTR and the JTR, the Air Force may reimburse a transferred employee for certain miscellaneous expenses incurred in the sale of a residence at the old permanent duty station, provided they are customarily paid by the seller of a residence in that locality and to the extent the amount claimed is within the limits of the amounts customarily paid in the locality of the residence. 41 CFR 302-6.2(d) (2000); JTR C14002-A.4. It is the claimant's burden to establish through persuasive evidence that it is customary for the buyer to assume a large percentage of the buyer's closing costs in the locality of the residence sold. E.g., Evan E. Zillmer, GSBCA 15728-RELO (June 24, 2002); Monika J. Dey, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001); Robert P. Azinger, Jr., GSBCA 15350-RELO, 00-2 BCA ¶ 31,062; Byron D. Cagle, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903. As we explained in Dey, there are a variety of ways in which to meet the burden of showing that it is "customary" for a seller to assume a particular cost. These include showing that a cost is allocated to a particular party in a preprinted sales form, submitting letters from local realtors and brokers confirming that a particular cost is invariably assumed by the seller for the buyer, providing data showing that over the years a commanding percentage of sellers have contributed to buyers' closing costs, and the like. In contrast, letters from realtors simply asserting that many sellers contribute to buyers' closing costs do not establish that a practice is customary. 02-1 BCA at 156,827-28.

In this case, Ms. Wilks has submitted a letter from her real estate agent stating that it is "customary and normal" for the seller to pay closing costs and that this was part of the buyer's offer which was agreed to by both parties. In addition, Ms. Wilks has submitted an electronic mail exchange with the Greater Springfield, Massachusetts Association of Realtors in which she was told that "costs involved in a real estate closing are negotiated in good faith between the parties" and recommending that she consult with the local realtor or her attorney for additional information concerning the specific industry practice in her area. Ms. Wilks' attorney states that the $3000 payment of buyer's closing costs was based upon the requirement that the buyer was to receive an FHA mortgage. The attorney explains that it is "customary and normal, indeed required by FHA, that the seller pays a part of the buyers' costs." In general, according to claimant's attorney, an FHA mortgage poses a substantial cost to the seller. While paying buyer's costs may not be done as a matter of course in non-FHA transactions, "it is invariably done in FHA closings, hence is customary in this area."

In rebuttal, the Air Force states that it, too, contacted the Greater Springfield Association of Realtors and some local realtors. The Air Force has submitted its own e-mail exchange with a representative of the local Association of Realtors, who stated that while it is not unusual for sellers to assume a portion of the buyer's closing expenses, it is not customary by any means, but rather is simply a subject for negotiation. In addition, the Air Force has submitted letters from a loan officer at Wells Fargo and from a local realtor, both of whom confirm that in the Greater Springfield area, a seller's contribution to the buyer's closing costs is a negotiated item and is not mandatory. Finally, the Air Force has submitted an extract from HUD's web site, addressing settlement costs for first-time buyers interested in using Government-mortgage programs. This article simply suggests that this is an item for negotiation. There is no indication in the web site article that it is mandatory for a seller to pay all or part of the buyer's closing costs under an FHA loan.

Based on the information submitted, we cannot conclude that claimant has met her burden to show that it is customary in this local area for the seller to assume a share of the buyer's closing costs under an FHA-insured loan. The evidence establishes that it is a common practice for the seller to shoulder a portion of the buyer's closing costs and that this is frequently the subject of negotiations between buyer and seller. We cannot, however, based on what has been provided by the parties, find that the preponderance of the evidence establishes that under an FHA-approved mortgage, the seller customarily assumes a large portion of these expenses, or that the FHA actually imposes such a requirement as a condition of the loan. In the absence of direct confirmation from the FHA or the lender that the buyer invariably will, or is indeed required to, shoulder a large portion of the buyer's closing costs in this local area, we cannot on this record find that the practice is customary for this locality.

Overnight Mailing Expenses

Because she moved to her new duty station prior to selling the house in Massachusetts, claimant maintains that it was necessary to incur overnight mailing expenses of $70 to facilitate the sale of the residence. One charge -- for $32 -- was incurred because Ms. Wilks had to execute a new deed to reflect unanticipated FHA requirements. Because Ms. Wilks had already relocated to Arkansas, her attorney sent it by overnight mail to ensure that the document would be signed on a timely basis. The attorney states that it is customary to use overnight mail in circumstances such as these, when the seller is located away from the local area of the residence. A second charge in the amount of $16 was for a courier required by the bank under the FHA mortgage. The bank required that the papers be prepared by it and delivered to the seller's attorney on the day of closing. According to claimant, the FHA does not permit this cost to be paid by the buyer, and Ms. Wilks' attorney avers that this expense is customarily and normally paid by the seller when the buyer has an FHA mortgage. Finally, the mortgage company charged $22 for mailing fees. Again, claimant's attorney asserts that all the banks in the local lending area charge this fee to sellers and that this is customary. The Air Force has not submitted any evidence to rebut the attorney's statements and, in fact, recognizes that these charges may be reimbursable.

Although there is no specific entitlement to reimbursement of overnight mailing charges, under statute or regulation, the provision in the FTR for reimbursement of incidental charges if required and not simply used as a convenience, may be applicable. 41 CFR 302-6.2(f); see, e.g., Paula K. Fowler, GSBCA 15384-RELO, 01-1 BCA ¶ 31,281; Larry D. Gatewood, GSBCA 15343-RELO, 01-1 BCA ¶ 31,211 (2000). Here, Ms. Wilks has provided the statement of her attorney explaining that these expenses were required because Ms. Wilks was no longer located in Massachusetts at the time she sold her house, and that the banks customarily require overnight mail be used to track important documents in such circumstances. The Air Force has not provided any contrary statement to challenge the attorney's statement. With respect to the amounts incurred by claimant and her attorney for transactions they generated, the Fowler rationale is applicable, and so long as the amounts charged do not exceed the amounts customarily charges in this locality, the Air Force should reimburse Ms. Wilks for these expenses. Based on this record, however, the charges imposed by the lender for overnight mailing expenses appear to be part of the bank's normal cost of doing business and thus would constitute a non-reimbursable element of the finance charges. Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610.

Repair Costs

Ms. Wilks also seeks reimbursement of some $3000, listed on the settlement statement as "Repairs to ReMax Prime Properties." She explains that this amount was required because certain items noted in inspections were required by the FHA to be corrected as a condition of making the loan to the buyer. Specifically, the seller was required to bring the wood stove in the house up to code and to install gutters and downspouts on the residence. Claimant maintains that the house was sold "as is" and that these were essentially upgrades required by the FHA as a condition of obtaining mortgage approval.

The Air Force contends that these items, upgrades of the wood stove and the installation of downspouts, are properly characterized as repairs, which are non-reimbursable miscellaneous expenses under FTR 302-6.2(d)(2)(iv), which provides that "operating or maintenance costs" may not be reimbursed. See also JTR C14002-A.4(b) (4), (6). The Air Force suggests that these items are akin to those for which reimbursement was denied in Harlan C. Thiel, GSBCA 13668-RELO, 97-1 BCA ¶ 28,710 (1996); see also Janeen H. Rosenberg, GSBCA 15591-RELO, 01-2 BCA ¶ 31,614; George S. Chaconas, GSBCA 14278-RELO, 98-1 BCA ¶ 29,728 ("Correction of deficiencies required to be completed in order to make a home saleable - even when the requirement was not in effect at the time the residence was completed - are operating and maintenance expenses which the FTR expressly states are not reimbursable residence transaction expenses.").

Ms. Wilks asserts that these costs were required by the lender under the FHA mortgage program and thus should be treated as a reimbursable incidental charge under FTR 302-6.2(f) and JTR C 14002-A.6. To qualify for reimbursement under this rubric, however, the items claimed must be for required services that are customarily paid by the seller at the old duty station, to the extent the charges do not exceed the amounts customarily charged in the locality of the residence. Thomas E. Sullivan, GSBCA 15453-RELO, 01-1 BCA ¶ 31,339 (plumbing costs). Here, while claimant's attorney asserts that the lender required that the repairs be made by the seller, and that it is customary to require this under FHA loans, the Air Force points out that the HUD settlement statement lists these items as repairs made by ReMax.

In addition to statements from her attorney and realtor confirming that, under an FHA loan, the seller is required to make certain repairs affecting the habitability of the house, Ms. Wilks has provided an extract from an internet site discussing FHA loans. This extract states that the FHA appraiser "is expected to require repair or replacement of anything that may affect the safe, sound, and sanitary habitation of the house. If repairs are required . . . the seller (in most cases) is ultimately responsible for seeing that the repairs are taken care of." FHA Home Loan Appraisals, at http://www.sunnations.com/mortagelibrary/fha-appraisals/default.asp. The only response from the Air Force, other than to take the position that the costs reflect operating and maintenance expenses, is that the internet extract is not an "official" FHA site. Since the Air Force has not produced any independent evidence suggesting that these were not required items mandated by the lender, Ms. Wilks has met her burden of proof that these were required items customarily paid by the seller. To obtain full reimbursement, however, she should provide the Air Force with evidence that the costs did not exceed amounts customarily charged in the locality.

To conclude, Ms. Wilks is entitled to recover a portion of the overnight mailing expenses and some or all of the FHA-required updates she made to her home in order for the buyer to get the FHA loan.

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CATHERINE B. HYATT
Board Judge