

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

June 10, 2002

GSBCA 15695-RELO

In the Matter of TERRENCE T. SMITH

Terrence T. Smith, Rochester, MN, Claimant.

Sandra S. Williams, Authorized Certifying Officer, National Finance Center, Department of Agriculture, New Orleans, LA, appearing for Department of Agriculture.

WILLIAMS, Board Judge.

The United States Department of Agriculture (USDA) has requested our opinion on whether it may certify for payment a claim submitted by Terrence T. Smith in conjunction with his permanent change of station. Specifically, USDA inquires as to whether Mr. Smith can be reimbursed for closing costs for the purchase of a residence which the seller paid on his behalf in lieu of making repairs required as a result of the home inspection.

Reimbursement of these expenses must be denied because the Federal Travel Regulation (FTR) requires that the employee actually incur the expense in order to be reimbursed, and the seller, not the purchaser, incurred the closing costs at issue here.

Background

In conjunction with his permanent change of station from Vermillion, South Dakota, to Willmar, Minnesota, on November 6, 2000, claimant purchased a home in Minnesota on February 18, 2001. The purchase agreement which claimant signed contained the following provision: "Due to inspection a number of concerns were brought up . . . Buyer is willing to accept these items as is if seller is willing to compensate buyer \$2500 toward closing costs." In accordance with this agreement, the seller paid on Mr. Smith's behalf the following fees:

Loan Origination Fee	\$1868
Appraisal Fee	150
Credit Report	17
Flood Certificate	15
Underwriting Fee	250

Title Search	25
Title Examination	100
Total	\$2425

Discussion

Provided that certain requirements are met, when an employee transfers in the interest of the Government, the employing agency is required to reimburse the employee for expenses of the purchase of a residence at the employee's new duty station. 5 U.S.C. § 5724a(d) (2000); 41 CFR 302-6 (2000). One of the requirements that must be met is that the employee must actually incur an expense in order for the Government to reimburse the employee for that expense. 41 CFR 302-6.1(f)(1); Marion L. Ladd, GSBICA 15138-RELO, 00-1 BCA ¶ 30,890; Nicholas A. Mendaloff, GSBICA 14542-RELO, 98-2 BCA ¶ 29,983. Thus, we must determine whether Mr. Smith can be deemed to have actually incurred the closing costs paid by the seller on his behalf.

In Jacquelyn B. Parrish, GSBICA 15085-RELO, 00-1 BCA ¶ 30,605, we adopted the Comptroller General's longstanding precedent that an employee who purchased a house at a new duty station could be reimbursed for closing costs that were included in the purchase price of a house and paid by the seller at closing, so long as the employee could establish 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 showed the amount of the closing costs and the purchaser's liability for them. In adopting this rule, we recognized that although the seller might initially pay the closing costs, the purchaser actually incurred the costs as part of the purchase price. In determining what expenses an employee actually incurred and paid in connection with a housing transaction, the Board looks to the settlement sheet. Ladd, 00-1 BCA at 152,461; Mendaloff, 98-2 BCA at 148,300; Harlan C. Thiel, GSBICA 13668-RELO, 97-1 BCA ¶ 28,710 (1996). Here, the settlement sheet showed that the seller paid the closing costs, and the purchase agreement further revealed that the costs were paid by the seller in exchange for the purchaser forgiving the seller's obligation to provide certain enumerated repairs required to be performed by the seller as a result of the home inspection. It is documented that the repairs needed to be made, and the parties agreed to have the seller pay for them by assuming certain closing costs rather than doing the work or decreasing the purchase price. Under the circumstances, the criteria for reimbursement have not been met since the seller and purchaser did not regard these costs as being paid by the purchaser. The costs were paid by the seller to cover the expense of repairs that were the seller's responsibility. This payment was akin to a credit to the purchaser or a reduction in the purchase price. As such, these closing costs are not recoverable by the purchaser. Marilyn Wire, GSBICA 15485-RELO, 01-1 BCA ¶ 31,413.

There is a separate basis for denying reimbursement of the underwriting fee. The FTR provides that unless specifically authorized elsewhere in the regulation, no fees, charges, costs, or expenses determined to be part of the finance charge under the Truth in Lending Act, 15 U.S.C. § 1605, may be reimbursed. 41 CFR 302-6.2(d)(2)(v). The Truth in Lending Act provides that the finance charge shall be determined as the sum of all charges imposed directly or indirectly by the creditor as an incident to the extension of credit. The Board has consistently recognized that the underwriting fee paid by the borrower, while not itself a finance charge, is a charge paid incident to and as a prerequisite to the extension of credit.

Craig A. Czuchna, GSBCA 15799-RELO (May 2, 2002); Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610; Aman B. Kay, GSBCA 15543-RELO, 01-2 BCA ¶ 31,508; Paula K. Fowler, GSBCA 15384-RELO, 01-1 BCA ¶ 31,281; Stanley H. Levine, GSBCA 15065-RELO, 00-1 BCA ¶ 30,809; James A Fairley, GSBCA 15133-RELO, 00-1 BCA ¶ 30,713 (1999); Gerald Fediw, GSBCA 14256-RELO, 98-1 BCA ¶ 29,513; Charles A. Peters, GSBCA 13643-RELO, 97-1 BCA ¶ 28,689 (1996).

Decision

Claimant is not entitled to be reimbursed for the closing costs at issue, and the agency should not certify his claim for payment.

MARY ELLEN COSTER WILLIAMS
Board Judge