Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

May 9, 2002

GSBCA 15761-RELO

In the Mater of DAVID L. REED, JR.

David L. Reed, Jr., Perryton, TX, Claimant.

Ann C. Cordes, Certifying Officer, National Finance Center, Department of Agriculture, New Orleans, LA, appearing for Department of Agriculture.

GOODMAN, Board Judge.

Claimant, David L. Reed, Jr., is an employee of the Department of Agriculture. The agency has requested that this Board issue an opinion as to whether claimant's claim for reimbursement of certain costs incurred in the purchase of his home at his new duty station as the result of a permanent change of station (PCS) move should be paid.

Background

Claimant was issued travel orders for a PCS to his new duty station in Texas in July 2001. He entered into a contract to purchase a home at the new duty station. During negotiation of the contract, claimant proposed that seller pay him $2000 to replace the existing carpet. The seller proposed a counter-offer of $1700 which was accepted by claimant. The contract stated, "Seller will give buyers a $1700.00 carpet allowance."

The agency states:

> When this [contract] was presented to the mortgage company who had pre-approved the purchase of the house, the mortgage company would not allow the exchange of money between the buyers and the sellers at the closing. The contract was amended to read "Seller to pay $1700.00 of buyer's closing costs," at the suggestion of the mortgage company.
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> The mortgage company supplied a statement regarding the closing of Mr. Reed's loan. They stated "His initial purchase contract stated a carpet allowance to be paid by the sellers in the amount of $1700. FHA does not allow such allowances to be included in purchase contracts, however FHA

> does allow the seller to pay part of the buyer's closing costs and pre-paid up to 6%."
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> The USDA denied Mr. Reed's claim per Settlement Statement dated 7/31/01 and supplied him with two . . . decisions [of the GSBCA]. Mr. Reed responded that he feels these two cases do not compare to this situation and would like a decision based on his case.
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> Therefore, we ask the following question:
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> Based on the statement shown on Mr. Reed's application, . . . the seller paid the appraisal fee, title insurance policy, certifications, credit report, and survey fee as an agreement with Mr. Reed to be used for carpet allowance. Should his request for $1,651.06 be allowed?

Discussion

The Government has denied claimant reimbursement based upon its interpretation of two decisions of this Board that stand for the principle that "the relevant transaction is the bargain that was made. The Government is not authorized to reimburse its employees for the hypothetical expenses of the bargain the parties may have contemplated but did not make." Nicholas A. Mendaloff, GSBCA 14542-RELO, 98-2 BCA ¶ 29,983; Roger G. Greening, GSBCA 13924-RELO, 97-1 BCA ¶ 28,883.

In both cases cited by the Government, the parties' agreements were structured so that the employee did not pay certain costs, and the Government denied reimbursement because such costs were not paid by the employee. The employees argued that the original intent of the negotiations of sale would have required the employee to pay for such costs and the employee would therefore have been entitled to reimbursement. Even though further negotiations structured the agreement so that the employee did not pay the costs, the employee maintained that he was nevertheless entitled to reimbursement. The Board held that the relevant transaction was the bargain that was ultimately made, and not the one that may been contemplated during negotiations.

The instant case presents similar circumstances. The claimant seeks to retain the benefit of his original bargain. Claimant and seller initially agreed to a $50,000 purchase price paid by claimant and a payment by seller of a $1700 carpet allowance, with claimant to pay his own closing costs. This would have resulted in a net out-of-pocket amount to claimant of $48,300, with the Government reimbursing him for his closing costs.

However, when the contract was submitted to the mortgage company, the mortgage company insisted that it would not allow the claimant to receive any funds at settlement, based upon the mortgage company's understanding of FHA requirements. The mortgage company suggested that the seller therefore pay approximately $1700 of the claimant's closing costs. This was agreeable to both claimant and the seller, and the contract was amended to reflect this agreement.

The claimant states, "The results in this change in the contract did not alter the purchase price, or the amount of money either the buyer or the seller had to pay or receive in order to complete the terms of the contract agreed to previously. No one gained or lost financially from the change. No price concessions were made and no hypothetical expenses were involved."

What claimant failed to realize at the time the contract was amended was that even though the agreed change to the contract did not alter the out-of-pocket amounts to be paid by the claimant and seller, the fact that certain closing costs were now being actually paid by the seller instead of the claimant might impact whether these costs were reimbursable to the claimant by the Government. Claimant seeks to retain the benefit of the original bargain that he made with the seller and have the Government reimburse him for those closing costs he would have paid but for the mortgage company's insistence that the contract be amended.

We cannot authorize reimbursement based upon the parties' agreement prior to the finalization of the contract of sale. While the parties originally agreed that buyer would pay certain closing costs, the final contract of sale had the seller bearing these costs. This final contract is the relevant transaction. Accordingly, claimant is not entitled to reimbursement of the costs that he seeks.

Decision

The claim is denied.

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ALLAN H. GOODMAN
Board Judge