

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

August 27, 2002

GSBCA 15812-RELO

In the Matter of GARY C. DUELL

Gary C. Duell, San Antonio, TX, Claimant.

David M. England, Office of General Counsel, Defense Commissary Agency, Fort Lee, VA, appearing for Department of Defense.

HYATT, Board Judge.

Claimant, Gary C. Duell, accepted a permanent change of station (PCS) from Fort Lee, Virginia, to San Antonio, Texas. The Defense Commissary Agency (DCA) authorized reimbursement of real estate transaction fees. A relocation services contractor was used for the sale of the house at the old duty station. Mr. Duell's claim is for various items of expense not reimbursed in connection with the purchase of a new home in San Antonio and for the recovery of Federal Express expenses incurred in the sale of the residence at the old duty station. The items of expense disallowed for the purchase of the new home include a loan processing fee, an underwriter's fee, and certain legal and related costs. Mr. Duell questions the disallowance of these costs.

Federal Express Expenses

DCA explains that the Federal Express charges were disallowed because Mr. Duell used a relocation services contractor for the sale of his home in Virginia. According to DCA, under the Joint Travel Regulations (JTR) the use of a relocation services contractor is the exclusive mechanism for payment of the expenses of selling a home at the old permanent duty station and no additional expenses incurred by the employee may be reimbursed.

Under 5 U.S.C. § 5738 (2000) and implementing regulations, an agency may offer transferring employees the option of using a relocation services contractor as a substitute for reimbursement of certain residence sale transaction expenses. E.g., Brent A. Myers, GSBCA 15466-RELO, 01-1 BCA ¶ 31,400; see 41 CFR pt. 302-12 (2000); JTR ch. 15. JTR C15003-B provides that "[o]nce an employee accepts relocation services, reimbursement to the employee shall not be allowed for expenses, authorized in other parts of this regulation,

that are analogous or similar to expenses or the cost for services the DOD component pays under the relocation service contract." In essence, while use of the relocation services contractor prohibits an employee from recovering any expenses similar to those the agency may have been required to pay the contractor, it does not necessarily preclude reimbursement of an expense that would be allowed in connection with the sale of a residence, but was not reimbursed to the relocation services contractor. The regulation, thus, does not entirely support the position taken by the Air Force -- it prohibits only reimbursement of duplicate or similar expenses that the agency has incurred in paying for the contractor's services. See Kelly K. Ward, B-252531 (Aug. 13, 1993); David B. Pidduck, 69 Comp. Gen. 137 (1989). The Air Force does not contend that it paid the contractor for these same Federal Express expenses; rather, it simply asserts that the use of the contractor prevented the employee from recovering any additional expenses.

Nonetheless, there is no specific entitlement to reimbursement of overnight mailing charges under the applicable regulations. To recover such expenses, the employee has the burden to show that the expenses in question were actually necessary for the sale of the residence and not used merely for personal convenience. In the record developed to date, claimant has not provided evidence that the costs of overnight mailing services were required by the relocation services contractor and that the amounts paid were reasonable and customarily paid in the locality of his former residence. 41 CFR 302-6.2(f); JTR C14002-A.6; see, e.g., Sandra L. Wilks, GSBCA 15669-RELO (July 2, 2002); Paula K. Fowler, GSBCA 15384-RELO, 01-1 BCA ¶ 31,281. Absent evidence of this nature, DCA could not properly allow these expenses.

Loan Processing and Underwriting Fees

Although DCA reimbursed claimant for the one percent loan origination fee he incurred in purchasing a residence at his new duty station, it declined to pay a loan processing fee of \$225 and an underwriting fee of \$250. Mr. Duell states that he is puzzled that these fees were not allowed, since his claimed expenses were well under the five percent of the purchase price limit on reimbursable expenses. The Air Force responds that these fees are part of the finance charge and, as such, are not reimbursable. Under JTR C14002-A.4(a)(2), the agency is not permitted to reimburse such expenses in excess of the one percent loan origination fee that may be paid.

DCA properly disallowed these costs. The limit on reimbursable expenses simply caps the payment of expenses that the Government is authorized by statute and regulation to make. The loan processing fee and the underwriting fee are not allowable under pertinent regulations, regardless of the total amount of expenses claimed by the transferring employee.

With respect to the loan processing fee, as the Board has recently explained:

Real estate transaction charges which are paid incident to and as a prerequisite to the extension of credit are considered to be finance charges under the Federal Travel Regulation (FTR), the fundamental regulation governing benefits for federal civilian employees who are transferred from one

permanent duty station to another. Finance charges are not reimbursable except to the extent that the FTR makes them so. 41 CFR 302-6.2(d)(2)(v) (1999); Larry W. Poole, GSBCA 15730-RELO[, 02-1 BCA ¶ 31,776].

A kind of finance charge which is expressly made reimbursable by the FTR is a loan origination fee. A loan origination fee is "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). Fees for preparation of documents needed to close a loan, and for the processing of the loan, are species of loan origination fee. Pamela R. Harris, GSBCA 15645-RELO, 01-2 BCA ¶ 31,640; Kathleen M. Lewis, GSBCA 15613-RELO, 01-2 BCA ¶ 31,616; Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610; Jeffrey P. Zippin, GSBCA 15115-RELO, 00-1 BCA ¶ 30,744; John P. Kemp, GSBCA 14335-RELO, 98-2 BCA ¶ 39,751.

Although the FTR makes loan origination fees reimbursable, it also places a limitation on the extent of reimbursement. Generally, the limitation is one percent of the loan amount. "Reimbursement may exceed 1 percent only if the employee shows by clear and convincing evidence that: (A) The higher rate does not include prepaid interest, points, or a mortgage discount; and (B) The higher rate is customarily charged in the locality where the residence is located." 41 CFR 302-6.2(d)(1)(ii).

Verna Pope, GSBCA 15718-RELO, 02-1 BCA ¶ 31,822. DCA has already reimbursed Mr. Duell for a loan origination fee in the amount of one percent of the amount of his mortgage loan. Although the loan processing fee is listed separately on the settlement sheet, it is for all intents and purposes simply an additional fee for loan origination. Claimant has not contended nor shown that a rate in excess of one percent of the loan amount is customarily charged in the locality of his former residence for loan origination fees. Consequently, he may not be reimbursed for the additional loan origination costs associated with loan processing. Id.; Joseph Thompson, GSBCA 15077-RELO, 00-1 BCA ¶ 30,615 (1999).

With respect to the underwriting fee, the Board, following the decisions of the General Accounting Office (GAO), our predecessor in resolving travel and relocation claims of civilian employees of the Government, has consistently recognized that the underwriting fee paid by the borrower, while not itself a finance charge, is, in reality, a charge paid incident to and as a prerequisite to the extension of credit. As such, for the reasons explained in the quote from Pope, above, these fees are not allowable. E.g., David L. Malone, GSBCA 15817-RELO (Aug. 2, 2002); Terrence T. Smith, GSBCA 15695-RELO, (June 10, 2002); Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610.

Legal and Related Costs

As to the claimed legal and related costs, DCA explains in its response that, upon further review of the documentation, this actually appears to be a claim for reimbursement of the cost of a survey paid for by the seller outside of closing and for which Mr. Duell was required to compensate the seller at closing. DCA agrees that this item is allowable and will be paid by the agency if Mr. Duell forwards the proper paperwork with a request that the agency reconsider this item.

CATHERINE B. HYATT
Board Judge