Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

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October 1, 2003

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GSBCA 16253-RELO

In the Matter of CLARENCE HESTER, JR.

Clarence Hester, Jr., Douglasville, GA, Claimant.

Major Michael G. Vecera, Office of the Staff Judge Advocate, Department of the Air Force, Dobbins Air Reserve Base, GA, appearing for Department of the Air Force.

DeGRAFF, Board Judge.

In mid-2003, the Department of Defense (DoD) transferred Clarence Hester, Jr. from one permanent duty station to another. In connection with the transfer, DoD authorized Mr. Hester to incur reimbursable real estate transaction expenses. Based upon conversations with several DoD officials, Mr. Hester understood he would receive "the commission" as an "incentive" for selling his house at his old duty station. Mr. Hester sold his house without using a real estate broker. Due to the type of financing chosen by the purchaser of his house, Mr. Hester was required to pay an underwriting fee. Mr. Hester submitted a claim to DoD for his real estate transaction expenses, some of which DoD reimbursed. He asks us to review DoD's decision not to reimburse him for the underwriting fee and for a sales commission of six percent of the sales price of his house.

DoD's decision to deny Mr. Hester's claim for reimbursement of the underwriting fee is correct. An underwriting fee is imposed incident to an extension of credit and is, therefore, treated like a finance charge. With certain exceptions not relevant here, DoD is not allowed to reimburse an employee for a fee that is part of a finance charge, regardless of whether the employee is required to pay the fee. 41 CFR 302-11.202(g) (2002); Joint Travel Regulations (JTR) C14002-A.4.b(5); <u>Gerald Fediw</u>, GSBCA 14256-RELO, 98-1 BCA ¶ 29,513 (1997).

DoD's decision to deny Mr. Hester's claim for reimbursement of a sales commission of six percent of the sales price of his house is also correct. DoD is authorized to reimburse an employee for real estate transaction expenses that are "required to be paid" by the employee. 5 U.S.C. § 5724a(d)(1) (2000). If Mr. Hester had been required to pay a commission to a real estate broker for selling his house, DoD would have reimbursed him for the payment he made, within certain limits. 41 CFR 302-11.200(a); JTR C14002-A.1.

Mr. Hester, however, sold his house without using a real estate broker and was not required to pay a commission. Although the Government will reimburse an employee for the actual expenses of a bargain that was made, it will not reimburse an employee for the hypothetical expenses of a bargain that was not made. David K. Goldblum, GSBCA 14142-RELO, 97-2 BCA ¶ 29,140; Roger G. Greening, GSBCA 13924-RELO, 97-1 BCA ¶ 28,883; Harlan C. Thiel, GSBCA 13668-RELO, 97-1 BCA ¶ 28,710 (1996). Mr. Hester's bargain for the sale of his house did not require him to pay a commission to a real estate broker, and DoD correctly decided not to reimburse him for an amount he might have been required to pay if he had used a real estate broker and paid a commission.

DoD also correctly decided not to pay Mr. Hester six percent of the sales price of his house as an incentive for selling his house by himself. DoD's home marketing incentive payment program allows it to pay an employee an incentive for marketing his or her residence at the old duty station. However, DoD is not required to make the program available to every transferred employee. When DoD makes the program available, the employee is eligible for an incentive payment only if the employee enters the residence into DoD's relocation services program, markets the house, finds a buyer, and transfers the house to the relocation services company that completes the sale. If these eligibility requirements are met, DoD will then determine the amount of the incentive payment, which is based upon the reduced amount DoD pays to the relocation services company. 41 CFR 302-14; JTR C15100. Here, DoD did not make its home marketing incentive program available to Mr. Hester. Even if it had, Mr. Hester did not meet the eligibility requirements for receiving an incentive payment and it is not possible to determine what the amount of any incentive payment might have been. In such circumstances, DoD cannot pay Mr. Hester six percent of the sales price as an incentive for selling his house by himself. Mark R. Tayler, GSBCA 15621-RELO, 02-1 BCA ¶ 31,816.

It is, of course, regrettable that Mr. Hester received incorrect advice from DoD regarding the reimbursement of his real estate transaction expenses. However, incorrect advice provided by agency employees does not provide DoD with the authority to expend public funds contrary to the provisions of published regulations. Masood Badizadegan, GSBCA 14393-RELO, 98-2 BCA ¶ 29,789.

The claim is denied.

MARTHA H. DeGRAFF
Board Judge