

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

November 30, 2005

GSBCA 16678-RELO

In the Matter of TERENCE L. LYNCH

Terence L. Lynch, Odenton, MD, Claimant.

Sandra S. Williams, Program Analyst/Authorized Certifying Officer, National Finance Center, Office of the Chief Financial Officer, Department of Agriculture, Washington, DC, appearing for Department of Agriculture.

DeGRAFF, Board Judge.

In order to determine whether an employee has incurred and paid a real estate transaction expense, we look to the settlement statement. A commitment fee paid by a borrower in order to bind a lender to certain loan terms is not a reimbursable expense.

Background

The United States Department of Agriculture (USDA) selected Terence L. Lynch to fill a position in Maryland, and Mr. Lynch moved there in August 2001. In connection with his move, Mr. Lynch purchased a house near his duty station. Although USDA reimbursed many of Mr. Lynch's real estate transaction expenses, it did not reimburse the amounts he claimed for a survey fee (\$175), a pest inspection fee (\$155), and a commitment fee (\$500).

USDA did not reimburse the survey fee because it was not listed on Mr. Lynch's settlement statement (the HUD-1) as an expense incurred either at or outside of closing and there was no canceled check or similar documentation to show Mr. Lynch paid this fee. USDA did not reimburse the pest inspection fee or the commitment fee because these were

listed on the HUD-1 as having been paid by the seller and there was no documentation to show Mr. Lynch paid these fees.

Mr. Lynch asked his mortgage broker, AllState Lending Services, Inc., for assistance in responding to USDA's denial of his request for reimbursement. In a letter dated September 24, 2003, AllState said Mr. Lynch obtained a loan insured by the Federal Housing Administration (FHA), which does not allow purchasers to pay certain closing costs. AllState said in order to obtain FHA approval for Mr. Lynch's loan, the HUD-1 had to show the seller paid the expenses that Mr. Lynch was not allowed to pay. Even though the HUD-1 says it is a statement of actual settlement costs, AllState said the HUD-1 does not "reflect and depict a 'true' account of [Mr. Lynch's] actual expenditures." AllState's letter contained a list of expenses which AllState described as a "more accurate account of the fees" Mr. Lynch paid to purchase the house. AllState's list of expenses allegedly paid by Mr. Lynch includes the survey, pest inspection, and commitment fees. Even so, the expenses listed in AllState's letter total approximately \$6000 less than the expenses shown on the HUD-1 as having been paid by Mr. Lynch. In a letter dated March 3, 2004, AllState said the commitment fee was "charged by Lender for Extended Lock."

In addition to the information provided by AllState, Mr. Lynch provided copies of two cashier's checks he used to purchase his house. These checks are for large lump sums and do not show what expenses they covered. One check is dated six weeks before closing and is for the precise amount Mr. Lynch paid as an earnest money deposit. The second check is not large enough to cover the amount Mr. Lynch was required to pay at closing according to the HUD-1 plus the amount of the fees for which he now claims reimbursement.

After considering the letters from AllState and the copies of the checks provided by Mr. Lynch, USDA decided once again to deny Mr. Lynch reimbursement for the survey fee, the pest inspection fee, and the commitment fee. Mr. Lynch asked for a review of USDA's decision, and USDA submitted the claim to us.

Discussion

Although USDA reimbursed many of Mr. Lynch's real estate purchase expenses, we are not sure it had the authority to do so. The documents we have suggest Mr. Lynch might have been a newly appointed federal employee in August 2001, and new employees are not eligible to be reimbursed for real estate transaction expenses. *Kevin R. Kimiak*, GSBCA 16641-RELO, 05-2 BCA ¶ 33,007. However, the documentation we have is incomplete, due in part to the forced evacuation of USDA staff in the wake of Hurricane Katrina, and it is possible USDA was authorized to reimburse Mr. Lynch for his expenses. Because our record

is incomplete, we assume USDA was authorized to reimburse his expenses and we address the claim accordingly.

Provided certain requirements are met, when an employee transfers in the interest of the Government, the employing agency is required to reimburse some of the expenses the employee incurs in purchasing a residence at the new duty station. 5 U.S.C. § 5724a(d) (2000). The applicable regulations provide that the employee must actually incur and pay an expense in order to be reimbursed. 41 CFR 302-6.1(f)(1) (2001).

In order to determine whether an employee has incurred and paid an expense, we look to the settlement statement. *Frank C. Cairo*, GSBCA 15975-RELO, 03-1 BCA ¶ 32,152; *Marion L. Ladd*, GSBCA 15138-RELO, 00-1 BCA ¶ 30,890. When a settlement involves a “federally related” mortgage loan, the HUD-1 ought to be the most reliable evidence of an employee’s real estate transaction expenses, because federal statute and regulation require the amounts listed on the HUD-1 to itemize clearly all charges imposed upon the borrower, and require the HUD-1 to be used as a statement of actual charges made in connection with a settlement. 12 U.S.C. § 2603(a) (2000); 24 CFR 3500.8(b), Appendix A (2001). Mr. Lynch’s HUD-1 does not show the survey fee at all, and it shows the commitment fee and the pest inspection fee as expenses incurred and paid by the seller. Thus, looking at the HUD-1, we cannot conclude that Mr. Lynch paid the fees for which he claims reimbursement.

In support of his claim, Mr. Lynch asks us to look at two cashier’s checks. Neither check shows what expenses it covered. It seems quite likely, however, that one check was for his earnest money deposit. Although the other check was large enough to cover the closing costs which the HUD-1 shows Mr. Lynch paid, it was not sufficient to cover, in addition, the amount he claims to have paid for the fees in question. The two checks do not establish Mr. Lynch paid the commitment fee, the pest inspection fee, and the survey fee.

Mr. Lynch also asks us to consider the statements made by AllState regarding the HUD-1. We do not find these statements reliable because they are contrary to the face of the HUD-1, which says it is a statement of actual costs. AllState’s statements are also unreliable because there is a \$6000 discrepancy between the total amount AllState says Mr. Lynch paid in connection with his purchase and the amount the HUD-1 shows he paid. AllState’s statements do not establish Mr. Lynch paid the fees for which he asks to be reimbursed.

Finally, even if Mr. Lynch could establish he paid the commitment fee, he could not be reimbursed for it. This fee, which is paid by a borrower in order to bind a lender to certain loan terms, is a finance charge and according to the applicable regulations, finance charges are not reimbursable unless specifically authorized. A commitment fee is not a specifically

authorized reimbursable expense. 41 CFR 302-6.2(d)(2) (2001); *Charles W. Adams*, GSBCA 16485-RELO, 05-1 BCA ¶ 32,956.

The claim is denied.

MARTHA H. DeGRAFF
Board Judge