



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 4, 2008

CBCA 1107-RELO

In the Matter of ERNESTO MESORANA

Ernesto Mesorana, Fort Pierce, FL, Claimant.

Linda L. Lane, Accounting Officer, Office of the Chief Financial Officer, Department of Homeland Security, Washington, DC, appearing for Department of Homeland Security.

SOMERS, Board Judge.

In October 2007, claimant, Ernesto Mesorana, a civilian employee of the Department of Homeland Security, purchased a new residence in connection with his transfer to Stuart, Florida. As part of the transaction, the seller offered an incentive of up to \$8000 towards Mr. Mesorana's closing expenses. The settlement statement reflects that the seller paid \$7450 of the closing expenses, including a portion used to pay off points for the mortgage rate. The seller paid the remainder, \$550, directly to Mr. Mesorana.

Mr. Mesorana sought reimbursement of \$5601.35 for his real estate purchase expenses. The agency reimbursed him for the appraisal fee of \$350, recording fee of \$78, and intangibles tax of \$344.51. Mr. Mesorana has appealed the agency's determination to deny reimbursement for the remainder of his claim. In response to the claim, the agency explained that Federal Travel Regulation (FTR) 302-11.303 precluded it from reimbursing Mr. Mesorana for expenses paid by someone else, which would include those paid by the seller.

Discussion

Provided 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). One such requirement is the employee must actually incur and pay an expense in order to be reimbursed. 41 CFR 302-11.303 (2007). In order to determine whether an employee has incurred and paid an expense, we usually look to the settlement statement. *Nicholas A. Mendaloff*, GSBCA 14542-RELO, 98-2 BCA ¶ 29,983. As explained in *Jacquelyn B. Parrish*, GSBCA 15085-RELO, 00-1 BCA ¶ 30,605 (1999), there are circumstances in which a purchaser incurs and pays closing costs as part of the purchase price, even though the costs are shown on the settlement statement as having been paid initially by the seller. In this case, however, the costs for which Mr. Mesorana asks to be reimbursed were not included in the purchase price of his house. Mr. Mesorana received an incentive credit from the seller and applied a portion of that credit to closing costs for which he seeks reimbursement. Unfortunately, Mr. Mesorana may not be reimbursed under these circumstances.

In a case considered by our predecessor board, the General Services Board of Contract Appeals, *Mendaloff*, the employee and the seller agreed that the employee would pay more for the house and the seller would in return pay the employee's closing expenses. The board agreed that the agency was not required to reimburse the employee for the closing costs because the employee had not actually paid them. In addition, the board's decision in *Marion L. Ladd*, GSBCA 15138-RELO, 00-1 BCA ¶ 30,890, is particularly apposite. There the employee, like claimant in the instant case, purchased a house from a builder. The builder agreed to give a \$3000 credit to be applied by the purchasers in any manner they wished. Although the claimant and his spouse asked for the credit to be applied to various upgrades and options to be added to the house, the builder applied the credit at settlement to pay certain closing costs that would normally have been paid by the purchaser. Like claimant in the instant case, the claimant in *Ladd* knew prior to settlement that the builder planned to apply the credit to closing costs, but he did not object because he did not anticipate that he could not be reimbursed for the closing costs paid by the builder. Also like the claimant in *Ladd*, Mr. Mesorana does not claim the credit was negotiated in order to include the closing costs in the cost of the house. Because the settlement sheet accurately reflected that these costs were paid by the seller, the claimant was not eligible for reimbursement.

These cases are dispositive here. The settlement sheet and claimant's own statement indicate that the costs were paid by the seller and were not included in the cost of the house. Although claimant might have structured the transaction differently had he realized that he would not be eligible for reimbursement of closing costs if they were paid by the builder rather than by him, neither the Board nor the agency is authorized to reimburse employees for expenses based on theoretical transactions that might have been made by the parties.

Decision

Claimant is not entitled to reimbursement of the settlement costs paid by seller.

JERI KAYLENE SOMERS
Board Judge