UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 29, 2010

CBCA 2023-RELO

In the Matter of BARBARA A. MALONEY

Barbara A. Maloney, Ft. Worth, TX, Claimant.

Mark B. McMurry, Office of Counsel, Fort Worth District, United States Army Corps of Engineers, Fort Worth, TX, appearing for Department of the Army.

HYATT, Board Judge.

Claimant, Barbara A. Maloney, transferred from Walnut Creek, California, where she was employed by the Internal Revenue Service, to accept a position with the United States Army Civilian Human Resources Agency, Southwestern Division, in Fort Worth, Texas. In conjunction with this permanent change of station (PCS), Ms. Maloney was authorized reimbursement of real estate expenses. Ms. Maloney has asked the Board to review the Army's disallowance of certain expenses she incurred in connection with the purchase of a new home in Fort Worth.

Background

On February 22, 2010, Ms. Maloney executed a contract with D. R. Horton Builders for the purchase of her new home in Fort Worth. She closed on the house on April 9, 2010, and promptly filed a voucher for reimbursement of real estate transaction expenses, seeking the amount of $6533.11. The voucher listed the following items of expense as being paid by the purchaser:

Legal and Related Fees	$2504.40
Lender's Appraisal Fee	$ 400.00

FHA or VA Application Fee	$ 150.00
Certification Fee	$ 800.87
Credit Report Fee	$ 20.00
Mortgage Title Policy Fee	$ 216.47
Escrow Agent's Fee	$1226.63
City/County/State Tax Stamps	$ 500.50
Sale or Transfer Taxes; Mortgage Tax	$ 138.24
Other Incidental Expenses[1]	$ 576.00

Claimant provided the HUD-1 settlement sheet from closing, but the expenses listed on that form are generally not reflective of the costs claimed on the voucher. Although the amounts claimed for the lender's appraisal fee and the credit report fee track from the settlement sheet, the other amounts claimed cannot readily be derived from a review of the HUD-1 form and claimant has not provided any other evidence to show that they were paid by her.

Noting that he could not identify expenses of claimant totaling $6533.11, which was the amount listed as the seller's costs on the HUD-1 settlement sheet, the Corps attorney based his determination solely on a review of the items listed on the HUD-1 form as having been paid for by the buyer at closing. In a memorandum dated April 16, 2010, the Corps attorney concluded that claimant was eligible to be reimbursed only the amount of $2042.30, which included the appraisal fee, credit report fee, lender's title insurance, a document preparation fee charged by a law firm, and various other fees itemized on the HUD-1 form.

The attorney concluded that the following items of expenses listed as purchaser expenses were not allowable:

Tax Service Fee	$ 90.00
Daily Interest Charge	$ 464.97
Mortgage Insurance Premium	$2527.21
Homeowners Insurance	$ 553.00
Escrow Account for Reserves	$ 352.78
Escrow Fee	$ 135.00 (out of total of $300)
Owner's Title Insurance	$1163.40
Homeowners Association Dues	$ 79.37

[1] Although the employee seeking reimbursement of incidental expenses is instructed to attach an itemized statement explaining these expenses, no such listing appears to have been submitted with the voucher.

Homeowners Association Transfer Fee	$ 100.00
Homeowners Association Resale Disclosure	$ 212.95
Homeowners Association Capital Contribution	$ 150.00

Claimant requested the Board's review after receiving notification that the amount of reimbursement from the agency would be considerably less than her claim.

Discussion

When an employee is transferred in the interest of the Government from one duty station to another within the United States, the agency is required to reimburse the employee for certain expenses incurred in purchasing a residence at the new station. 5 U.S.C. § 5724a(d)(1) (2006). The Federal Travel Regulation (FTR) implements this statutory provision and prescribes which expenses are allowable and which are not in 41 CFR 302-11.200, .202 (2009). The Joint Travel Regulations (JTR) supplement the FTR and are applicable to civilian employees of the Defense Department. The relevant JTR provisions are C5756-A.4.a and C5756-A.4.b.

In order to determine whether an employee has incurred and paid an expense, we look primarily to the settlement statement (HUD-1), which generally delineates what expenses are paid for by the buyer and what expenses are paid for by the seller. *See, e.g.*, *Keith E. Hancock*, CBCA1515-RELO, 10-1 BCA ¶ 34,323 (2009); *Terence L. Lynch*, GSBCA 16678-RELO, 06-1 BCA ¶ 33,153 (2005); *Frank D. Cairo*, GSBCA 15975-RELO, 03-1 BCA ¶ 32,152; *Marion L. Ladd*, GSBCA 15138-RELO, 00-1 BCA ¶ 30,890. In this case, the HUD-1 settlement sheet is the only source of information as to how expenses were split between the buyer and the seller and thus properly formed the basis for identifying the expenses for which claimant was eligible to be reimbursed.

Claimant concedes that counsel's analysis is most likely accurate, and the Board's review of the Corps' determination confirms that this is largely the case. Ms. Maloney maintains, however, that prior to buying a house, she tried diligently to get answers from the Corps as to her eligibility for reimbursement and was not properly informed by the agency as to what costs would be reimbursed. She received a copy of the Defense Finance and Accounting Service (DFAS) Handbook for Civilian Permanent Duty Travel (January 2010) that referred to the regulations and provided a summary list of allowable and unallowable costs with respect to real estate purchases. The DFAS Handbook did not define the items listed or the terms used. Among the items listed as reimbursable if reasonable in amount and customarily paid by the buyer was "closing costs." Ms. Maloney apparently assumed that this meant all of the costs paid by her at closing would be reimbursed. She thus told the seller, a builder, that she did not need help with closing costs since the Government would

reimburse them. Had she known that many of the costs she paid were not reimbursable, she says that she would not have forgone the builder's offer.

In response to this argument the Corps points out that the Handbook contains the following cautionary caveat:

> This pamphlet is intended to be a helpful guide to CIVILIAN PCS allowances. The information and examples used are generalized. We've tried to address the most frequently asked questions. It does not have the answers to all your questions and is not an authoritative source - The Joint Travel Regulations, Volume 2 (JTR) contains binding provisions concerning relocation allowances.

The Corps further points out that even in the absence of this disclaimer, claimant's reliance on the DFAS Handbook cannot create an entitlement that the agency has no authority to pay.

Claimant's primary complaint is indeed one for which the Board can offer no remedy. It appears from the information provided to the Board that Ms. Maloney's confusion was contributed to by the listing of "closing costs" as eligible for reimbursement in the DFAS Handbook. The Board has recognized that the term "closing costs" tends to be used broadly and as a catch-all in real estate transactions. It is frequently used interchangeably with the term "settlement costs" and may, in the context of real estate transactions in general, bring under its umbrella items that are not allowable expenses under the FTR and JTR. *Christopher L. Andino*, CBCA 957-TRAV, 08-1 BCA ¶ 33,817. Nevertheless, although we understand the source of claimant's misunderstanding, as the agency points out, it is well-settled that employees cannot be reimbursed for expenses that the agency lacks the authority to pay even if the employee may have relied to his or her detriment on ambiguous or erroneous advice, or was given no guidance at all. *See, e.g.*, *Connie J. Holliday*, CBCA 1866-RELO, 10-1 BCA ¶ 34,439; *John H. Shingler*, CBCA 1672-RELO, 10-1 BCA ¶ 34,351; *Beena Maharaj*, CBCA 1693-RELO, 10-1 BCA ¶ 34,332 (2009); *Earl Austin Rivenburg*, CBCA 767-RELO, 07-2 BCA ¶ 33,651.

The agency's disallowance of the items of expense listed above is largely in accord with regulations and settled precedent. The tax service fee is imposed incident to the extension of credit and thus is unallowable. 41 CFR 302-11.202(g); JTR C5756-A.4.b(5); *e.g.*, *Teresa M. Lopez*, CBCA 1434-RELO, 10-1 BCA ¶ 34,333 (2009). The mortgage insurance and home owner's insurance premiums are unallowable items of expense. 41 CFR 302-11.202(c); JTR C5756-A.4.b(1); *e.g.*, *M. Marty Goff*, CBCA 1791-RELO (Jan. 14, 2010). Reimbursement of the daily interest charges is proscribed under 41 CFR 302-

11.202(d) (agency may not reimburse interest on loans); JTR C5756-A.4.b(2). The escrow account for reserves category on the HUD-1 form represents deposits made for homeowner's insurance and mortgage insurance premium and for property taxes, all of which are unallowable expenses. 41 CFR 302-11.202(c), (e); JTR C5756-A.4.b(1), (3); *e.g.*, *Kerry M. Kennedy*, GSBCA 16540-RELO, 05-1 BCA ¶ 32,877. The Corps, relying on *Edward C. Brandt*, GSBCA 13649-RELO, 97-2 BCA ¶ 29,054, reduced the amount of the escrow fee paid at closing on the ground that in Texas this fee is customarily split evenly between the buyer and seller. In the absence of any evidence showing this custom does not apply here, the Corps's disallowance must be sustained.

The agency also disallowed four separate charges imposed by the homeowner's association (HOA). Absent a contrary showing from claimant, the charge for HOA dues would appear to be an ongoing expense of home ownership and the capital contribution would appear to be a maintenance cost. 41 CFR 320-11.202(f); JTR C5756-A.4.b(4). It is not clear what the purpose of the HOA transfer fee or resale disclosure fee is, but absent any information showing that these fees are for required services customarily paid by a purchaser in the locale,[2] rather than an operating or maintenance expense, the agency has no authority to reimburse these expenses. *See Daniel T. Mattson*, CBCA 654-RELO, 07-2 BCA ¶ 33,635; *Andreas Frank*, CBCA 557-RELO, 07-1 BCA ¶ 33,531. If claimant is able to produce documentation that these expenses meet the definition of "required services," she may ask to Corps to reconsider its disallowance of these expenses.

There is an additional area that claimant may wish to pursue with respect to the possibility of additional reimbursement of expenses. Claimant paid $279.70 for lender's title insurance and $1163.40 for owner's title insurance. The Corps allowed reimbursement of the lender's title insurance, but disallowed the amount for owner's title insurance. This follows the rule that while title insurance premiums required by the lender are reimbursable expenses, premiums for owner's title insurance generally are not, unless the owner's policy is inseparable from the lender's policy or its purchase by the buyer is a prerequisite to financing. 41 CFR 302-11.202(c); JTR C5756-A.4.a(8), b(1).

The record does not reflect that the purchase of owner's title insurance was required by the lender; however, the disparity in the two premiums gives rise to the question of what the premium for owner's title insurance would have been had Ms. Maloney not undertaken to buy owner's title insurance. The Board has held that if a claimant can show what the premium for lender's title insurance would have been had owner's insurance not been

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[2] A required service is one that is imposed by either a lender or by Federal, state or local government as a precondition of sale. 41 CFR 302-11.200(f)(11), (12).

purchased, the claimant is entitled to be reimbursed that amount. This exception to the rule is well illustrated in *Thomas Gene Gallogly*, GSBCA 15891-RELO, 03-1 BCA ¶ 32,091 (2002). There, the claimant was given the choice of paying $2053 for lender's title insurance, or, for $100 more ($2153), he could pay for lender's and owner's title insurance. The claimant prudently chose the latter option. The Board found under these circumstances that Mr. Gallogly was entitled to be reimbursed the amount that the lender's title insurance would have cost if purchased without owner's insurance.

A recent decision, *Michael T. Happold*, CBCA 1829-RELO, 10-1 BCA ¶ 34,412, addressed circumstances similar to those presented here. The Board ruled that if the claimant could obtain evidence of what the premium for lender's title insurance alone would have been, he would be entitled to reimbursement of that amount. It is Ms. Maloney's responsibility to pursue this matter and obtain confirmation of this amount from the lender, insurance company, or settlement agency. If she is able to do this, she would be eligible for that amount less what she has already been reimbursed. This amounts to an adjustment of the lender's title insurance cost, and is not tantamount to reimbursing the buyer for the cost of owner's title insurance.

Decision

The claim is denied, except to the extent that Ms. Maloney undertakes to provide evidence of what the cost of lender's title insurance alone would have been or that the HOA fees represented "required services" as discussed above.

CATHERINE B. HYATT
Board Judge