



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 9, 2007

CBCA 457-RELO

In the Matter of WILLIAM L. KING, JR.

William L. King, Jr., New York, NY, Claimant.

Patricia J. Jadwin, Attorney-Advisor, Office of General Counsel, Justice Management Division, Department of Justice, Washington, DC, appearing for Department of Justice.

HYATT, Board Judge.

Claimant, William L. King, Jr., is employed by the Justice Management Division of the Department of Justice. In September 2005 Mr. King was transferred from Atlanta, Georgia to New York, New York. Certain of his claims for reimbursement of real estate transaction expenses incurred in connection with the sale of his home in Atlanta and the purchase of a residence in New York were reduced by the agency. Mr. King has challenged these actions.

The Sale of the Residence in Georgia

Mr. King's home in Georgia was and is classified as having two separate addresses. The main residence, which was occupied by Mr. King and his wife, is a two-bedroom unit. The other unit within the duplex is a one-bedroom apartment which was occupied by Mr. King's adult son, who did not pay rent. There is a single driveway for the two units.

When Mr. King purchased the duplex property upon his transfer to Atlanta in 2002 he was compensated a pro rata share of the expenses of the purchase and made no objection at that time to the limitation of his real estate expenses in this manner. When he sold this residence upon his transfer, the agency similarly limited his eligibility for reimbursement of expenses to a pro rata share of the reimbursable expenses incurred in connection with the sale. His reimbursement of allowable expenses incurred in selling the residence was thus reduced by forty-two percent.

Mr. King objects that his expenses should not have been limited to a pro rata portion of the reimbursable costs incurred as a result of the sale of the duplex. He points out that it was not feasible to sell just one of the two units and he further urges that since his son occupied the second apartment, free of rent, the use of the residence was entirely for his benefit.

Mr. King has also submitted a letter written by his real estate agent explaining the practices and customs in the neighborhood where Mr. King's former residence is located. The homes in that neighborhood were built in the 1940s as duplexes, with one larger unit, listed as the main residence, and one much smaller unit sharing the single lot. If the owner pays a fee, the city of Atlanta will reclassify the houses as single family units, but present day building codes and municipal fees make conversion to single family home status impractical. Thus, the realtor states that many families simply occupy the two units without formally converting to a single address. Finally, the realtor advises that because there is only one lot, the two units must be sold together -- a separate sale would require that the lots be subdivided.

Prior to 2002, the Federal Travel Regulation (FTR) explicitly provided that residence transaction expenses would be reimbursed on a pro rata basis "[i]f the residence is a duplex or other type of multiple occupancy dwelling which is occupied only partially by the employee." 41 CFR 302-6.1(f)(2)(I) (2001). Effective in 2002, the FTR converted the provisions pertaining to real estate transactions to a plain language question and answer format and converted FTR part 302-6 to part 302-11. The FTR no longer explicitly states that reimbursement for the sale of a multiple occupancy residence should be reduced on a pro rata basis. It now states in pertinent part that the allowances for real estate expenses are intended to compensate employees who relocate in the interest of the Government for certain costs incurred in the "sale of one residence" at the old official duty station." 41 CFR 302-11.1(a) (2005). Nothing in the FTR or in the comments accompanying the revisions, however, suggests that the intention was to make substantive changes to the rule as previously stated.

The Department of Defense, in its Joint Travel Regulations (JTR), which supplement the FTR, has continued to explicitly provide for prorata reimbursement of expenses incurred in the sale or purchase of a multiple occupancy dwelling.¹ JTR C14000-F.2.a. The Justice Management Division has a similar set of internal rules supplementing the FTR's guidance in its employee handbook entitled "Your Career on the Move." This handbook was written

¹ The Board has recently applied this JTR provision in limiting reimbursement of expenses to a pro rata amount in *Andrew Perez*, GSBICA 16764-RELO, 06-1 BCA ¶ 33,206.

by the Financial Operations Service of the Justice Management Division to apply to employees who are relocated within the Justice Management Division. With respect to reimbursement for real estate expenses, this policy states that a pro-rated reimbursement may occur with respect to the purchase or sale of multiple occupancy residences that are only partially occupied by the employee/and or family.

Although Mr. King's adult son occupied the second unit without paying rent, there is no information in the record to show that the two units were altered so as to permit common occupancy of the house effectively as a single family unit. *See Perez* (the existence of evidence that the employee planned to convert the duplex into a single family residence would justify payment of the full amount of allowable expenses). It is not decisive that no rent was collected from claimant's son. *See Heidi C. Hirsh*, GSBCA 15720-RELO, 02-2 BCA ¶ 31,867. Nor is it determinative that it would be impractical to pay the fees assessed by the county to have the house formally converted to a single family residence. Rather, based on the record we have, the two units were maintained as separate residences. Only the main residence was occupied by the immediate family unit -- claimant and his spouse. The Department's policy calls for a pro-rated reimbursement under these circumstances.

Although neither party addresses this point, it appears that all of the expenses associated with the sale of the residence were reduced pro rata. We note, however, that with respect to allowable expenses that are assessed at a flat rate, rather than at a rate that is linked to the sale price of the property, Mr. King should be reimbursed in full. *See Frank A. Sterbenz*, GSBCA 13662-RELO, 97-1 BCA ¶ 28,871. Claimant should review the costs he paid in selling this property and determine if there are any costs that were assessed at a flat rate for which he may be eligible for full reimbursement.

The Purchase of the Home in New York

Mr. King also made a claim for reimbursement of expenses incurred with respect to the purchase of a new residence in New York. He seeks review of two items of expense that the agency disallowed: a mortgage broker fee of \$7193 and an underwriting fee of \$495.

Mortgage Broker Fee

Mr. King's initial voucher itemizing the costs incurred in buying the new residence reflected a charge on the HUD-1 statement for a mortgage broker fee in the amount of \$7193. The agency disallowed this item as a finance charge pursuant to FTR 302-11.202(b).

Under the FTR, 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). Finance charges are not reimbursable except to the extent that the

FTR makes them so. 41 CFR 302-11.200(f)(2)(v) (2005); *see also Ioan V. Sere*, GSBCA 16815-RELO, 06-2 BCA ¶ 33,412; *Edward D. Ellis*, GSBCA 16763-RELO, 06-2 BCA ¶ 33,304; *Larry W. Poole*, GSBCA 15730-RELO, 02-1 BCA ¶ 31,776. The exception is for reimbursement of a loan origination fee, which 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). By way of example, fees for preparation of documents needed to close a loan, and for the processing of the loan, are types of expenses that are recoverable as making up the loan origination fee. *See, e.g., 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.

Although the FTR makes loan origination fees reimbursable, it also caps reimbursement, generally at one percent of the loan amount: “Reimbursement may exceed 1 percent only if [the employee provides] evidence that the higher rate: (a) Does not include prepaid interest, points, or a mortgage discount; and (b) Is customarily charged in the locality where the residence is located.” 41 CFR 302-11.201; *accord Verna Pope*, GSBCA 15718-RELO, 02-1 BCA ¶ 31,822.

When the Department disallowed the mortgage broker fee, citing 41 CFR 302-11.202(b), which provides that the agency will not pay fees charged by a broker or commissions in connection with the purchase of a residence at the new duty station, Mr. King contacted his lender for an explanation of what the charge covered. Mr. King states in his claim that he was told that the expenses actually represented a loan origination fee. He thus submitted an amended HUD-1 statement showing this item as a loan origination fee in support of his contention that he should be reimbursed for this expense. No other charge on either the original or amended HUD-1 statement is listed as a loan origination fee.

The agency explains its decision to continue to disallow this item by pointing out that Mr. King, after placing the telephone call to the lender, simply revised the HUD-1 statement by hand and resubmitted it. Justice contends that this is not enough to justify paying the claimed amount.

The Board has recognized that expenses designated as a mortgage broker fee, but which in reality represent the cost of processing a loan application, may in fact be reimbursable as a loan origination fee or its equivalent. *E.g., Floyd C. Freeman*, GSBCA 16648-RELO, 05-2 BCA ¶ 33,044; *Timothy R. Defoggi*, GSBCA 16496-RELO, 05-1 BCA ¶ 32,907. In assessing whether a particular expense is reimbursable under the FTR, we will look beyond the labels used by the parties and examine the underlying substance of the fee in question. It is, however, claimant’s burden to establish his entitlement to payment of a particular expense. *E.g., Defoggi; Cindy L. Luciano*, GSBCA 16403-RELO, 04-2 BCA ¶ 32,715. If Mr. King contends that the term “mortgage broker fee” was not used in its

customary sense, but rather denotes administrative expenses of processing the loan, he must provide written verification from a knowledgeable source, such as the mortgage company, explaining the actual nature of this charge. *Sere; Richard A. Poisel*, GSBCA 15330-RELO, 01-1 BCA ¶ 31,284. To the extent claimant can show that this charge was for items similar to those covered in a loan origination fee, he may be able to recover this expense, at least up to one percent of the loan amount. *Virginia Wensley Koch*, GSBCA 16277-RELO, 04-1 BCA ¶ 32,625. To recover the entire charge, Mr. King will need to be able to show that the higher amount is customarily charged in the locality of his new residence.

As the agency points out, in this case, claimant has not yet presented a convincing case for reimbursement of all or part of the fee he says was the equivalent of a loan origination fee. His amended claim is based solely on his report of a telephone conversation he had with the lender. In the absence of documentation generated by the lender, specifically explaining the substance of this transaction -- i.e., what this fee actually covered -- the agency has properly disallowed this expense in its entirety. The agency may reconsider reimbursing some portion of this expense to the extent claimant can produce the requisite documentary support. At best, however, his recovery will be limited to one percent of the loan in the absence of a showing that a higher fee is customarily charged to buyers in this locality.

Underwriting Fee

The agency properly disallowed the underwriting fee. The Board has recognized on many occasions that underwriting fees are charges that are imposed “incident to and as a prerequisite to the extension of credit, and they are consequently not reimbursable.” *Willo D. Lockett*, GSBCA 16391-RELO, 04-2 BCA ¶ 32,722; *see also Sere; Luciano; Koch*. This fee is not akin to a loan origination fee and cannot be reimbursed in lieu of a loan origination fee. It also does not matter that this fee is generally charged to the buyer at closing -- it is simply not a reimbursable expense. *See Shane Douthitt*, GSBCA 16819-RELO, 06-1 BCA ¶ 33,262.

Decision

The claim is denied. Claimant may ask the agency to reconsider its position if he is able to provide the type of documentation discussed above.

CATHERINE B. HYATT
Board Judge