



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 29, 2015

CBCA 4889-RELO

In the Matter of KEVIN KELLEHER

Kevin Kelleher, Erie, CO, Claimant.

Angela M. Hunter, Chief of Western Operations Branch, National Oceanic Atmospheric Administration, Department of Commerce, Seattle, WA, appearing for Department of Commerce.

SHERIDAN, Board Judge.

Claimant, Kevin Kelleher, seeks reimbursement of \$8535 in costs he claims are associated with the purchase of a new home at his new duty station. He is not entitled to these costs because the builder-seller paid these costs as part of an incentive allowance for the home purchase.

Background

Claimant, a civilian employee of the National Oceanic Atmospheric Administration (NOAA or agency), Earth System Research Laboratory (ESRL) was issued travel orders on May 1, 2014, to relocate from Norman, Oklahoma, to Boulder, Colorado. As incident to his relocation claimant was authorized to purchase a new home. He purchased a home located in Erie, Colorado, and the builder-seller offered an incentive allowance of \$10,000 to be used in any way claimant chose at closing “without restrictions.” Claimant writes that he could have used the incentive allowance “to reduce the cost of the house, buy down the mortgage, help pay closing costs, etc.” Claimant states: “[a]fter consulting with the Western Operations Branch (WOB) specialist, claimant’s [mortgage loan officer] came up with a plan for using the \$10,000 that included paying \$8535 in closing costs.”

On March 9, 2015, claimant submitted a real estate reimbursement voucher in the amount of \$7280.05 associated with the purchase of the home. Claimant sought:

Legal and Related Costs	\$ 337.00
Lender's Appraisal Fee	\$ 450.00
Loan Origination Fee	\$4815.74
Certifications	\$ 100.00
Credit Report	\$ 42.30
Mortgage Title Policy	\$1479.00
Sales or Transfer [taxes]	\$ 55.51
Total New Residence	\$7280.05¹

The itemized expenses shown on the supplemental page of the HUD-1 settlement statement showed a list of items paid by the builder-seller that included:

Total Origination Charges	\$4815.74
Appraisal Fee	\$ 450.00
Credit Report	\$ 42.80
Interest - Line 901	\$ 304.47
Homeowner's Insurance - Line 903	\$ 941.15
Title Services - Line 1101	\$ 995.00
Recording Fee	\$ 112.00
Transfer Tax	\$ 49.34
Escrows - Impounds	\$ 824.50
Total Seller paid [closing costs]	\$8535.00

On March 11, 2015, claimant was notified by NOAA that he would only be reimbursed \$106.17, and that several of his claimed real estate expenses were denied because it appeared that the expense had been paid by the builder-seller and not by claimant. NOAA cited Federal Travel Regulation (FTR) 302-6.1(f)(1)² for its denial of several of the real estate expenses that might have been reimbursable had claimant paid them himself. NOAA provided the following breakdown for what it was paying and not paying:

1 This list correctly adds up to \$7279.55.

2 The FTR provision used by NOAA is outdated; the applicable provision is now found at FTR 302-11.303.

Amount requested for Reimbursement	\$7280.05 ³
Less Seller Paid Closing Costs	-\$6464.88
Less Owner's Title Insurance	-\$ 484.00
Less Survey Costs - Line 1301	-\$ 225.00
Total Reimbursement	\$ 106.17

Arguing that he should be reimbursed more closing expenses, claimant states that he made his decision to use the incentive allowance to pay closing costs after consulting with the WOB specialists and “[a]t no time during the discussions with the WOB specialists were any restrictions or caveats mentioned regarding the reimbursement by the government to me for the relocation benefits covered on their website.”

NOAA apologized for not being aware that claimant “must incur the costs personally” and promised that the process on how employees were advised would be changed. Claimant posits that had the WOB specialists provided more complete information to him he would have chosen to use the entire amount of the incentive allowance to reduce the mortgage loan. Claimant contends that he has not been made whole by the reimbursement process.

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) (2012). One such requirement is that the employee must actually incur and pay an expense in order to be reimbursed. 41 CFR 302-11.303 (2014) (FTR 302-11.303). FTR 302-11.303 provides:

Will the Government reimburse me for expenses incurred in connection with my residence transactions that are paid by someone other than me or a member of my immediate family?

No, the Government will not reimburse you for expenses incurred in connection with your residence transactions if they are paid by someone other than you or a member of your immediate family.

³ Using the corrected \$7278.55 indicates claimant should have been reimbursed \$105.67.

In order to determine whether an employee has incurred and paid an expense, we look to the settlement statement (HUD-1), which generally delineates what expenses are paid for by the purchaser and what expenses are paid for by the seller. *Keith E. Hancock*, CBCA 1515-RELO, 10-1 BCA ¶ 34,323 (2009); *Ernesto Mesorana*, CBCA 1107-RELO, 08-2 BCA ¶ 33,874; *Nicholas A. Mendaloff*, GSBCA 14542-RELO, 98-2 BCA ¶ 29,983. Although the HUD-1 statement usually controls, there are instances in which the settlement statement is not an entirely accurate reflection of the transaction.

As the General Services Board of Contract Appeals (GSBCA), one of our predecessors in deciding federal civilian employee travel and relocation claims, 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 *Parrish*, the employee-purchaser did not have sufficient cash to pay the closing costs, and the builder-seller agreed to increase the price of the home to cover the closing costs so that the employee could pay closing costs as part of the purchase price of the home. Applying long-standing precedent from the General Accounting Office (GAO), another of our predecessors in deciding these claims, the GSBCA concluded:

that an employee could be reimbursed for closing costs that were included in the purchase price of a house and paid by the seller at closing, so long as the employee could establish that (1) the closing costs were clearly discernible and separable from the price paid for the house, (2) both the seller and the purchaser regarded the costs as having been paid by the purchaser, and (3) documentation showed the amount of the closing costs and the purchaser's liability for them.

Id. at 151,114; *see also Hancock*, 10-1 BCA at 169,522 (“the sum of \$5000 . . . added to the purchase price was intended to be credited to the buyer for the purpose of paying closing costs”); *David A. Anderson*, CBCA 556-RELO, 07-1 BCA ¶ 33,580 (the original purchase price of the home was increased because the parties negotiated a \$2000 increase to the sales price for the sole purpose of covering the loan origination and broker fees). To meet the *Parrish* test, the employee is also required “to provided a statement from the seller, a real estate agent, or some other person with knowledge of the transaction, that the costs were actually paid by the purchaser as a part of the purchase price” of the home. 00-1 BCA at 151,114 (citations omitted).

In contrast to the circumstances giving rise to *Parrish*, in *Marilyn Wire*, GSBCA 15485-RELO, 01-1 BCA ¶ 31,413, the GSBCA subsequently analyzed facts similar to the ones before us. In *Wire*, the employee-purchaser was provided a cash incentive that she

could use in a variety of ways – to reduce the price of the house, to defray closing costs, or to pay for upgrades and options. The employee-purchaser elected to use the cash incentive for closing costs and the builder-seller paid the closing costs at settlement. In denying the claim, the GSBCA noted:

Analogous situations have previously been addressed by the Board. In *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. The Board's decision in [*Marion L. Ladd*, GSBCA 15138-RELO, 01-1 BCA ¶ 30,890] is particularly apposite. There the employee, like Ms. Wire, 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 Mr. Ladd 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 *Wire*], Mr. 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. Because the settlement sheet accurately reflected that these costs were paid by the seller, Mr. Ladd was not eligible for reimbursement.

The settlement sheet [in *Wire*] reflects that closing costs were paid by the seller. Although [Ms. Wire] might have structured the transaction differently had she realized that she would not be eligible for reimbursement of closing costs if they were paid by the [seller] rather than her, 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.

01-1 BCA ¶ 31,413, at 155,146.

Claimant here has not established that he meets the test set forth in *Parrish*, and accordingly, is not entitled to further reimbursement of his closing costs.

Claimant is understandably upset that he lost the opportunity to maximize his recovery of the real estate expenses. However, even though it appears that the WOB specialists failed to apprise claimant that his decision to take the incentive through closing costs would likely cause him serious financial harm, claimant still cannot recover these expenses. We have concluded in numerous decisions that “[t]he Government is not bound by the erroneous

advice of its officials even when the employee has relied on this advice to his detriment. Erroneous travel orders, reflecting mistaken assumptions on the part of authorizing officials, cannot obligate the Government to expend monies contrary to regulation.” *Ramsey D. Lockwood*, CBCA 3556-RELO, 14-1 BCA ¶ 35,560, at 174,248 (quoting *Flordeliza Velasco-Walden*, CBCA 740-RELO, 07-2 BCA ¶ 33,634, at 166,580 (citations omitted)). Likewise, the WOB specialists’ ineptitude in withholding of information cannot serve as a basis for reimbursement here.

The agency acted properly in disallowing the expenses paid by the seller.

Decision

The claim is denied.

PATRICIA J. SHERIDAN
Board Judge