



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 14, 2015

CBCA 4702-RELO

In the Matter of ADRIAN M. WILSON

Adrian M. Wilson, Fort Worth, TX, Claimant.

Stephen D. Sanders, Trial Attorney, Central Regional Command, Defense Contract Management Agency, Fort Worth, TX, appearing for Department of Defense.

WALTERS, Board Judge.

Claimant, Adrian M. Wilson, a civilian employee of the Defense Contract Management Agency (DCMA), made a permanent change of station (PCS) move within the agency in 2014. Mr. Wilson submitted a claim for real estate transaction expenses allegedly incurred to purchase a home near his new duty station. He seeks Board review of DCMA's denial of his claim in its entirety.

Mr. Wilson states that he incurred a total of \$27,101.40 of real estate expenses, but reduced his claim to \$17,806, which represents five percent of the purchase price of the home he acquired, i.e., \$356,120. The agency, based on its analysis of the HUD-1 settlement statement and other supplemental information, concluded that a large portion of the amount claimed by Mr. Wilson represented his down payment on the property, which it disallowed on the ground that a down payment does not qualify as a reimburseable real estate transactional expense. As to the remaining items of expense claimed, the agency maintains, they were either unallowable under the regulations or, even if allowable, such items were non-reimbursable, since they were not paid by claimant, but rather by the seller or the lender. On this basis, the agency concludes, it has no authority to reimburse Mr. Wilson for any of the items claimed. For the reasons stated below, we sustain the agency's denial.

Discussion

Statute provides that, pursuant to regulations prescribed by the Administrator of General Services, an agency shall pay certain real estate purchase expenses on behalf of an employee who transfers from one permanent duty station to another within the United States in the interest of the Government. 5 U.S.C. §§ 5724a(d)(1), 5738(a)(1) (2012). The Federal Travel Regulation (FTR), which establishes the agency's obligations, expressly lists those real estate transaction expenses that are reimbursable, and those that are not, when a transferred employee purchases a residence at a new duty station. 41 CFR 302-11.200 to .202 (2013) (FTR 302-11.200 to .202). The Joint Travel Regulations (JTR) supplement the FTR for civilian employees of the Department of Defense, such as claimant.

The agency here acted reasonably when analyzing Mr. Wilson's claim "through the prism of the HUD-1 settlement statement." In this regard, the Board previously recognized that the HUD-1 settlement statement (HUD-1) ordinarily "conveys the best delineation of which expenses were paid by each party to the transaction." *David G. Battle*, CBCA 4366-RELO, 15-1 BCA ¶ 35,891, at 175,461. There are circumstances, however, where the HUD-1 does not present the whole picture. For example, the HUD-1 may list the seller as bearing closing costs that the parties understand are ultimately being borne by the purchaser by means of an increase in the house's purchase price. See *Estefanie B. Duncan*, GSBCA 16239-RELO, 04-1 BCA ¶ 32,449, at 160,522 (citing *Jacquelyn B. Parrish*, GSBCA 15085-RELO, 99-1 BCA ¶ 30,605).

Claimant here avers that, whatever may be indicated on the HUD-1, he has established –by way of bank account withdrawal records (two checks in the amounts of \$5000 and \$17,276.93) presented to the Board– that he paid out of pocket more than the \$17,806 he is claiming, and that he had no control over how the title company distributed his payments. He argues that he is entitled to recover five percent of the purchase price of his home, because, when issuing its travel orders to him, the agency undertook an obligation to reimburse him for that percentage. The agency counters that the five percent figure was not related to any absolute, unconditional obligation, contractual or otherwise, that it supposedly undertook. Rather, it says, the five percent figure is a reimbursement limit for real estate transactional expenses, a limit that emanates from the provision of JTR paragraph C5696-B.2, in effect at the time of claimant's relocation claim submission (currently JTR 5912-B.2). That paragraph, in pertinent part, reads as follows:

B. Reimbursement Limit. Total reimbursements must not exceed:

* * *

2. 5% of the purchase price of a residence at the new PDS.

See also FTR 302-11.300; *Gordon M. Chancey*, CBCA 1660-RELO, 10-1 BCA ¶ 34,430, at 169,938.

Mr. Wilson's impression that he is entitled to five percent of the purchase price of the home at his new permanent duty station, regardless of how the money he provided may have been distributed, clearly is incorrect. Under the regulations, he would be entitled to a maximum of five percent of the property purchase price, and then only to the extent claimed costs are among those expense items specified by the regulations as reimbursable. Moreover, even if reimbursable, unless claimed expenses are actually paid by the employee (or a member of his/her family), as opposed to being borne on his/her behalf by others, reimbursement to the employee is not authorized. FTR 302-11.303; JTR C5692-H.1; *Ernesto Mesorana*, CBCA 1107-RELO, 08-2 BCA ¶ 33,874 at 167,670.

Mr. Wilson's initial claim, submitted on a DD Form 1705, listed four items of claimed costs:

1. Legal and Related Expenses	\$ 5,097.45
2. Lender's Appraisal Fee	400.00
3. Certification Fee	733.00
4. Other Incidental Expenses	<u>20,870.95</u>
Total	\$27,101.40

Although the \$400 Lender's Appraisal Fee appears on line 804 of the HUD-1, none of the other items claimed can be directly found on the HUD-1. The item designated as "Legal and Related Expenses" in the amount of \$5097.45 appears to be the total of four individual items listed under section 1100 of the HUD-1, entitled "Title Charges." These items include: (1) a "Settlement/Closing Fee" of \$300; (2) "Owner's Title Insurance" of \$2408.70; (3) "Lender's Title Insurance" of \$100; and (4) "Agent's Portion of the Title Insurance Premium" of \$2288.75.

The item entitled "Certification Fee" in the amount of \$733 appears to be composed of three separate items of cost listed on the HUD-1: (1) a survey fee of \$433; (2) a homeowner's association (HOA) transfer fee of \$200; and (3) an HOA working capital fee of \$100.

The last item claimant listed on the DD Form 1705, “Other Incidental Expenses” in the amount of \$20,870.95, is actually a down payment required of him in order to qualify for VA (Department of Veterans Affairs) financing. Though it is not disputed that this sum was paid by claimant, down payments are not, by their nature, transactional expenses, but rather, investments in property equity. As such, we have held, they are not reimbursable as real estate transactional expenses incurred in conjunction with a permanent change of duty station. *Kristin Pherson*, CBCA 2728-RELO, 12-1 BCA ¶ 34,948.

As to the other items listed on the DD Form 1705, questions exist as to cost allowability and/or as to whether the costs were actually paid by claimant and not by others. First, regarding allowability, while the appraisal fee (\$400) and survey fee (\$433) would be reimbursable items under the regulations, both HOA-related cost items – HOA transfer/assessment fee (\$200) and HOA working capital fee (\$100) – clearly would not. *Janet D. Winn*, CBCA 4434-RELO, 15-1 BCA ¶ 35,978. Additional information would have had to be presented about the nature of what has been referred to as the “Settlement /Closing Fee” (\$300) in order to establish its allowability. The item designated as “Agent’s Portion of Title Insurance Premium” (\$2288.75) (representing the portion of the overall title insurance premium that is retained by the title insurance agent) is duplicative of the other title insurance premium expenses claimed and thus would not be reimbursable. *Robert C. Sales*, CBCA 2776-RELO, 12-2 BCA ¶ 35,168, at 172,565. Finally, owner’s title insurance is generally non-reimbursable. When it was procured as a prerequisite for financing of the property, *id.*, however, or where, as here, there is an obvious imbalance between the premium for owner’s title insurance (\$2408.70) and the premium for lender’s title insurance (listed variously as either \$100 or \$238.70), it may be reimbursable. Lender’s title insurance premiums are reimbursable, and the Board allows reimbursement to a claimant for the amount of premium he/she can show would have been charged for lender’s title insurance had it been purchased independently of owner’s title insurance. *Armando L. De Hoyos*, CBCA 2398-RELO, 11-2 BCA ¶ 34,812; *Thomas Gene Gallogly*, GSBCA 15891-RELO, 03-1 BCA ¶ 32,091 (2002); *see also Francis B. Biggar*, GSBCA 13981-RELO, 97-2 BCA ¶ 29,053.

Notwithstanding theoretical allowability of particular expense items, as noted above, a claimant may not recover for real estate transactional expenses borne by others. The record in this case is severely muddled, for the most part, when it comes to establishing which costs were borne by the claimant. We do know, from the document entitled “Attachment to the HUD-1/HUD-1A Settlement Statement” (the HUD-1 supplement), that the seller paid the so-called “Settlement/Closing Fee.” Thus, it would not be a reimbursable item, even if it could be categorized as an allowable expense. While there is a lender credit of \$5542.67 on the HUD-1 supplement listed as “ORIGINATION CREDIT” among the items designated as “Fees the Lender is Paying on Behalf of the Borrower,” the credit does not seem to be an

offset against any loan origination fee charged to claimant, *see, e.g., Judith C. Rothschild, GSBGA 14787-RELO, 99-1 BCA ¶ 30,285*, but rather a general undesignated credit against settlement expenses. With such a lender credit, the Board first normally applies the credit to non-allowable residence transaction costs. *Michelle D. Thomas, CBCA 3572-RELO, 14-1 BCA ¶ 35,561*. The HUD-1 supplement lists the following items among those paid by the lender on behalf of the borrower:

Appraisal Fee	\$ 400.00
Daily Interest Charges: 2 days at \$43.6401/day	87.28
Hazard Insurance Premium (homeowner's)	1,026.00
Owner's Title Insurance	2,408.70
Lender's Title Insurance	283.70
Attorney Document Preparation	100.00
Electronic Filing/Recording Fee	8.00
Texas Guaranty Assessment Recoupment Fee	3.60
Recording Fees	120.00
Survey Fee	433.00
HOA Transfer/Assessment	100.00
HOA Working Capital Fee	<u>200.00</u>
Total	\$ 5,170.28

Subtracting from this total the ORIGINATION CREDIT of \$5542.67 resulted in all of the expense items being covered, both allowable and non-allowable. The HUD-1 supplement thus shows as "Total of Fees the Lender is Paying on Behalf of the Borrower" a negative sum, -\$372.39. No further explanation is offered regarding how the ORIGINATION CREDIT was computed or how the negative amount was applied.

What adds to the confusion is that the total amount claimant asserts he paid in the form of the two checks, \$22,276.93, exceeds the aforesaid down payment (\$20,780.95) by \$1495.98. This would seem to indicate that claimant made a cash outlay of \$1495.98 for some of the settlement expenses. By the same token, the HUD-1 itself indicates a total of "settlement charges to borrower" of \$5689.97 and lists as paid by the borrower the "deposit or earnest money" of \$5000, the amount of claimant's first check. This would seem to indicate that claimant only bore settlement expenses of \$689.97 beyond the down payment. The nature of expenses paid by claimant was never disclosed and their reimbursability under the regulations was never established. Two attempts by the Board to elicit further information from the claimant as to what specific expenses he paid and for which he is claiming reimbursement were unsuccessful.

As we recently noted, “in travel and relocation expenses cases, ‘[t]he burden is on the claimant to establish . . . the liability of the agency, and the claimant’s right to payment.’” *Benjamin A. Knott*, CBCA 4579-RELO, slip op. at 3 (June 30, 2015) (citing *Christopher R. Chin-Young*, CBCA 3734-RELO, 14-1 BCA ¶ 35,688, at 174,684) (quoting 48 CFR 6104.401(c) (2013)). Mr. Wilson has failed to sustain his burden in this case, having furnished no justification to support his claim for expense reimbursement.

Decision

The claim is denied.

RICHARD C. WALTERS
Board Judge