



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 3, 2008

CBCA 877-RELO

In the Matter of ANTHONY J. KRESS

Anthony J. Kress, Clarksburg, MD, Claimant.

Barbara F. Sesek, Paralegal Specialist, Department of the Army, Fort Monroe, VA,
appearing for Department of the Army.

McCANN, Board Judge.

Background

Anthony J. Kress, a civilian employee of the Department of the Army, was relocated for the convenience of the Government from Carrollton, Virginia, to Maryland. He sold his residence in Carrollton, and the sale closed on May 10, 2007. He submitted his claim for all of the expenses he incurred in that sale in the amount of \$28,815.85 on May 23, 2007.

The Army originally allowed \$16,564.50 and disallowed \$12,251.35 of the \$28,815.85 claimed. Upon review the Army allowed an additional \$354.38. Thus, the Army's final determination was to allow \$16,918.88 and disallow \$11,896.97. The following are the amounts that have been disallowed and to which Mr. Kress claims entitlement:

\$3,279.10	-	Loan origination fee
\$325.00	-	Closing and settlement fees
\$265.00	-	Title search, document preparation and courier fees
\$2,663.87	-	County and state tax stamps
\$125.00	-	Recording fees
\$50.00	-	Wire fee

\$100.00	- Homeowners Association Resale Fee
\$295.00	- Administrative Fee
<u>\$4,794.00</u>	- Loan discount fee
\$11,896.97	- Total

The Army disallowed these fees and expenses on the ground that they are not the kinds of fees and expenses that are customarily paid by the seller of a residence in the locality. Mr. Kress contends that, due to the declining real estate market, these fees and expenses have become the kinds of fees and expenses that are customarily paid by the seller in the locality.

Discussion

When an agency transfers an employee from one permanent duty station to another within the United States, and the transfer is for the convenience of the agency, federal law requires the agency to pay the employee's real estate sale expenses. 5 U.S.C. § 5724a(d) (2000). The agency's obligation under this statute is set out in the Federal Travel Regulation (FTR), which applies to civilian employees of the Federal Government. The FTR is published in the Code of Federal Regulations and the pertinent provisions are contained in 41 CFR pt. 302-11 (2006). The expenses for which the FTR permits reimbursement are payable only if the claimant can show that the costs incurred are customarily incurred by the seller of the property in the locality of the old residence. 41 CFR 301-11(f).

Customarily, the costs and fees that make up the \$11,896.97 claimed by Mr. Kress are costs and fees paid by the buyer in a real estate transaction in the locale. Mr. Kress does not dispute this. Mr. Kress claims, however, that he had to pay these costs because the market in the area was so poor that paying was the only way that he could sell his residence. He also claims that most, if not all, sellers were regularly paying these costs. Accordingly, Mr. Kress claims that, because of the poor real estate market in the locale, it had become customary for sellers to pay these costs.

Mr. Kress has submitted statements from seemingly reputable people in the real estate industry. These statements indicate that the real estate market in the area was poor at the time of sale, and that, in their view, it had become "customary" for sellers to pay the costs usually paid by the buyer. The Board acknowledges that the real estate market in the area, and indeed the market all over the United States, has declined appreciably and takes judicial notice of that fact. The Board also acknowledges that in bad markets sellers tend to pay for more of the buyers' customary closing costs, and that in good markets buyers tend to pay for more of the sellers' closing costs.

A declining market, however, does not change the definition of “custom or customarily” as that term is used in this provision of the FTR. In fact, the term “customarily” is unrelated to the strength or weakness of the real estate market. The term customarily simply means what is usual, normal, habitual, or routine. The American Heritage Dictionary of the English Language, Fourth Edition (2000) defines custom as “a common tradition or usage, so long established that it has the force or validity of law.” There is no dispute in this case that the claimed costs, under ordinary circumstances, would be paid by the buyer.

Mr. Kress’ contention regarding what is customary is incorrect and unworkable. It would be impossible for the Government to evaluate the real estate market on a daily basis and determine whether it was “so good” or “so bad” that the customary costs paid for in a real estate transaction had shifted from buyers to sellers, or sellers to buyers. Real estate markets go up and down. Sometimes they are good; sometimes they are bad. They are always moving, either quickly or slowly, in one direction or another. These market movements have no impact on what is customary. When Mr. Kress agreed to pay closing costs normally paid by the buyer, he essentially agreed to sell his house for a lower price -- an action that reflected the decreased value of his house in the current market.

Mr. Kress’ argument, if upheld, would severely undermine the Government’s ability to determine under the FTR what costs it should or should not reimburse its employees when they sell their houses. Claimant’s argument regarding the effects of the market on what is and what is not customarily reimbursed in a real estate transaction is without merit.

Claimant’s claim for the additional \$11,896.97 is denied.

R. ANTHONY McCANN
Board Judge