



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 20, 2007

CBCA 557-RELO

In the Matter of ANDREAS FRANK

Andreas Frank, Ladera Ranch, CA, Claimant.

Bradley R. Lindgren, Chief, Government Accounting Branch, Program Support Center, Department of Health and Human Services, Rockville, MD, appearing for Department of Health and Human Services.

FENNESSY, Board Judge.

Background

On April 25, 2005, the Department of Health and Human Services (DHHS) permanently transferred claimant, Andreas Frank, from his duty station in Washington, D.C., to a new duty station in California. The travel order issued by DHHS in connection with the transfer authorized Mr. Frank to incur, among other things, residence transaction expenses.

On November 6, 2006, Mr. Frank closed his purchase of a residence in Ladera Ranch, California, and submitted an itemized request to DHHS for reimbursement for \$12,732 in expenses incurred in connection with the purchase of his new residence.

DHHS reimbursed all but \$2825, an amount charged by Ladera Ranch Community Services as a Community Enhancement Fee (CEF). The CEF is assessed to all purchasers of homes in Ladera Ranch, calculated as .25% of the total purchase price. Mr. Frank has asked the Board to review DHHS's decision that the CEF is not a reimbursable expense. As discussed below, we find that DHHS's action was correct.

Mr. Frank claims that the CEF is reimbursable because it is a miscellaneous other expense within the meaning of 41 CFR 302-11.200(f)(12) (2005). He states that the fee is a settlement cost assessed to all purchasers in the Ladera Ranch Community and encumbers all lots within the community. In support of his claim, Mr. Frank submitted a form of Ladera Ranch Community Services that must be signed by buyers of homes in the Ladera Ranch Community. That form provides:

Community Enhancement Fee (CEF)-REQUIRED FEE-Ladera
Ranch Community Services (LARCS)

Pursuant to the Community Enhancement Fee Agreement, which encumbers each lot/unit within Ladera Ranch Maintenance Corporation, Ladera Ranch Community Services (LARCS) is authorized to place this demand for payment of the Community Enhancement Fee (CEF) with the escrow agent for each initial sale and each subsequent transfer of Lots and Condominiums within Ladera Ranch Maintenance Corporation.

The Payment Options section of this form characterizes the CEF as a transfer fee.

Mr. Frank submitted an e-mail message from Sue Shaver, Director of Ladera Ranch Community Services, which states in pertinent part: "All homes purchased in Ladera Ranch are subject to this [Community Enhancement] fee."

Mr. Frank also submitted a letter addressed "To whom it may concern," from Jeni Ward, Escrow Officer, New Century Title Company, Laguna Beach, California. The letter states in pertinent part:

Please be advised that Andreas Frank, the above referenced buyer, closed his purchase on November 1, 2006

The purpose of this letter is to disclose the expenses specifically related to this transaction that are customarily paid by the buyer for homes located in the city of Ladera Ranch

Ms. Ward identified the expenses under various categories. The CEF fee is included under the category entitled "Government Recording and Transfer Fees Customary in Locality."

Included with Mr. Frank's original request for reimbursement was the Department of Housing and Urban Development settlement form HUD-1. That form showed the CEF as an additional settlement charge paid by Mr. Frank.

DHHS denied reimbursement of the CEF. According to DHHS, the CEF was shown on the HUD-1 form as a settlement charge because Mr. Frank elected to pay it in a lump sum at the time of settlement rather than in installments as permitted. DHHS also reported that Sue Shaver, Director of Ladera Ranch Community Services, stated that the fee is applied towards funding community events and programs such as July 4th celebrations, Pilates classes, and a children's day camp, as well as maintenance of the community internet site. DHHS stated that it sought an opinion from the General Services Administration (GSA), which advised that GSA considered the CEF to be similar to a homeowner association fee and not a reimbursable expense.

In response, Mr. Frank states that the CEF is a one-time assessment for community services and programs that must be paid in order to close on the property, is customarily paid by purchasers in Ladera Ranch, and is not specifically prohibited by 41 CFR 302-11.202.

Discussion

By statute, "an agency shall pay to or on behalf of an employee who transfers in the interest of the Government, expenses for the . . . purchase of a residence at the new official station that are required to be paid by the employee, when the old and new official stations are located within the United States." 5 U.S.C. § 5724a(d)(1) (2000). This mandate is to be exercised consistent with the provisions of the Federal Travel Regulation (FTR). *Id.* §§ 5724a(d)(1), 5738(a)(1). The purpose of an allowance for expenses incurred in connection with a residence transaction is to reimburse a transferred employee for, among other things, expenses incurred due to the purchase of a residence at the new official duty station. 41 CFR 302-11.1.¹

The FTR provides that an agency will pay residence transactions expenses "[p]rovided they are customarily paid by the seller of a residence at the old duty station or by the purchaser of a residence at the new official station" Among the enumerated residence transactions expenses are brokers fees for the sale of a residence at the last official duty station, appraisal costs, the cost of title insurance, the costs of preparing conveyances

¹ An employee will be reimbursed for the expenses of the sale or the purchase of a residence from which the employee makes the daily commute to and from the official duty station. *Wendy J. Hankins*, 04-2 BCA ¶ 32,686 GSBCA 16324-RELO, citing 41 CFR 302-11.100.

and other contracts, related notary fees, recording fees, the cost of title searches and legal fees for a title opinion, and other miscellaneous expenses. 41 CFR 302-11.200 (a)-(f). Other miscellaneous expenses include loan origination fees, the cost of preparing credit reports, mortgage and transfer taxes, the cost of state revenue stamps, fees and charges similar to the foregoing, mortgage title insurance for the benefit of the lender, expenses in connection with environmental testing and property inspection fees when they are required by federal, state, or local law, or by the lender as a precondition to the sale or purchase, and “[o]ther expenses of . . . purchase made for *required services* that are customarily . . . paid by the purchaser of a residence at the new official station.” 41 CFR 302-11.200(f)(12) (emphasis added).

The FTR also expressly provides that an agency will not pay operating and maintenance costs. 41 CFR 302-11.202(f).

The question is whether the CEF is reimbursable as an expense for required services customarily paid by a purchaser or is a nonreimbursable operating and maintenance expense.

Mr. Frank has demonstrated that the CEF is an expense customarily paid by the purchaser of a residence at the new official station. However, he has not addressed that portion of the regulation providing that the expense must be made for required services.

Required services have been described as:

those services imposed on the employee by a lending institution or by state or local law as a precondition of sale. Such fees as lender inspection fees, termite inspection, roof inspection, and other such fees required by lenders are “required services” to which a seller or purchaser is entitled.

Edward C. Brandt, GSBCA 13649-RELO, 97-2 BCA ¶ 29,054 (citing *Leonard J. Garofolo*, 67 Comp. Gen. 449 (1988)).

We have observed that some fees charged by cooperative associations in conjunction with the transfer of residences are reimbursable and others are not. Fees for real estate brokerage and for preparing documents required for the transfer of ownership have been held to be reimbursable. On the other hand, fees for supervising necessary repairs and for redecorating, and payments on a mortgage, utilities, insurance policy, and maintenance items have been held not reimbursable. *Richard J. Brenner*, GSBCA 15309-RELO, 002-BCA ¶ 31,014 citing *Ronald R. Chronister*, B177947 (June 7, 1973).

The fees at issue here are similar to the nonreimbursable cooperative association fee discussed in *Herbert W. Everett*, 60 Comp. Gen. 451 (1981). In that case the Department of Agriculture transferred Mr. Everett to a new permanent duty station. In connection with his transfer, he purchased a cooperative home for which he was required to pay a \$300 membership fee at the time of purchase. The membership was a one-time, nonrefundable, and nontransferable fee. Mr. Everett submitted a claim to the agency for residential transaction expenses including the membership fee. The Comptroller General denied the claim for the membership fee, stating:

Pursuant to 5 U.S.C. § 5724a (1976), paragraph 2-6.2 of the Federal Travel Regulation[s] . . . provides for reimbursement of certain expenses incurred by employees in connection with residence transactions. Membership fees such as Mr. Everett paid are not included as reimbursable expenses under those regulations. Instead, membership fees in condominium or cooperatively owned homes or apartments are regarded as items of added value continuing to benefit the purchaser. As such, they are considered a part of the purchase price and not a part of the cost or expense of purchasing. . . .

In the present case, the membership fee had no relationship to any expense or charge for services required for the purchase of the property. It was a requirement for occupancy and participation in the management of the cooperative development. Accordingly, such membership fee is not reimbursable as a relocation expense under the Federal Travel Regulations.

60 Comp. Gen. at 451-52. Here, as in *Everett*, the agency's uncontroverted description of the purpose of the CEF, that is to fund celebrations, fitness classes, and the operation of a child care center, and to maintain a community internet site, reflects that the CEF is an item of added value of continuing benefit to Mr. Frank. It is plainly not for services required to effect the purchase of the residence. Rather, the CEF is for operating expenses of the Ladera Ranch Community Services organization and, therefore, is not reimbursable.²

² Mr. Frank's contention that he pays a monthly homeowner's association fee does not change the nature of the CEF.

The agency correctly interpreted the FTR in denying reimbursement for the CEF. The claim is denied.

EILEEN P. FENNESSY
Board Judge