



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 19, 2008

CBCA 957-TRAV

In the Matter of CHRISTOPHER L. ANDINO

Christopher L. Andino, Washington, DC, Claimant.

Lucia Oswald, Employee Claims Division, Global Financial Services Center, Department of State, Charleston, SC, appearing for Department of State.

POLLACK, Board Judge.

Claimant, Christopher Andino, contests the denial by the Department of State (State) of his claim for \$1,573.33 for monthly mortgage interest, property tax expenses, homeowner association dues, and a one-time condominium transfer fee, all associated with his purchase of a home incident to a temporary duty assignment (TDY). For the reasons stated below, we allow the claim for mortgage interest, property tax (adjusted), and homeowner association dues. We deny the one-time condominium transfer fee.

Background

On September 2, 2007, claimant began an eleven-month TDY assignment in Washington, D.C., arriving from his duty station in Bogota, Colombia, en route to Tripoli, Libya. According to claimant, he opted to purchase a condominium within fifty miles of the work site and as he stated "use the entitlements laid out in the decision in GSBICA 14514-TRAV (Arensburger) to pay the interest, tax and maintenance fees on property in Washington, D.C." Settlement was held on the property on September 12, 2007. Claimant took occupancy on that day.

Claimant filed a request for reimbursement on October 2, 2007. Specifically, claimant asked for reimbursement of \$1116.06 in mortgage interest, \$203.49 in property tax, \$218.02 in homeowners' association dues, and \$34.96 for a one-time condominium transfer fee. State denied reimbursement of claimed sums, and in response, claimant then filed this case with the Board on October 31, 2007. He provided a supplement dated November 2, 2007, which included his travel orders. State was given an opportunity to reply and on January 10, 2008, notified the Board that it would not provide additional information and that in not paying the claim, it was following guidance provided by an official of State's Office of Entitlements and Allowance. That guidance was set forth on State's "Ask Admin" website. The guidance essentially provided that since the sums requested were paid at closing on the property, they must be classified as closing costs and as such not reimbursable. No outside authority or regulation was cited by State to support the conclusion set out in the web answer.

In his claim, claimant set out each of the costs claimed and pointed out that although the payments were reflected at settlement, they were not transfer or purchase costs, but instead, costs of holding and maintaining the property. Claimant explained that because the first principal payment on the loan was not due to the lender until November 1, 2007, he furnished the HUD-1 Settlement Statement to State as the receipt of record for the expenses he paid for mortgage, interest, and other items. The referenced settlement sheet showed in Box 901, under "Items Required by Lender to be Paid in Advance," the following: "Interest from 9/12/07 to 10/01/07 @ \$58.740000/ day (19 days %)." The interest totaled \$1116.06. The nineteen days represented the days from settlement (September 12) to the end of the month.

As pointed out by claimant, and not contested by State, mortgage interest is paid in arrears, i.e., the November 1 payment made by claimant to its lender would be for October. Accordingly, the mortgage interest for the nineteen days in September was paid at settlement and covered the payment of mortgage interest from that date to the end of September. Absent State agreeing to reimburse claimant for the sums reflected in box 901, interest for the nineteen days in September would go un-reimbursed.

In addition, the settlement sheet showed payment for property taxes in Box 1003 and a homeowners' association fee. As to the former, claimant has stated, and State has not disagreed, property taxes are paid twice annually, on March 31 and September 15. Escrow payments to cover the annual payments were collected with each mortgage payment at the rate of \$184.21 per month or approximately \$6.14 per day. Line 1003 on the settlement sheet shows \$552.63 under taxes, which funds the escrow account for property taxes for approximately three months. Claimant, however, has asked for \$203.49 for September reimbursement. In asking for that sum, claimant uses twenty-one days. It is unclear how

claimant comes up with the twenty-one days or how claimant comes up with the total he derives by using that multiplier. Regardless, what he uses does not comport with the actual costs. Instead, and since claimant used nineteen days for mortgage interest, we use nineteen days as the appropriate multiplier against the daily rate of \$6.14. The total for taxes applicable to September should therefore be \$116.66.

Claimant also asked for the monthly maintenance fee for the condo. This item is reflected on line 109 of the settlement sheet and totals \$197.96 for the time frame from settlement to the end of the month. According to claimant and not disputed by State, the claimant, at settlement, reimbursed the previous owner \$197.96 for the amount accrued from September 12 to October 1.

The final item being claimed is the condominium transfer fee. This one-time fee has been identified as an application cost associated with the transfer of the property and not a continuing monthly type of expense.

The reimbursement sought by claimant is for expenses paid at the time of settlement and solely for reimbursement for expenditures dealing with dates starting on or after settlement and not prior to it. State has not claimed that any of the costs being sought were covered by later payments or reimbursements.

As noted above, State declined to provide a specific response to the claim. Through the claimant's presentation, the Board was provided a series of e-mail messages between State and claimant which appeared to indicate that the denial was not based on a finding that the cost were not generally reimbursable, but instead, on the conclusion that the sought costs, having been paid at settlement, were closing costs, and closing costs could not be paid. State did not provide in any of the e-mails, or in its limited correspondence with the Board, a citation to authority (some regulation or rule) specifying that such costs could not be paid. In contrast, Mr. Andino in his claim to State cited the decision of the General Services Board of Contract Appeals (GSBCA) in *Dimitri & Eugenia Arensburger*, GSBCA 14514-TRAV, 98-2 BCA ¶ 30,055, a case which deals with reimbursement of items associated with an employee's purchase of a home while on TDY. State, however, appeared to give that case no weight nor can we find that it conducted any analysis, even though *Arensburger* and cases it cites were clearly applicable.

Discussion

In several decisions, the GSBCA, our predecessor board in deciding these claims, addressed the question of the use of a per diem allowance to reimburse lodging expenses incurred by travelers on TDY for holding and maintaining residences they owned and lived

in at the TDY location. In *Arensburger*, two interpreters, who had purchased property in a TDY location as a second residence for use while on TDY, were found to be entitled, under the lodging component of their per diem allowance, for reimbursement of a proration of their monthly costs of interest, utilities, property taxes, and maintenance applicable to the period of their stay. Similarly, in *Donald C. Smaltz*, GSBCA-TRAV, 14328, 97-2 BCA ¶ 29,311, the board allowed lodging costs based on monthly interest, property taxes, utility costs, and maintenance on property purchased at the site of the TDY. In both *Arensburger* and *Smaltz*, the property for which reimbursement was sought had been purchased to provide the travelers a place to live during the TDY assignment.

More recently, in *Harriette Treloar*, GSBCA 16699-TRAV, 05-2 BCA ¶ 33,056, the board reiterated, albeit under different facts, the principle that a per diem allowance can be used to reimburse a traveler for ownership costs. In *Treloar*, the costs in issue were incurred by a traveler while staying in the TDY location at a home owned by the traveler. In allowing reimbursement, the board in *Treloar* set out a review of the applicable law and identified circumstances where reimbursement could be made and where it could not. In pertinent part, the board said as follows:

Nearly thirty years ago, GAO [the General Accounting Office - now the General Accountability Office] decided in applying this principle that if a federal employee on temporary duty spends his nights in a residence he owns at the temporary duty location, the costs he incurs in staying in the house - mortgage interest, property taxes, and utility charges - are reimbursable if the house was purchased as a place to live during the temporary duty, but not if the house was purchased earlier for other reasons. *Robert E. Larrabee*, 57 Comp. Gen. 147 (1977); *Sanford O. Silver*, 56 Comp. Gen. 223 (1977). The Board adopted this approach in *Donald C. Smaltz*, GSBCA 14328-TRAV, 97-2 BCA ¶ 29,311, in which we said that maintenance expenses, like the other costs mentioned by GAO, are reimbursable if the house was purchased as a place to live during the temporary duty. We have applied the holding of *Smaltz* in other cases. *Lawrence A. Mahoney*, GSBCA 15600-TRAV, 02-1 BCA ¶ 31,824; *Dimitri & Eugenia Arensburger*, GSBCA 14514-TRAV, 98-2 BCA ¶ 30,055; *Thomas J. Dresler*, GSBCA 13985-RELO, 98-1 BCA ¶ 29,434 (1997).

Id. at 163,860.

In addition to the above, the Board in *Treloar* also addressed the matter of whether one must first own a home at one's permanent duty station before being eligible for reimbursement for a home at the TDY locale. In that instance, the agency was concerned

that because Ms. Treloar did not own a home at her permanent duty station, she was, therefore, not incurring any extra living expenses due to ownership of the house at the TDY location. While the board expressed understanding as to the basis of concern by the agency, the board unequivocally rejected it, stating the following:

Costs of ownership and operation of a house purchased at a temporary duty station for the purpose of living while on temporary duty have been considered reimbursable whether the employee kept his home at his permanent duty station as a family residence, as in *Smaltz and Arensburger*, or kept such a home and rented it to others, as in *Larrabee*, or had no permanent residence at all while on temporary duty as in *Gary R. Carini*, B-203440 (Feb. 26, 1992); B-201478 (Aug 7, 1981); *James H. Quiggle*, B-192435 (June 7, 1979); and *Nicholas G. Economy*, B-188515 (Aug. 18, 1977).

05-2 BCA at 163,861.

Mr. Andino has stated and State does not dispute that he purchased the house for which he seeks various reimbursement to use as a residence while on TDY. This is not a case where the house was purchased for other reasons. Further, it is also clear that Mr. Andino's reimbursements are uniformly of the same nature and type as allowed in prior cases (except for the application fee). The fact that the payments for which he seeks reimbursement were made at settlement does not change the fact that the items are reimbursable items.

Reimbursement to Mr. Andino, however, is not without limitation. As the board provided in *Treloar*, "there is a cap on reimbursement - the monthly expenses incurred can be repaid only to the extent that they do not exceed the maximum monthly lodging costs which would be reimbursable if the employee stayed in a commercial facility such as a hotel." 05-2 BCA at 163,860. Thus, to the extent we allow reimbursement it is subject to cap limits.

Accordingly, we find the interest, taxes, and condo fees claimed are payable items. We do not, however, find the condominium fee payable. We deny payment of the condominium fee because it is a one-time item, rather than a recurring item and we find that it is not of the class or nature of costs allowed in prior cases as lodging expenses. We understand those earlier cases and the decision in *Arensburger* to reflect that reimbursement is to cover recurring type of payments involved in lodging and not to cover non-recurring payments or payments made solely for the process of settling or transferring a property.

Finally, and for guidance to State, the wording “closing costs” in real estate practices tends to be used broadly and as a catch-all. It often is used interchangeably with the term settlement costs and often pulls in under its umbrella items that are actually recurring costs and not costs incurred for the actual transfer or close of the property. Put another way, at settlement or closing, various settlement and closing costs are paid solely for purposes of transferring the property. At that same settlement, other payments are made to cover current and future obligations to lenders and reimbursement to sellers for sums already paid. Items incurred for transfers include such non-recurring items as credit report fees, termite inspection fees, recording stamps or recording taxes, transfer taxes, recording fees, appraisal costs and loan points. Recurring costs such as mortgage interest, taxes and maintenance fees are continuing costs associated with running, not purchasing, a property.

Decision

We allow reimbursement of the mortgage interest, taxes and condo fee for a total of \$1430.68 to the extent this amount does not exceed the lodging expenses otherwise payable. We deny reimbursement of the condominium transfer fee.

HOWARD A. POLLACK
Board Judge