



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 20, 2010

CBCA 2182-RELO

In the Matter of CHRISTINA M. GALLAGHER

Christina M. Gallagher, Groton, MA, Claimant.

Bruce Krasker, Ethics and Personnel Attorney, Defense Contract Management Agency, Eastern Region, Boston, MA, appearing for Department of Defense.

WALTERS, Board Judge.

Claimant, Christina M. Gallagher, an employee of the Defense Contract Management Agency (DCMA), was authorized reimbursement of her real estate expenses incident to her 2008 permanent change of duty station from Tucson, Arizona, to Boston, Massachusetts. The sole matter at issue is her entitlement to recover for the full real estate broker's fee she paid for the sale of her residence in Tucson. The 8.5% fee she was charged for the November 2008 sale of the residence amounted to \$56,525. DCMA reimbursed her for only \$39,900, representing 6% of the sales price of \$665,000. Ms. Gallagher is claiming the \$16,625 difference.

Background

DCMA's refusal to pay the \$16,625 balance is based on its conclusion that "the reasonable and customary fee paid in the Tucson area was 6% of the sales cost" and not the 8.5% fee Ms. Gallagher paid. In this regard, DCMA cites to paragraph C5756 of the Joint Travel Regulations (JTR), applicable to civilian employees of the Department of Defense like the claimant. That paragraph reads:

ALLOWABLE EXPENSES FOR SALE OR PURCHASE OF
RESIDENCE

A. Reimbursable Expense.

Broker's Fees or Real Estate Commission. A broker's fee/real estate commission for services in selling the residence is reimbursable, **but not in excess of rates generally charged for such services in the old PDS [permanent duty station] locality.**

To support its conclusion that 6% is the prevailing rate in Tucson, DCMA cites to a 2003 decision of the General Services Board of Contract Appeals, *Chris S. North*, GSBCA 15999-RELO, 03-2 BCA ¶ 32,385, in which a claimant's real estate brokerage fee of 8.34% was reduced to 6% by the reviewing agency. In that case, the agency offered statements from both the Phoenix office of the Department of Housing and Urban Development (HUD) and the Arizona Association of Realtors to the effect that 6% was the "typical rate charged." There, because the claimant provided no evidence that higher rates were regularly charged, the Board upheld the agency's position. In that case, the residence was located in Glendale, Arizona, some 127 miles from Tucson. In the present case, DCMA states that it was unsuccessful in its attempt to contact HUD. No mention is made of any attempt in this case by DCMA to contact the Arizona Association of Realtors. DCMA does say, however, that, prior to issuing the agency's denial letter of June 5, 2009, one of its attorneys contacted the Arizona Department of Real Estate and "received confirmation that the reasonable and customary fee in the Tucson area is not higher than 6%." No individual was identified from that state office as having provided such confirmation, however.

DCMA also relates that it contacted three realtors in the Tucson area (whom the agency names) about the rates they were charging. These contacts were all made during the fall of 2010. None of these realtors was asked specifically about fees charged in 2008, when Ms. Gallagher's residence was offered for sale, whether there are any variations in fees depending on the types of property or property price range involved, or about the conditions of the real estate market in and around Tucson at that time. One realtor reportedly advised DCMA that, "whilst there is no standard set, an average sale in the Tucson Market would probably be around the 6% mark." A second realtor responded that he charges "6% of the sales price towards commissions." The third realtor, associated with the same large nationwide multi-office realty company that had handled the sale of Ms. Gallagher's property, stated that his firm's "normal brokerage commission to sell a residential property is 6% of the final sales price."

Challenging these conclusions, claimant advances several pieces of information. First, she states, she too (through her husband) contacted the Arizona Department of Real Estate and was advised by a Ms. Linda Bevins of that office: (1) that real estate commissions

are not set by that state office; (2) that Federal Trade Commission rules prohibit realtors from colluding to establish a “set structure for commissions”; (3) that commissions are set by individual brokers and are negotiable; (4) that her department is only involved where realtor fraud exists; (5) that, in her experience across the area, “full service brokers charge between 6-12% depending on the type of property, and the Department of Real Estate only becomes concerned if a far off nominal value such as 40% is used to take advantage of the public by a broker or realtor.” According to claimant, “to the best of Ms. Bevins’ knowledge,” commissions for residential real estate vary “from 6-10% depending on location and price range of the property, as well as market conditions in the specific area in question.” For problem sales, e.g., properties located where “vast amounts of similar unsold properties [are] on the market,” Ms. Bevins indicated, commissions “can range up to 10-12%.” These statements, first presented by Ms. Gallagher based on Mr. Gallagher’s notes of his conversation of November 12, 2010, with Ms. Bevins, were confirmed by Ms. Bevins by an email on November 22, 2010.

Next, claimant states, she researched the issue of real estate commissions with the Arizona Association of Realtors and spoke with a Ms. Tammy Dezotell of that office. She reports that Ms. Dezotell advised her that there is no “average” or “normal” and that even to opine on what is “average” would be improper, since the law dictates that commissions are negotiable. Ms. Dezotell related that neither the Association nor the State of Arizona maintains statistics of such averages and further insisted that “any average would not be directly relevant to any individual property, because of differences in the characteristics of the region, neighborhood and the specific property.” According to Ms. Dezotell, commissions for the time period involved in 2008 “were up to 10%.”

As to the Gallagher property and the conditions that existed in 2008 when Ms. Gallagher’s residence was being offered for sale, claimant provides June 2009 Pima County real estate statistics showing that the \$665,000 sales price put the residence “in the top 2-3% of the price range for the Tucson market” – a price range, claimant insists, requiring special marketing expertise. She also states that, when her residence was being offered for sale in 2008, there were 106 Tucson homes on the market in the \$650,000-\$700,000 price range. Only four sales in that price range had been made during the previous month. This translates to a 26.5 month supply of such homes in that price range at that time, i.e., a “very slow market,” one where, claimant urges, “extensive extra marketing” by a “proactive realtor” was essential to assure that her home would sell. Claimant identifies her realtor’s office as being “one of the top teams in the Tucson area,” having “a great deal of experience and marketing expertise.” As indicated above, and as confirmed by the agency, the realtor was associated with a large nationwide multi-office real estate company. Finally, claimant states, based on verbal presentations she received from other realtors specializing in homes in her price range who looked at the property at the time it was being put on the market back in 2008, as well

as based on the information more recently obtained about the 2008 rates from the Arizona Department of Real Estate and Arizona Association of Realtors, the commission paid for the sale of her home was “well within the reasonable range of real estate commissions in Tucson at the time of sale” and “well below the maximum allowed by the JTR.”

Discussion

Both the Federal Travel Regulation (FTR) and the JTR limit reimbursement of real estate commissions in conjunction with permanent changes of duty station to the “rates generally charged for such services in the old PDS locality.” 41 CFR 302-11.200(a) (2008) (FTR 302-11.200(a)); JTR C5756-A.1. Although a 6% commission rate may frequently appear in Arizona and elsewhere throughout the country, the regulations do not mandate that rate or preclude reimbursement at higher rates. Moreover, by using the plural – i.e., “rates” – the regulations appear to acknowledge that, even in a particular locality, there may be a variety of different commission rates being “generally charged,” depending on varying types of property, price ranges, specific neighborhoods, and market conditions. It is the claimant’s burden to prove by a preponderance of the evidence that the commission rate he/she paid was no more than that “generally charged” in that locality for the sale of a property such as his/hers under the conditions that existed when the property was being offered for sale. *Janice Ayala*, GSBCA 16330-RELO, 04-1 BCA ¶ 32,580, at 161,197 (and cases cited therein).

This case is not one in which all the evidence regarding prevailing rates is provided either by the agency, *cf. Theresa M. Grimm*, CBCA 1743-RELO, 10-1 BCA ¶ 34,428; *Chris North*, or by the claimant, *cf. Janice Ayala*. Rather, as seen above, both parties have come forward with evidence, and it is up to this Board to weigh the evidence and determine whether claimant has sustained her burden of proof. In this instance, we conclude that claimant has sustained her burden.

In contrast with the information provided by claimant, the agency’s evidence regarding real estate sales commission rates appears focused on “average” or “normal” rates being currently charged for “typical” residential property in Tucson, rather than on what was being “generally charged” in Tucson for residential property in the price range of claimant’s home in 2008, when the property was being offered for sale. And although the agency’s attorney purportedly “received confirmation” from the Arizona Department of Real Estate “that the reasonable and customary fee in the Tucson area is not higher than 6%,” the source of that confirmation was not identified, that information was directly and very specifically contradicted by claimant’s source at that state office, and the confirmation provided to the claimant was presented by her to the Board in written form. Ms. Bevens of the Arizona Department of Real Estate clearly indicated that commissions for residential real estate vary

“from 6-10% depending on location and price range of the property, as well as market conditions in the specific area in question.” Indeed, she stated, for problem sales, e.g., properties located where “vast amounts of similar unsold properties [are] on the market,” commissions “can range up to 10-12%.” Here, claimant cited contemporaneous 2008 sales statistics showing a substantial surplus of unsold higher-priced houses such as hers on the Tucson market. The information obtained by claimant from the Arizona Association of Realtors is of similar effect regarding the range of commission rates being “generally charged” in Tucson during the period in question. We therefore find, based on the preponderance of the evidence presented, that the 8.5% commission claimant paid falls within that range of rates, particularly for the type of property she was selling.

Decision

For the reasons stated above, we grant the claim. Claimant is due the balance of \$16,625.

RICHARD C. WALTERS
Board Judge