

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

February 23, 2005

GSBCA 16433-RELO

In the Matter of JOHN P. RYDZIK

John P. Rydzik, Sacramento, CA, Claimant.

Michael J. Conkey, Program Manager, National Business Center, Office of the Secretary, Department of the Interior, Denver, CO, appearing for Department of the Interior.

NEILL, Board Judge.

Mr. John P. Rydzik, claimant in this case, is an employee of the Department of the Interior. He asks that we review his agency's denial of a claim he submitted for reimbursement of a broker's fee which he allegedly incurred in connection with the sale of his residence on the occasion of his transfer from Riverside to Sacramento, California. For the reasons stated below, we affirm the agency's denial of the claim.

Background

On July 22, 2003, claimant and his wife went to settlement on the sale of the residence they had occupied at the time of Mr. Rydzik's transfer. The settlement sheet showed that the broker's commission was divided between two realty companies, Coldwell Banker Associated (Coldwell) and Regency Realty (Regency). Coldwell had served as claimant's broker while Regency had served as broker to the purchaser. Of the amount paid from sellers' funds at settlement, \$19,400 was to be paid to Coldwell and \$1000 to Regency.

In seeking reimbursement for fees due to brokers in connection with the sale of his home, however, Mr. Rydzik sought a total of \$42,680. While the agency was willing to pay the \$20,400 shown on the settlement sheet, it denied the balance of \$22,280 on the ground that the settlement sheet did not show that this amount was actually incurred and paid. Claimant disagrees with the agency's ruling and has provided the following explanation for why he sought a total of \$42,680.

Four offers were originally received for the purchase of his residence. Two were for \$775,000. The parties submitting these two highest offers were invited to submit best and final offers. One of the offers was increased to \$776,000. The other offer remained unchanged. Claimant and his wife thereupon accepted the increased offer.

The original contract presented by the successful offerors provided that a broker's fee of three percent of the purchase price would be due their broker, an agent of Regency. In the formal amendment of their original offer, the successful offerors not only raised their original offer to \$776,000, but also stated: "Selling agent reserve[s] the right to reduce his commission and all parties agree to reduce the sale price by the same amount." (The contract, as originally presented, had already disclosed that Regency's agent in this case was the brother of one of the offerors.)

Upon acceptance of this final offer, Regency's agent made a gift to the purchasers of all but \$1000 of his commission of \$23,280 (3% of \$776,000). As a result, the sales price of \$776,000 was reduced to \$753,720 -- as was reflected in the final settlement statement.

It is the contention of Mr. Rydzik that, with the acceptance of the final offer of \$776,000, the real estate commission of \$23,280 clearly became an expense borne by him and his wife. He disagrees with the agency that this is merely a theoretical expense of the bargain agreed upon by the parties. Rather, he insists that the full amount of the Regency broker's commission is a real expense incurred in the sale of his residence.

Discussion

In denying Mr. Rydzik's claim, the agency relies upon our decision in Nicholas A. Mendaloff, GSBCA 14542-RELO, 98-2 BCA ¶ 29,983. The case is cited by the agency in support of the proposition that reimbursement is limited to expenses actually incurred and paid. The agency's reliance on this decision is appropriate to support this proposition. Use of the case, however, does present a slight problem inasmuch as the facts in Mendaloff differ somewhat from those in the instant case -- as Mr. Rydzik is quick to point out.

In Mendaloff, the claimant was attempting to recover costs allegedly incurred in conjunction with the purchase of a residence at the new duty station rather than in conjunction with the sale of a residence at the old duty station. In Mendaloff, the price of the house to be purchased was raised in exchange for the seller's agreement to pay the purchaser's settlement costs. In the instant case, the price of the house has been lowered in exchange for the remission of nearly all of the commission which would be due to the buyer's agent.

These factual distinctions, valid as they may be, do nothing to change the outcome in this case. By statute, an agency is required to pay to an employee who transfers in the interest of the Government from one duty station to another within the United States, expenses of the sale of the residence at the old official station and the purchase of a residence at the new official station. This provision, however, applies only to expenses which "are required to be paid by the employee." 5 U.S.C. § 5724a(d)(1) (2000). The Federal Travel Regulation (FTR), which implements this and related statutory provisions regarding the relocation of employees of the Federal Government, states that the purpose of an allowance for expenses incurred in connection with residence transactions is to reimburse the employee for "expenses that you *incur*." 41 CFR 302-11.1 (2003) (FTR 302-11.1) (emphasis added).

Contrary to Mr. Rydzik's claim, we can find no basis for concluding that he did, as a matter of fact or law, incur any expense with regard to the amount of the Regency agent's

voluntary reduction in commission due him on the sale of claimant's former residence. The contract, as amended by the offerors' best and final offer, to which claimant agreed, provided that the selling price of \$776,000 could be reduced by whatever amount the selling agent chose to reduce his commission. The amount of reduction in commission and, consequently, in the sales price as well, was \$22,280. This amount was never incurred as a charge and, therefore, quite obviously, was never paid by claimant.

In cases with facts more similar to the facts in this case than to those found in the Mendaloff decision, we have consistently upheld an agency's denial of claims for reimbursement of broker's fees which have been remitted by realtors in exchange for a reduction in selling price. E.g., Christopher P. Murnane, GSBCA 16239-RELO, 04-1 BCA ¶ 32,449; David Goldblum, GSBCA 14142-RELO, 97-2 BCA ¶ 29,140 (stating that employee cannot claim reimbursement of the broker's commission that might have been owed had the price not been reduced); Harlan C. Theil, GSBCA 13688-RELO, 97-1 BCA ¶ 28,710 (1996) (stating that the Government is not authorized to reimburse its employees for hypothetical expenses of the bargain that the parties may have contemplated, but did not make). It is for this reason that we urge agencies, as a general rule, to look to the settlement sheet itself as the most reliable measure of the actual expenses incurred in connection with the transferred employee's real estate transactions.

We recognize that, by accepting the final offer of the buyers in this case, claimant netted on the sale an amount less than what he would have received if the full amount due the brokers had actually been paid at settlement and thereafter paid to him in its entirety as a reimbursable cost of sale. Unfortunately, a good portion of this amount was neither sought nor paid but rather was remitted in exchange for a reduction in the selling price of claimant's house. Under current rules, that price reduction is simply not reimbursable because traditionally it is not recognized as an expense incurred and paid. Accordingly, this claim is denied.

EDWIN B. NEILL
Board Judge