

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-216425**DATE:** August 21, 1985**MATTER OF:** Orville D. Grossarth - Prepayment
Penalty for Sewer Assessment Lien**DIGEST:**

A transferred employee sold his old residence and seeks reimbursement for a prepayment penalty incurred upon the payoff of a sewerage improvement lien on his residence. The claim may be allowed under the Federal Travel Regulations, para. 2-6.2d(1)(g), since the prepayment of the assessment to satisfy the lien was required by the lending institution and FHA regulations. Thus, it meets the test that it be customarily paid by the seller in the locality of the old official station. V. Stephen Henderson, B-207304, April 15, 1983, distinguished. The prepayment penalty was required by the municipal code and the recorded assessment roll which placed a lien on the property was an "other security instrument" within the meaning of para. 2-6.2d(1)(g).

This decision is in response to a request from the Director for Fiscal Management, Pacific Northwest Region of the Forest Service, U.S. Department of Agriculture, requesting a decision in the case of Mr. Orville D. Grossarth. The matter involves his entitlement to be reimbursed for a prepayment penalty he paid on the sale of his former residence. We conclude that Mr. Grossarth may be reimbursed.

BACKGROUND

Mr. Grossarth is an employee of the Forest Service. Incident to a permanent change of station in October 1982, he sold his residence in the area of his old duty station. Included in his claim voucher was an expense item of \$414.10, which was identified as a penalty for prepayment of a lien for sewer improvements against his residential property.

That expense was administratively disallowed by the National Finance Center (NFC), Department of Agriculture.

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The reason given was that it was considered to be interest on a sewerage assessment and not a bona fide prepayment penalty associated with a mortgage or other security instrument.

On resubmission to the NFC, Mr. Grossarth contended that due to the nature of that obligation, i.e., one imposed on real estate owners by municipal code, it qualified as a reimbursable prepayment penalty under para. 2-6.2d(1)(g) (Supp. 4, Aug. 23, 1982) of the Federal Travel Regulations (FTR), incorp. by ref., 41 C.F.R. § 101-7.003 (1984). The expense was again disallowed by NFC, this time based on decision V. Stephen Henderson, B-207304, April 15, 1983. That ruling by the NFC is the basis for the submission here.

FACTS

In March 1982, well before Mr. Grossarth's transfer, the City Council of Boise, Idaho, approved and undertook the financing of necessary sewer improvements in the Local Improvement District (LID) in which Mr. Grossarth's residence was located.

Pursuant to the Boise Municipal Code, Mr. Grossarth and the other LID property owners were authorized two methods of payment. The first method was that property owners could pay all or part of their share of the assessment within 30 days of its imposition. Second, any amount not paid by that time would be thereafter financed through the sale of municipal bonds, secured by a lien upon the property. Mr. Grossarth and others were informed that if each assessment share was not totally paid within the 30-day period, such action would be considered as an election to pay the unpaid assessment in installments, plus interest, over 15 years. Further, since the City of Boise would be committed to the payment of interest to the bond holders over the entire life of the bonds, the Code required that an additional amount be paid as a penalty in the event an assessed property owner should choose to make a lump-sum payment of his remaining assessment installments.

Mr. Grossarth chose the installment plan, thereby binding the property and himself, as owner, to the 15 years of payments. These were the circumstances in which he found himself when he was transferred in October 1982.

On February 25, 1983, a buyer reached a tentative agreement to purchase Mr. Grossarth's residence. The salient terms of that agreement were that the buyer was to put up \$500 earnest money and agree to purchase the residence upon obtaining suitable financing. Further, the agreement stated: "Seller to pay March 31 sewer LID payment and buyer will assume future LID payments."

After the buyer applied for financing, Mr. Grossarth was requested to supply the Idaho Housing Authority with certain information regarding the property and the terms of the sale. By Affidavit of Seller, dated March 31, 1983, Mr. Grossarth informed the Authority about the buyer's agreement to assume the future LID payments. This was changed upon a determination by the lending institution that all liens against the property had to be satisfied in full; the sewer assessment could not be assumed by the purchaser.

Accordingly, an amended sales agreement was prepared, dated April 4, 1983, stating that "[s]eller to pay off sewer LID." The selling price was not adjusted, thus requiring the seller to bear the full cost of the assessment. Mr. Grossarth accepted this because of the time already spent in negotiating the sale.

A representative of the City of Boise Public Works Department advised the Forest Service that lending institutions in the locality normally require that all liens be satisfied to produce a free and clear title. A representative of the lender, First Security Realty Service, also stated that, at the time in question, the lending institution required all liens shown on the title report to be satisfied. Finally, an official of the Boise office of the Department of Housing and Urban Development (HUD) informed the Forest Service that FHA regulations required that all liens be satisfied in order to qualify for FHA financing.^{1/}

^{1/} Subsequent to the time of this transaction, the lending institution has allowed liens such as the LID sewer assessment to be passed on to the purchaser, provided the purchaser agrees to such terms. This is consistent with HUD's advice to the Forest Service that FHA regulations have been amended to permit assessment liens of this type to remain on property on the proviso that the buyer agrees in writing to assume payment of such lien.

DECISION

The issues presented for our decision are:

(1) Was the expense incurred by Mr. Grossarth a bona fide prepayment penalty or was it merely the payment of principal and interest on the assessment which is barred by our decision in Henderson?

(2) If the charge imposed on Mr. Grossarth for early payoff of the sewerage assessment is not barred by Henderson, does it qualify for reimbursement as a "charge for prepayment of a mortgage or other security instrument" under para. 2-6.2d (1)(g) of the Federal Travel Regulations?

I.

The Department of Agriculture's National Finance Center concluded that our decision V. Stephen Henderson, B-207304, April 15, 1983, requires disallowance. The NFC states that, "since Mr. Grossarth's claim for a sewer assessment appears to be analogous to the paving lien in the cited decision, it would be considered a capital improvement and not reimbursable."

We disagree. In Henderson, the question was whether a paving lien imposed on the employee's property was a reimbursable seller's expense due to the fact that it was customary in the locality for sellers to pay off such liens at the time of sale. We held that it was not a reimbursable expense. Our basis for so ruling was that even though the employee, as seller, was required by local practice to pay off the lien, that was not a sufficient basis to allow reimbursement since the street improvement was analogous to a capital improvement to the property itself which is not reimbursable.

The matter at issue in Mr. Grossarth's case, however, is not the value of the capital improvement. He is not claiming the total amount of \$2,623.78 paid to satisfy the sewerage lien; he is only claiming the prepayment charge of \$414.10 imposed on him as a penalty for paying off a sewerage improvement lien after it has been financed through the sale of municipal bonds. Thus, Henderson, which did not involve a prepayment penalty, is not controlling.

II.

Paragraph 2-6.2d of the FTR (Supp. 4, Aug. 23, 1982), provides, in part:

"d. Miscellaneous expenses.

"(1) Reimbursable items. The expenses listed below are reimbursable in connection with the sale * * * of a residence, provided they are customarily paid by the seller of a residence in the locality of the old official station * * * to the extent they do not exceed amounts customarily paid in the locality of the residence.

* * * * *

"(g) Charge for prepayment of a mortgage or other security instrument in connection with the sale of a residence at the old official station to the extent the terms in the mortgage or other security instrument provide for this charge. * * *"

It is clear from the statements provided by the lending institution, the City of Boise, and the Boise Office of HUD that the expense for early payoff of the sewerage lien was, at the time in question, customarily paid by the seller in the Boise locality and that the amount fixed by law did not exceed the amount customarily paid in that locality. The difficult issue, however, is whether this expense is a prepayment charge imposed by a "mortgage or other security instrument."

Those terms are not defined in the FTR. It is clear that a prepayment penalty incurred by a seller pursuant to the terms of a mortgage is reimbursable. David J. Connolly, B-194298, August 10, 1979. We also allowed reimbursement where a prepayment agreement was contained in a document collateral to a mortgage. Donald F. Reynolds, B-194892, March 14, 1980. Also, in Charles L. Putnam and Billie L. Verble, B-183251, May 29, 1975, we ruled that a prepayment

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penalty under a second deed of trust, which was placed on the residence a number of years after the original purchase, qualified as a reimbursable expense upon the sale of the residence incident to a transfer.

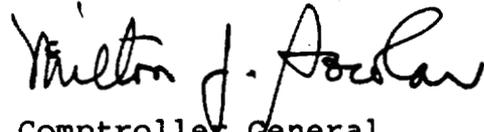
Turning to the present case, the debt created for the sewerage improvement upon the landowners benefitted thereby is secured by a lien upon the properties assessed. The Municipal Code, in section 50-1715, as added in 1976, provides that, upon passage by the City Council of an ordinance confirming the assessment roll, which ordinance is a final determination of each assessment contained therein and of the amount thereof levied upon each lot or parcel of land benefitted, the clerk shall certify and file the confirmed assessment roll with the treasurer of the municipality, and that the confirmed assessment roll and the assessments thereunder shall be a lien upon the property assessed from the date that notice thereof is filed by the clerk with the county recorder.

Accordingly, the confirmed assessment roll when notice thereof was recorded in the land records of the county became a lien upon each assessed property. Thus, the assessment roll enacted by ordinance of the Boise City Council, which imposed a lien upon Mr. Grossarth's residence, qualifies as an "other security instrument" within the meaning of FTR para. 2-6.2d(1)(g). As noted above, the penalty for prepayment of the assessment is mandated by the same section 50-1715 of the Municipal Code that establishes the lien upon the assessed properties.

Thus, the amount claimed by Mr. Grossarth qualifies as a "charge for prepayment of a mortgage or other security instrument in connection with the sale of a residence * * *" under FTR para. 2-6.2d(1)(g). Since the sewerage assessment lien was required to be paid off by the lending institution in accordance with both local custom and FHA regulations, it is clear that this expense meets the test that it be "customarily paid by the seller of a residence in the locality of the old official station * * *" as set forth in FTR, para. 2-6.2d(1).

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Accordingly, we conclude that Mr. Grossarth is entitled to be reimbursed for the \$414.10 charge he incurred as a prepayment penalty for paying off the sewerage assessment against his residence.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States