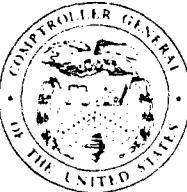


**DECISION**



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

50895

FILE:

DATE: JUL 14 1975

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R-182631  
MATTER OF:

David R. Hoffman - Real Estate Broker's Commission

DIGEST:

1. Transferred employee who paid 9 percent real estate commission when HUD schedule of closing costs showed prevailing commission rate of 6 percent, did not overcome presumption created by HUD schedule by showing that real estate commissions paid in area ranged from 6 percent to 10 percent, without showing that any rate other than 6 percent was dominant.
2. Transferred employee who paid 9 percent real estate commission to entice broker to make every effort to sell house, may only be reimbursed at 6 percent rate shown in schedule of closing costs which was the prevailing rate in the locality where the house was sold, since higher rate was not prevailing or generally charged rate.

This matter is before us based upon a request for reconsideration of Settlement Certificate No. 2-2540714, issued June 13, 1974, by our Transportation and Claims Division, which limited the reimbursement paid to Mr. David R. Hoffman for the real estate broker's commission incurred when he sold his residence at his old duty station to 6 percent of the selling price.

Under the authority of Travel Authorization No. 2420-74-6, dated August 17, 1973, Mr. Hoffman, an employee of the Internal Revenue Service (IRS), was transferred from Beckley, West Virginia, to Toledo, Ohio. Incident to that transfer, he sold his residence at his old duty station for \$42,000, paid a real estate broker's commission of 9 percent of the sales price, or a total of \$3,780, and sought reimbursement of that entire amount. As part of its review of Mr. Hoffman's claim, IRS requested that the Charleston Insuring Office of the Federal Housing Administration, Department of Housing and Urban Development (HUD), provide them with the amount of the "typical" real estate broker's commission in Beckley, West Virginia. By letter of February 7, 1974, HUD advised IRS that the "typical" commission rate was 6 percent. Mr. Hoffman was then reimbursed 6 percent or \$2,520.

Mr. Hoffman submitted a reclaim voucher seeking reimbursement of the difference between the 6 percent commission allowed and the 9 percent he paid. In support of his position he has submitted a letter from the Executive Secretary of the West Virginia Real Estate Commission which states that there is no law or regulation that sets forth the commission rate to be charged by a real estate broker, and that the commission rate varies in West Virginia from 6 percent to 10 percent. Mr. Hoffman also submitted a letter from Mr. P. L. Raines of the Beckley Realty Company, the broker that handled the sale of, and actually purchased, Mr. Hoffman's former residence. Mr. Raines states that his company has no standard or set commission rate that he negotiates the commission when each property is listed and generally attempts to fix the rate at 6 percent to 10 percent, but he has gone above and below those rates. He also states that there is no standard commission rate recognized by the Beckley Board of Realtors.

Essentially Mr. Hoffman contends that 6 percent is not the prevailing commission rate in Beckley. He states that he requested that Mr. Raines provide him with a breakdown showing the number of homes sold at the various commission rates. He also contends that the HUD statement that 6 percent was the prevailing rate was inaccurate because it probably included the more urbanized Charleston area. We also note the following passage contained in the material submitted with his reclaim voucher:

"Why did I feel that it was necessary to pay a 9% commission to move my home? The method that I used in arriving at the 9% was relatively easy. In the Internal Revenue Service manual on moving expenses I found that I would be permitted to be reimbursed for allowable items incurred on the sale of my home up to 10% of the sales price or \$5,000. As stated above the real estate market was extremely slow and the local realtors also constructed their own homes for sale on which they receive substantial profits. In listing the home with a realtor I felt that it was necessary to go to the 9% in order to entice him to make every effort possible to sell this property.  
\* \* \*  
(Emphasis added.)

After reviewing all of the information provided by Mr. Hoffman, we contacted the HUD Charleston Insuring Office to discuss the issues raised. They provided us with copies of their marketing expense surveys for the "Beckley-Bluefield-Princeton Area." In a survey listing

four different real estate firms dated September 4, 1973, all four reported a commission rate of 6 percent. In a survey of three realtors dated August 20, 1974, two charged 6 percent and the other 5 percent. Inquiries made by HUD on May 8, 1975, of seven firms showed three charging 6 percent, two charging 5 percent to 6 percent; one 7 percent in town and 10 percent outside the city limits.

The statutory authority for reimbursing real estate expenses is found in 5 U.S.C. 5724a(4) (1970), which provides that there may be reimbursement of:

"Expenses of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old station and purchase of a home at the new official station required to be paid by him when the old and new official stations are located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone.

However, reimbursement for brokerage fees on the sale of the residence and other expenses under this paragraph may not exceed those customarily charged in the locality where the residence is located, and reimbursement may not be made for losses on the sale of the residence. This paragraph applies regardless of whether title to the residence or the unexpired lease is in the name of the employee alone, in the joint names of the employee and a member of his immediate family, or in the name of a member of his immediate family alone. \* \* \* (Emphasis added.)

This provision has been implemented by the statutory regulations, Federal Travel Regulations (FPMR 101-7), para. 2-6.2a (May 1973), which provides that:

" \* \* \* A broker's fee or real estate commission paid by the employee for services in selling his residence is reimbursable but not in excess of rates generally charged for such services by the broker or by brokers in the locality of the old official station. No such fee or commission is reimbursable in connection with the purchase of a home at the new official station."

Finally, FTR, para. 2-6.3c (May 1973) provides that local or area offices of HUD should be consulted to determine what charges are

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customary in the locality, and that this information should serve as a guideline, not as a rigid limitation on the reimbursement allowed.

In effect, the closing cost information supplied by HUD creates a rebuttable presumption as to the amount that may be reimbursed. One method of rebutting the presumption is to take a survey of the real estate firms in the area. This was done successfully in B-173091, June 22, 1971; B-174022, December 28, 1971; and B-174625, January 17, 1972. The HUD survey results forwarded to us confirm their prior statement that 6 percent was the prevailing commission rate. The information provided by Mr. Hoffman does not demonstrate that 6 percent is not the prevailing commission rate in Beckley, it only shows that rates other than 6 percent are charged in certain circumstances. To be the prevailing rate or the rate generally charged, it is not required that all sales commissions be at that rate. Nor is it required that a rate be set by regulation or be recommended by a local real estate board, since the Department of Justice views such practices as anti-competitive and violative of the anti-trust laws. Mr. Hoffman has not even demonstrated that 9 percent is the rate generally charged by the broker that sold his former residence. Therefore, we cannot say that the "prevailing" or "generally charged" real estate commission rate in Beckley, West Virginia, at the time in question was other than 6 percent.

We also note the statement accompanying Mr. Hoffman's reclaim voucher to the effect that he agreed to the 9 percent rate to entice the broker "to make every effort possible to sell this property." We have held that when a commission rate greater than that usually charged is paid to expedite the sale of the property, there can be no reimbursement of the excess above the prevailing rate. B-165200, September 23, 1968; B-166764, May 21, 1969; and B-181129, August 19, 1974.

Accordingly, for all of the above reasons, the disallowance of Mr. Hoffman's claim for further reimbursement of real estate commission expenses is sustained.

PAUL G. DEMBLING

For the Comptroller General  
of the United States