

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

December 8, 2000

GSBCA 15330-RELO

In the Matter of RICHARD A. POISEL

Richard A. Poisel, Vail, AZ, Claimant.

Capt. Leslie A. Rowley, Office of the Staff Judge Advocate, Claims Division, United States Army Intelligence Center, Fort Huachuca, AZ, appearing for Department of the Army.

HYATT, Board Judge.

Claimant, Richard A. Poisel, is a civilian employee of the Department of the Army. He was transferred from Fort Monmouth, New Jersey to Fort Huachuca, Arizona in April 1999. Incident to this transfer, he purchased a new home in Arizona and submitted a claim for reimbursement of real estate expenses incurred. The Army reduced his claim for expenses, which totaled \$9,849, to the amount of \$4,927. Mr. Poisel disagrees with some of the reductions made and has requested the Board's review of these disallowances.

Background

Mr. Poisel decided to have a home built in Arizona. He purchased a lot, obtained a construction loan, and eventually took out a permanent mortgage to finance the house. It appears that he sought to have the Army pay all closing costs associated with the three loans required for (1) the purchase of the lot, (2) construction of the house, and (3) permanent financing for the residence. The Army reviewed the expenses associated with the purchase of the land and made a number of reductions. The principal reductions for which Mr. Poisel seeks review pertain to disallowance of the underwriting fee, the tax service fee, a loan discount fee, and an item described as a one percent discount to the mortgage company. The Army paid a number of the customary and reasonable expenses incurred on the construction loan, but disallowed mortgage broker fees, which it determined, after a discussion with the mortgage company, were actually discount points. The Army declined to pay any expenses associated with the third loan, for permanent financing on the house, reasoning that these were duplicative of the expenses incurred under the first two loans.

Mr. Poisel challenges the disallowances of the various fees described above and argues that the closing expenses associated with the third loan were necessary and not duplicative. The Board wrote to claimant and the Army and requested that they provide a description of what the loan and mortgage discounts, and broker fees, consisted of. In addition, the Board noted that, under applicable rulings, ordinarily the closing costs associated with the permanent loan, rather than the costs associated with closing on the prior loans, are reimbursed and we asked the Army to explain its decision in this regard.

With respect to the loan discount fees, Mr. Poisel states that he could not obtain supplementary statements from the mortgage company, but contends that these fees should not be deemed to reflect interest, or points, associated with the loans because it would have made no sense, and was not his intent, to buy down the interest rate on short term loans. Thus, he maintains that these were not loan discount fees or points, but some other type of charge identified as such under the mortgage company's accounting system. Claimant further asserts that before he engaged a loan brokerage firm, Pinnacle Mortgage Company, it was explicitly agreed that no loan discount fees would be permitted. In its response, the Army counters that it contacted the mortgage company and was told that the charges were in fact "discounts."

As to the broker fees charged for the construction loan, Mr. Poisel states that it is his understanding that this was the fee received by the loan brokerage firm for processing the loan documents. A loan broker was needed to obtain the lowest possible interest rate.

Discussion

Under 5 U.S.C. § 5724a(a)(4)(Supp. IV 1998), employees who are transferred in the interest of the Government may be reimbursed for certain expenses incurred in the purchase of a residence at the new duty station. Included among the items that may be reimbursed are certain miscellaneous expenses that are customarily paid by . . . the purchaser of a residence at the new official station, to the extent they do not exceed specifically stated limitations, or in the absence thereof, amounts customarily paid in the locality of the residence." 41 CFR 302-6.2(d) (1999). Among the miscellaneous charges that may be reimbursed are fees charged by banks or mortgage companies for the administrative costs of processing the loan. Fees related to the extension of credit itself, however, may not be reimbursed.

Underwriting and Tax Service Fees

The Army has properly disallowed Mr. Poisel's claim for the underwriting fee and the tax service fee. Neither of these fees is recoverable under the Federal Travel Regulation (FTR), 41 CFR 302-6.2(d)(2)(v) (1999), which provides that unless specifically authorized elsewhere in the regulation, no fees, charges, costs, or expenses determined to be part of the finance charge under the Truth in Lending Act, 15 U.S.C. § 1605 (1994), may be reimbursed. Accord Joint Travel Regulations (JTR) C14002-A.4.b(5). The Truth in Lending Act provides that the finance charge shall be determined as the sum of all charges imposed directly or indirectly by the creditor incident to the extension of credit. The Board has consistently recognized that these fees are charges paid incident to and as a prerequisite to the extension of credit, and thus are not reimbursable. Gerald Fediw, GSBCA 14256-

RELO, 98-1 BCA ¶ 29,513; accord Stanley H. Levine, GSBCA 15065-RELO, 00-1 BCA ¶ 30,809.

Loan Discount and Mortgage Broker's Fees

The Army also disallowed loan discount fees charged in connection with the financing process. The Board has previously recognized that "loan discounts" and "mortgage discounts" are generally synonymous and that under FTR 302-6.2(d)(2)(ii), "mortgage discounts" are nonreimbursable real estate transaction costs. Brent T. Wahlquist, GSBCA 13721-RELO, 97-2 BCA 29,094. Claimant was given an opportunity to show that the mortgage company used the term "loan discount" to assess some other type of charge that might be reimbursable, but was unable to explain what the term was intended to mean. Even if we accept claimant's argument that he did not pay points and that these charges were not a form of interest, there is no basis in this record for us to determine that these charges represent administrative costs or that it is customary in this locality for the buyer to pay them. The burden is on the claimant to establish his right to payment. Rule 401(c) (48 CFR 6104.1(c) (1999)). In the absence of satisfactory evidence to the contrary, we must conclude the term refers to a charge associated with the extension of credit and that the agency properly disallowed this cost.

Similarly, there is no statute or regulation that would authorize payment of the mortgage broker's fees. Thus, the Army properly declined to reimburse these charges. Michael L. Peeler, B-252355 (July 20, 1993).

The Three Loans

In response to Mr. Poisel's claim for reimbursement of the closing costs incurred with respect to the three loans associated with the purchase of his newly constructed house, the agency properly recognized that it should not reimburse duplicative costs. With respect to closing costs and other expenses associated with the three loans, in addressing similar circumstances the Board has recognized that an employee who chooses to construct a home at the new duty station will be eligible to recover real estate transaction expenses to the same extent as an employee who purchased an existing home. Where each stage of the building process involves a number of expenses which would appropriately be reimbursed in connection with the purchase of an existing residence, the employee may be reimbursed only once for each type of expense that is allowable under the regulations. In general, the expenses incurred incident to permanent financing on the completed house are most representative of expenses an employee would incur to purchase an existing residence, and entitlement determinations should be based primarily on an examination of that settlement. When similar fees and expenses are incurred more than once as a result of the decision to construct a new home rather than buy an existing residence, the duplicate fees are considered to have resulted from the construction of the new home and are not reimbursable. Thomas S. Cushing, GSBCA 13867-RELO, 97-2 BCA ¶ 29,022; see also David G. Winter, GSBCA

14229-RELO, 98-1 BCA ¶ 29,361; Brent T. Wahlquist, GSBCA 14163-RELO, 97-2 BCA ¶ 20,095.¹

The intent of this rule of thumb is that the employee should not receive a higher level of reimbursement when a house is newly constructed than would have been received for purchasing an existing house. The agency has not provided any explanation for its decision to reimburse the closing costs for the land and the construction loan, rather than the costs associated with the permanent loan. On this record we do not know whether claimant would receive a higher level of reimbursement if the Army were instead to reimburse the closing costs incurred for the permanent loan. To determine the proper amount of reimbursement due to claimant, the agency should review the files, ascertain the costs that are reimbursable in connection with the third loan for permanent financing, and then review whether there are any additional, nonduplicative costs incurred with respect to the two earlier loans which might also be reimbursed. The agency should then make the appropriate adjustment.

CATHERINE B. HYATT
Board Judge

¹Thus, although the agency expressed concern about whether it was proper to take out three loans, this is immaterial. The employee's recovery is limited by the rule prohibiting the payment of duplicative costs or costs incurred solely by reason of the decision to construct a house, rather than purchase an existing residence.