

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

August 2, 2002

GSBCA 15817-RELO

In the Matter of DAVID L. MALONE

David L. Malone, Grovetown, GA, Claimant.

Vivian A. Davis, Senior Attorney, Real Estate Division, United States Army Corps of Engineers, Savannah District, Savannah, GA, appearing for Department of the Army.

BORWICK, Board Judge.

In this matter, claimant, David L. Malone, a civilian employee of the United States Army Corps of Engineers, seeks reimbursement of miscellaneous real estate transaction fees he incurred in the sale of his house, incident to his permanent change of station, at his old permanent duty station (PDS), Cartersville, Georgia. Claimant maintains that he incurred those expenses on behalf of the buyer, which was the customary practice in Cartersville. We grant the claim in part. Claimant is entitled to reimbursement of \$928.73 for the loan origination fee, \$150 for the title examination fee, \$20 for the credit report fee and \$16 for the flood certification fee. Claimant has not demonstrated entitlement to the other fees sought.

In May of 2001, the agency transferred claimant, in the interest of the Government, from Cartersville, Georgia, to Savannah, South Carolina, and granted claimant reimbursement of real estate transaction expenses. Incident to that transfer, claimant sold his house and paid the cost of certain transaction expenses as follows:

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|---|---------------|
| (a) loan origination fee | \$928.73 |
| (b) loan discount fee | 235.67 |
| (c) automated underwriting | 20.00 |
| (d) document preparation fee | 350.00 |
| (e) flood certification fee | 16.00 |
| (f) tax service fee | 56.00 |
| (g) Georgia residence mortgage loan fee | 6.50 |
| (h) recording fee | 46.00 |
| (i) o/n payoff | 16.00 |
| (j) county taxes | <u>307.76</u> |
| total | 1982.66 |

Claimant sought reimbursement of these amounts in block twenty-six of the travel voucher (DD Form 1705) under the category of other incidental expenses. That block states that "this includes other expenses that are reasonable and customary charges or fees paid as may be authorized and not properly included in the items listed above." On another section of the form, claimant also sought reimbursement of the buyer's title examination fee of \$150 and credit report fee of \$20.

The buyer of claimant's residence financed the purchase with a Federal Housing Administration (FHA) loan in the amount of \$94,266. According to the agency, the FHA loan attachment to the sales contract provided that the "Seller shall pay the following lender fees: Underwriting, Document Preparation and Tax Service Fees."

The agency allowed reimbursement of the recording fee, but initially disallowed reimbursement of the loan origination, loan discount, automated underwriting, document preparation, flood certification, Georgia residence mortgage loan, title examination, and credit report fees because the claimant had not demonstrated that it was normal and customary in the Cartersville, Georgia, area for a seller to pay those fees for the buyer. The agency also disallowed reimbursement of the tax service fee as a non reimbursable finance charge, disallowed the o/n payoff because reimbursement was not listed on the settlement sheet, and disallowed reimbursement of county taxes as non reimbursable under the Joint Travel Regulations (JTR) C14002A-4(b)(3).

In his appeal to the Board, claimant contested the agency's disallowance of the title examination fee, the credit report fee, the loan origination fee, the loan discount fee, the automated underwriting preparation fee, and the document preparation fee. Claimant maintained that those items were "normally paid by the seller in the Cartersville, Georgia [area]." In support of that position, claimant attached a letter from a real estate agent in Cartersville, Georgia, who stated that the title examination and credit report fees, the loan discount fee, the Georgia residence mortgage loan fee, and the o/n payoff (the denial of which claimant did not challenge) were the "usual & customary cost of the seller in this area." The real estate agent also stated that the loan origination, underwriting, document preparation, and flood certification fees were "always paid by seller on this type [FHA] of loan."

In responding to the claim, the agency now "agrees that the underwriting, document preparation, and tax service fees (the denial of which claimant did not challenge) are required to be paid by the seller when a[n] FHA loan is involved." However, the agency argues that the underwriting and tax service fees are paid incident to and as a prerequisite to the extension of credit and are not reimbursable. JTR C14002-A.4.b.(5). The agency states that if reimbursement of the loan origination and document preparation fees is allowable, the payment may not exceed one percent of the loan (\$942.66). JTR C14002-A.4.a.(2).

As to the remaining challenged items, the agency has secured statements from two other real estate agents in the area. One agent stated that a seller pays the buyer's cost in approximately twenty percent of the sales. The second stated that all closing expenses were negotiated on a case by case basis depending on a buyer's ability to purchase and the seller's willingness to sell and that it was normal and customary for a seller to pay up to three percent

of the purchase price toward the closing costs on behalf of a buyer. The agency does not challenge the reasonableness of the fees.

Statute authorizes agencies to pay transferred employees closing costs where those costs are "required to be paid." 5 U.S.C. § 5724a(d)(1) (2000). The Federal Travel Regulation (FTR) and the JTR implementing the statutory provision allow reimbursement of identified miscellaneous real estate transaction expenses when those expenses are customarily paid by the seller of a residence at the old permanent duty station or by the buyer of a residence at the new permanent duty station. 41 CFR 302-6.2(d) (2001); JTR C14002-A.4.a.

Claimant has established that the payment of the loan origination, underwriting, document preparation and flood certification fees are customary for FHA loans in the Cartersville, Georgia, area. Claimant's real estate agent confirmed that, in the Cartersville, Georgia, area, sellers always pay those fees on behalf of buyers on FHA loans. That statement is not rebutted by the more general statements applicable to real estate transactions generally, but not dealing with FHA loans, from real estate agents consulted by the agency.

However, claimant is not entitled to reimbursement of both the loan origination fee (\$928.73) and the document processing fee (\$350), which are shown on the settlement sheet

as charged by the lender. The FTR explains that the loan processing fee (the same as the loan origination fee here) is to compensate the lender for administrative type expenses in administering and processing a loan. 41 CFR 302-6.2(d)(ii). We have generally refused reimbursement of document preparation fees charged by the lender (as distinguished from document preparation fees separately charged by attorneys or mortgage brokers) when the lender has also assessed a loan origination fee since that fee already compensates the lender for administrative costs of processing the loan. Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610; Jakie A. Lowery, 15538-RELO, 01-2 BCA ¶ 31,603. The claimant has not shown why document preparation was not covered by the loan origination fee.

Claimant is entitled to reimbursement of the flood certification fee. We have allowed reimbursement of this fee under JTR C14002-A.6 as an "other expense" for a "required service" when the fee is required by the lender. Wayne E. Smith, GSBCA 14844-RELO, 99-1 BCA ¶ 30,247; see also 41 CFR 302-6.2(f). The agency does not specifically address the flood certification fee in this matter, and we have no reason to believe that reimbursement of this fee is not allowed by regulation.

Claimant is not entitled to reimbursement of the underwriting fee. The underwriting fee of \$20 is a charge paid incident to and as a prerequisite to the extension of credit and is thus not reimbursable, regardless of who customarily pays. JTR C14002-A.4.b.(5); Terrence T. Smith, GSBCA 15695-RELO (June 10, 2002). Claimant is not entitled to reimbursement of the loan discount fee. Such a fee is not reimbursable, regardless of who customarily pays. 41 CFR 302-6.2(d)(2)(ii); JTR C14002-A.4.b.(2); Paula K. Fowler, GSBCA 15384-RELO, 01-1 BCA ¶ 31,281.

Claimant has established that the seller's reimbursement of the buyer's title examination and credit report fees are normal and customary in the Cartersville, Georgia, area. Claimant submitted the statement of one real estate agent that these fees are usually or customarily paid by sellers in the area. The agency tried to rebut that statement by submitting opinions of other real estate agents in Cartersville that sellers' payments of buyers' costs occur a relatively small percentage of the time or on a case-by-case basis. The statement of the second agent was inconsistent--either sellers' payment of buyers' costs occur on a case-by-case basis or it is usual and customary for sellers to pay buyers' costs up to three percent of the purchase price. The statements of the agency's two agents are also inconsistent. The statements relied upon by the agency were general and inconsistent. In contrast, the statement of claimant's agent was definite and specific. Therefore, the preponderance of the evidence establishes that, in the opinion of real estate professionals, in a commanding percentage of real estate transactions in Cartersville, sellers pay these particular fees for buyers. Sandra L. Wilks, GSBCA 15669-RELO (July 2, 2002).

We grant the claim in part. Claimant is entitled to reimbursement of the loan origination fee (\$928.73), the title examination fee (\$150), the credit report fee (\$20) and the flood certification fee (\$16).

ANTHONY S. BORWICK

Board Judge