UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 2, 2008

CBCA 1389-RELO

In the Matter of MARK BODYCOMBE

Mark Bodycombe, Washington, DC, Claimant.

Timothy Soltis, Comptroller, Defense Intelligence Agency, Washington, DC, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

Mark Bodycombe, an employee of the Defense Intelligence Agency (DIA), was transferred to a new permanent duty station in June 2007. He bought a house at his new location and asked the DIA to reimburse him for expenses he incurred in doing so. The agency reimbursed him for many of the expenses. Mr. Bodycombe asks the Board to reverse the agency's determination denying reimbursement of other costs.

Mr. Bodycombe's "biggest complaint" is that although he incurred a loan origination fee of 1.5% of the amount of the loan he received to make the purchase, the agency limited reimbursement to only 1% of that amount. He asserts that before he moved, he was not advised of the 1% limit; he was told only that the maximum reimbursement would be 5% of the purchase price. Had he known of the limitation, he says, he could have negotiated a lower loan origination fee or chosen a lender which would have charged only 1%.

The agency's determination as to this fee was in accord with regulation. Both the Federal Travel Regulation (FTR) (which applies to all federal civilian employees) and the Joint Travel Regulations (JTR) (which implement and supplement the FTR with application to civilian employees of the Department of Defense) provide that with one exception, loan origination fees and similar charges are reimbursable only to the extent of 1% of the loan

amount. Fees assessed at a higher rate can be reimbursed only when an employee "provide[s] evidence that the higher rate (a) [d]oes not include prepaid interest, points, or a mortgage discount; and (b) [i]s customarily charged in the locality where the residence is located." 41 CFR 302-11.200(f)(2), -11.201 (2006); JTR C5756-A.4.a(2). Mr. Bodycombe has not provided such evidence, so his reimbursement was properly capped at 1% of the loan amount.

The regulations do contain the 5% limitation that the employee calls to our attention. 41 CFR 301-11.300(b); JTR C5756-B.2. This limitation applies to the *total* of reimbursable expenses, however; it does not supersede the limitations established elsewhere in the regulations on reimbursement for specific kinds of fees. And while provision of more information by the agency in advance of the move would have been preferable, it cannot alter our resolution of the case. We apply the requirements of statute and regulation to actions that did occur, not to those which might have occurred if circumstances had been different from what they actually were.

Among other matters in dispute, the one which involves the greatest number of dollars concerns title insurance premiums. The agency reimbursed Mr. Bodycombe in the amount of $885.20, which it says was the premium for title insurance to protect the interest of the employee's lender. Mr. Bodycombe says that the total amount which appears on his settlement sheet is $1934.80. The employee says, "I've never been shown or seen any breakdown or proof of the single fee referenced on the Settlement Statement which differentiates between the Lender's required insurance policy and an Owner's policy. I obtained the Title Insurance as determined by Weichert which was both the Lending and Realty company I used, and I assume it was in conjunction with financing."

We have previously explained the regulations which govern reimbursement of title insurance premiums:

> A "[m]ortgage title insurance policy, paid by [the transferred employee], on a residence [the employee] purchased for the protection of, and required by, the lender" is reimbursable if it is customarily paid by the purchaser of a residence at the location in question. An "[o]wner's title insurance policy" is generally not reimbursable. Such a policy is reimbursable, however, if it is customarily paid by the purchaser of a residence at the location in question and if "it is a prerequisite to financing or the transfer of the property; or if the cost of the . . . policy is inseparable from the cost of other insurance which is a prerequisite."

Gary Twedt, GSBCA 16905-RELO, 06-2 BCA ¶ 33,433, at 165,744; *Thaddeus Hosley*, GSBCA 16899-RELO, 06-2 BCA ¶ 33,394; *Gregory A. Tate*, GSBCA 16753-RELO, 06-1 BCA ¶ 33,195; *see* 41 CFR 302-11.200(f)(8), -11.202(c); JTR C5756-A.4.a(8), -A.4.b(1).

If Mr. Bodycombe paid two separate premiums for title insurance, one to protect the lender's interest and one to protect his own, the DIA was correct in reimbursing him only for the first of these premiums. If, on the other hand, he paid a single premium and paying that premium was a prerequisite to financing, the agency should have reimbursed him for the contested amount. *Hosley*; *Donald F. Moore*, GSBCA 16794-RELO, 06-1 BCA ¶ 33,254. The burden is on the employee to demonstrate that his position is correct. Rule 401(c) (to be codified at 48 CFR 6104.401 (2008)). Mr. Bodycombe has not met his burden; he has simply assumed that the money he paid was in conjunction with financing. Therefore, we cannot fault the DIA's rejection of his claim.

Similarly, Mr. Bodycombe has failed to convince us that he should be reimbursed for a charge which is labeled "administrative fee." The agency has correctly stated, citing as support *Edward D. Ellis*, GSBCA 16763-RELO, 06-2 BCA ¶ 33,304, "It is the claimant's burden to establish the purpose of the fee and that he is entitled under the applicable regulations to be reimbursed for it. Until additional information is provided this expense has been disallowed." The employee has responded, "[T]he Lender stated the fee is 'A Real Estate Company charge; would be better called a Compliance or Consumer Protection fee. In addition to the standard administration of the transaction, this covers the maintenance/compliance with a variety of State mandated laws and regulations including Agency Disclosure, Property Disclosure, RESPA (Real Estate Settlement Procedures Act), Megan's Law, Lead-based Paint Disclosure, "Do Not Call" compliance, etc.'" This response is inadequate because it does not explain whether this fee is customarily paid by the purchaser of a residence at the location in question, or whether the amount is reasonable. *See* 41 CFR 302-11.200(f)(12); JTR C5756-A.4.a(6).

Whether other expenses at issue in this case should be reimbursed depends on whether they are "fee[s], cost[s], charge[s], or expense[s] determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, as amended, and Regulation Z issued by the Board of Governors of the Federal Reserve System (12 CFR part 226)." If they fall within this category, they are not reimbursable. 41 CFR 302-11.202(g); JTR C5756-A.4.b(5).

We have previously explained that two of the expenses are not reimbursable:

> Tax service fees are generally charged by a lender to monitor tax assessments on mortgaged property. Underwriting fees are generally charged by a lender

> to cover the cost of having a loan underwritten. These fees are not usually denominated as finance charges on real estate transaction settlement sheets. Nevertheless, they are paid by the consumer and imposed by the creditor as incident to the extension of a mortgage loan (a form of credit). Consequently, they are 'finance charges,' as that term is defined in the Truth in Lending Act and Regulation Z. Reimbursement of these fees is not specifically authorized in the FTR. The fees are therefore not reimbursable by the transferring Government agency.

Craig A. Czuchna, GSBCA 15799-RELO, 02-2 BCA ¶ 31,898, at 157,594; *see also William Duncan Baker*, CBCA 1145-RELO, 08-2 BCA ¶ 33,882; *John W. Bodford*, CBCA 1006-RELO, 08-1 BCA ¶ 33,862; *William L. King, Jr.*, CBCA 457-RELO, 07-1 BCA ¶ 33,504; *Willo D. Lockett*, GSBCA 16391-RELO, 04-2 BCA ¶ 32,722.

Mr. Bodycombe also seeks reimbursement for delivery fees of various sorts -- express mail, courier, and "investor delivery." These fees "may be reimbursed if the claimant can demonstrate the use of the [service] was prompted by more than considerations of personal convenience and when it is clear that the fee was incurred either by claimant or someone working on his or her behalf, and not by the creditor." *Ellis*, 06-2 BCA at 165,144; *see also Martha V. Hooks*, GSBCA 16754-RELO, 06-1 BCA ¶ 33,198. Mr. Bodycombe has made such a demonstration with regard to the courier and "investor delivery" fees by explaining that the settlement agent imposed these fees on him to ensure timely delivery of documents to their recipients in connection with settlement. We therefore direct the DIA to reimburse the employee for these fees, totaling $128, in connection with his purchase of a residence at his new duty station. The employee has not provided any information as to the express mail charges, so the agency acted reasonably in not providing reimbursement for those costs.

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STEPHEN M. DANIELS
Board Judge