UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 8, 2010

CBCA 1829-RELO

In the Matter of MICHAEL T. HAPPOLD

Michael T. Happold, Keller, TX, Claimant.

Mark B. McMurry, Office of Counsel, United States Army Corps of Engineers, Department of the Army, Fort Worth, TX, appearing for Department of the Army.

McCANN, Board Judge.

Claimant was employed by the United States Fish and Wildlife Service in South Dakota. He obtained employment with the United States Army Corps of Engineers at the Fort Worth (Texas) District. Accordingly, he and his wife moved, pursuant to permanent change of station orders, from Yankton, South Dakota, to Fort Worth, Texas.

On September 22, 2009, claimant and his wife executed a purchase contract with Standard Pacific Homes for a house in Fort Worth, Texas. Closing on this house was executed on October 9, 2009.

According to the HUD-1 claimant paid, *inter alia*, the following fees at closing:

800 **Items Payable in Connection with loan**	
801 Loan Origination Fee - 1.000% Standard Pacific Mortgage	$2,792.00
808 Processing Fee	495.00
809 Underwriting Fee	495.00
1100 **Title Charges**	
1108 Title Insurance - See supplemental page....	$2,273.00
1109 Lender's Coverage . . . Premium $100.00	
1110 Owners Coverage . . . Premium $2,173.00	

After closing, claimant submitted a claim for $9351.62 for real estate expenses incurred in the purchase of his house. The Corps of Engineers denied $4471.09 of this claim. In his claim letter to this Board, dated December 7, 2009, claimant requests that he be reimbursed $3163 for the processing fee ($495), the underwriting fee ($495), and the owner's coverage for title insurance ($2173), that the Corps denied.

Processing and underwriting fees

Claimant contends that the processing and underwriting fees are eligible for reimbursement under the Joint Travel Regulations (JTR) Chapter 5, Part P. He claims that the JTR indicate that reimbursement may exceed the one percent loan origination fee if two conditions apply: (1) the fees do not include prepaid interest, points, or a mortgage discount, and (2) the fees are customarily charged in this locality. Claimant believes that these fees satisfy these two conditions. Claimant alleges that the lender informed him that the fees were administrative fees charged by all lenders for administrative services, were a cost of doing business, and were in addition to the loan origination fee.

Claimant is not entitled to reimbursement for the processing and underwriting fees. Under 41 CFR 302-200(f)(2) (2009), an employee may be reimbursed "[l]oan origination fees and similar charges . . . not to exceed 1 percent of the loan amount . . . ." Similarly, JTR C5756-A.4.a(2) limits recovery of loan origination fees:

> (2) Loan origination fees and similar charges such as loan assumption fees and loan transfer fees; (A loan origination fee is a fee paid by a borrower to compensate a lender for administrative-type expenses incurred in originating and processing a loan. . . . An employee may be reimbursed for these fees in an amount not in excess of 1 percent of the loan amount without itemization of the lender's administrative charges. Reimbursement may exceed 1 percent only if an employee shows by clear and convincing evidence that: (a) the higher rate does not include prepaid interest, points, or a mortgage discount; and (b) the higher rate is customarily charged in the residence locality.). [Emphasis added.]

Claimant contends that such fees are administrative fees just as the loan origination fee is an administrative fee. Accordingly, to be reimbursed claimant must demonstrate by clear and convincing evidence that the fees do not include interest, points, or a mortgage discount. He has failed to meet this burden. Furthermore, the processing and underwriting fees are similar to the loan origination fee and must be considered to be finance charges. *Terry L. Hood*, GSBCA 16061-RELO, 03-2 BCA ¶ 32,314; *Gary C. Duell*, GSBCA

15812-RELO, 02-2 BCA ¶ 32,034. Reimbursement of finance charges in excess of one percent is prohibited "unless specifically authorized as provided in 41 CFR § 302-11.200." 41 CFR 302-11.202(g). Section 302-11.200 does not specifically authorize this reimbursement. Accordingly, the underwriting and processing fees are not reimbursable.

Owners title insurance policy

Claimant further contends that pursuant to chapter 5, part P of the JTR he is entitled to reimbursement for the cost of the owner's title insurance policy because it was a prerequisite to obtaining financing from the lender ($2173). Section C5756-A.4. of the JTR reads:

> a. Reimbursable Items. The expenses listed below are reimbursable ICW [in connection with] residence sale (if customarily paid by a seller of a residence at the old PDS [permanent duty station]) and/or purchase of a residence (if customarily paid by a purchaser at the new PDS) to the extent they do not exceed specifically stated limitations, or in the absence of limitation, amounts customarily paid in the residence locality:
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> . . . .
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> (9) Owner's title insurance policy, provided it is a prerequisite to financing or the transfer of property; or the owner's title insurance policy cost is inseparable from the other insurance costs, which is a prerequisite to property financing or transfer.

Claimant points to paragraph 7 of the sales contract as support for his position that owner's title insurance was required to obtain financing. This paragraph does indicate that the buyer is to pay for the cost of "Buyers Title Policy." However, this clause does not actually apply to the situation at hand. The clause is found in the contract between the purchaser and the seller and requires the buyer to pay for the cost of the buyer's title policy if the buyer chooses to purchase one. However, this clause does not really relate to what the lender requires before it will provide financing.

A lender will not lend money for a mortgage unless the owner purchases title insurance that will cover the lender. In this case, according to the HUD-1, the claimant paid $100 for the lender's coverage and $2173 for the owner's coverage. This allocation, however, is misleading. Much of the cost of owner's coverage, in actuality, goes to cover the lender's risk. The lender's coverage, without owner's coverage, would cost much more, as the Corps admits. The lender's coverage is shown as $100 on the HUD-1 only because

the purchaser is buying owner's coverage. Under the regulations and prior case law, the amount that claimant is entitled to be reimbursed is the actual cost to him of the lender's coverage which he must purchase to obtain financing. This cost is the cost of lender coverage without owner coverage.

Although not specifically stated in the documentation, claimant had the option of purchasing only lender's insurance, or, for a small amount more, both lender's and owner's insurance. Choosing to purchase both lender's and owner's and insurance was likely a prudent choice for claimant as the increase in price for the package was surely minimal. The purpose of the regulations is to reimburse employees for the cost of obtaining financing. The regulations were not intended to force a buyer to choose between purchasing only lender's insurance, and being completely reimbursed; and purchasing both lender's and owner's insurance, and being reimbursed only a small portion of the slightly-increased combined cost. Surely the regulations were not meant to discourage buyers from purchasing owner's title insurance.

This issue has been thoroughly discussed in *Thomas Gene Gallogly*, GSBCA 15891-RELO, 03-1 BCA ¶ 32,091 (2002). In that case, the situation was substantially the same. In that case, it was clear that the claimant could either pay $2053 for lender's title insurance, or, for $100 more ($2153), he could pay for lender's and owner's title insurance. The claimant did the smart thing and paid $2153 for both coverages. The GSBCA, our predecessor board, found entitlement to be $2053. *Id*. See also *Andrew Perez*, 16764-RELO, 06-1 BCA ¶ 33,206; *Nadab O. Bynum*, GSBCA 16715-RELO, 05-2 BCA ¶ 33,100.

In the case at hand we do not know the exact amount of claimant's entitlement, as we do not know the exact amount that lender's title insurance alone would have cost him. It should not be difficult for claimant to find out what that amount would have been and to submit supporting documentation. In *Gallogly* an e-mail message from the lender was sufficient. In *Perez*, a letter from the settlement agent was adequate. It is claimant's responsibility to provide such support if he wishes to be reimbursed. *Bynum*. After that amount is determined, claimant will be entitled to reimbursement.

The Corps maintains that claimant is not entitled to reimbursement for the owner's title policy, in any event, because the general rule in the locality is that the seller pays for the owner's title policy. The JTR does require that, before a claimant can be reimbursed for an expense, the cost must be customarily paid by the claimant/purchaser at the new permanent duty station. JTR C5756-A.4.a. The Corps, however, fails to substantiate this assertion with any evidence. The validity of the Corps' assertion seems very unlikely; we know of no

reason why a seller would normally pay for a title insurance policy that will only inure to the benefit of the buyer.

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R. ANTHONY McCANN
Board Judge