

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

February 28, 2002

GSBCA 15718-RELO

In the Matter of VERNA POPE

Verna Pope, Gilbert, AZ, Claimant.

Janice Mickels, Budget & Accounting Analyst, Defense Contract Audit Agency, Central Region, Irving, TX, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

The Defense Contract Audit Agency transferred auditor Verna Pope from Tucson, Arizona, to Tempe, Arizona, in April 2000. Ms. Pope bought a new home near Tempe and asked the agency to reimburse her for various costs she incurred in making this purchase. The agency paid for most of the costs but refused payment for some. Ms. Pope requests that we review the agency's denial of seven items – fees paid by her for document preparation, loan processing, two home inspections, credit reports, an attorney's services, and seller administration. We affirm the agency's determination as to five of these items and reverse it as to two of them.

Document preparation fee; loan processing fee

Real estate transaction charges which are paid incident to and as a prerequisite to the extension of credit are considered to be finance charges under the Federal Travel Regulation (FTR), the fundamental regulation governing benefits for federal civilian employees who are transferred from one permanent duty station to another. Finance charges are not reimbursable except to the extent that the FTR makes them so. 41 CFR 302-6.2(d)(2)(v) (1999); Larry W. Poole, GSBCA 15730-RELO (Jan. 24, 2002).

A kind of finance charge which is expressly made reimbursable by the FTR is a loan origination fee. A loan origination fee is "a fee paid by the borrower to compensate the lender for administrative type expenses incurred in originating and processing a loan." 41 CFR 302-6.2(d)(1)(ii). Fees for preparation of documents needed to close a loan, and for the processing of the loan, are species of loan origination fee. Pamela R. Harris, GSBCA 15645-RELO, 01-2 BCA ¶ 31,640; Kathleen M. Lewis, GSBCA 15613-RELO, 01-2 BCA ¶ 31,616; Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610; Jeffrey P. Zippin,

GSBCA 15115-RELO, 00-1 BCA ¶ 30,744; John P. Kemp, GSBCA 14335-RELO, 98-2 BCA ¶ 39,751.

Although the FTR makes loan origination fees reimbursable, it also places a limitation on the extent of reimbursement. Generally, the limitation is one percent of the loan amount. "Reimbursement may exceed 1 percent only if the 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 locality where the residence is located." 41 CFR 302-6.2(d)(1)(ii).

The agency has already reimbursed Ms. Pope for a loan origination fee in the amount of one percent of the amount of her mortgage loan. Although a document preparation fee and a loan processing fee are shown separately from the loan origination fee on the transfer agent's settlement sheet, they are for our purposes simply additional fees for loan origination. Ms. Pope has not shown that a rate in excess of one percent of the loan amount is customarily charged in the Tempe, Arizona, area for loan origination fees. Consequently, she may not be reimbursed for the additional loan origination costs associated with document preparation and loan processing. Harris; Coney; Zippin; Joseph Thompson, GSBCA 15077-RELO, 00-1 BCA ¶ 30,615 (1999).

Home inspection fees

The FTR makes a home buyer's property inspection fees reimbursable when they meet three tests: the fees must be (a) customarily paid by the purchaser of a residence in the locality in question, (b) in an amount no greater than is customarily paid in that locality, and (c) required by federal, state, or local law, or by the lender as a precondition to the purchase. 41 CFR 302-6.2(d)(1)(xi); Harris; Lewis; Thomas E. Sullivan, GSBCA 15453-RELO, 01-1 BCA ¶ 31,339; Albert L. Van Tuinen, GSBCA 14492-RELO, 98-2 BCA ¶ 30,091.

Ms. Pope incurred two inspection fees with regard to her purchase. She paid one fee to a home inspection service which provided her with a report on the building's condition. The other fee, in a lesser amount, was charged by her mortgage lender.

Ms. Pope says that she hired the service to examine aspects of the structure which were inaccessible to her (for example, the roof) or of unique importance (wheelchair accessibility features). According to the employee, a realtor she contacted believes that three-quarters of all home buyers in the Tempe area hire services to inspect homes prior to purchase. Neither the employee nor the agency has commented on the other inspection fee, which is shown on the settlement sheet among various charges imposed by the lender.

The fee paid by Ms. Pope to the home inspection service is not reimbursable because it fails the third of the three tests set out in the FTR: it was not required by federal, state, or local law, or by the lender as a precondition to the purchase. Even if we were to determine that a home inspection fee is customarily paid by the purchaser of a residence in the Tempe

area¹ and that the amount paid by this purchaser was not greater than what is customary there, the failure to pass the third test makes the fee non-reimbursable. The smaller inspection fee, on the other hand, was required by the lender, so the agency should repay Ms. Pope for it unless the agency concludes, based on further investigation, that lenders in Tempe customarily do not assess an inspection fee or that the fee in question exceeds the customary amount.

Credit report fees

The cost of preparing a home buyer's credit reports is reimbursable, providing that this cost is customarily paid by a purchaser of a residence in the locality in question and does not exceed amounts customarily paid in that locality. 41 CFR 302-6.2(d)(1)(iii); Poole. The agency determined, based on information from the Arizona Mortgage Lenders Association and the company through which Ms. Pope secured her mortgage loan, that the typical cost of a full credit report in the Phoenix area (including Tempe) is no more than sixty dollars. The agency has already reimbursed the employee in this amount for credit report fees. Additional costs were incurred by Ms. Pope, according to the mortgage company, "from having to obtain new credit reports each time the time limit expired." We conclude from this evidence that because of some events peculiar to this employee's purchase, more than one credit report had to be prepared. The agency acted appropriately in not reimbursing the additional costs associated with the extra report or reports, which were apparently caused by actions of the employee herself or the persons with whom she engaged in the transaction at issue.

Attorney fee

The FTR makes "legal and related expenses" involved in a home purchase reimbursable, provided that these costs meet three tests: they must be (a) not included in brokers' or similar charges for which reimbursement is claimed under other categories, (b) customarily paid by a purchaser of a residence in the locality in question, and (c) in an amount not in excess of what is customarily paid in that locality. The FTR makes numerous, specifically-designated "legal and related expenses" reimbursable, and it states that "similar expenses" are reimbursable as well. 41 CFR 302-6.2(c); Van Tuinen. The General Accounting Office, our predecessor in settling claims by federal civilian employees for relocation benefits, held that because obtaining necessary and reasonable legal services incident to the purchase or sale of residential housing is both prudent and customary, all fees customarily charged for such services (except for litigation) are reimbursable. The principle was first enunciated in George W. Lay, 56 Comp. Gen. 561 (1977), and followed thereafter. See Frank W. Hahnenberg, B-248,506 (Oct. 26, 1992); John C. Bisbee, 65 Comp. Gen. 473 (1986); Reid T. Stone, B-210,604 (Aug. 24, 1983); Alexander D. Bell, B-201,382 (July 7, 1983); Constance A. Hackathorn, B-205,579 (June 21, 1982). The Board adopted the reasoning and conclusion of these decisions, as to attorney fees, in Edward C. Brandt, GSBCA 13649-RELO, 97-2 BCA ¶ 29,054.

¹The evidence may not support such a conclusion. "The fact that a practice may be 'common' or 'normal' does not raise it to the status of a charge 'customarily assumed' by the purchaser." Van Tuinen.

Ms. Pope engaged a lawyer to review documents prepared by the seller regarding the prospective transaction, for the purpose of ensuring that the documents would require the seller to convey a wheelchair-accessible house. The agency denied reimbursement of the very small fee charged by the lawyer, on the ground that the attorney may have given advice, but did not actually prepare a conveyance, other instrument, or contract. (Preparation of any of these documents is specifically listed in the FTR as generating a reimbursable expense.) The agency's conclusion is inconsistent with the law since Lay. Legal advice incident to the purchase of a residence is a service similar to the ones noted by the agency, and thus reimbursable if necessary and in a reasonable, customary amount. Ms. Pope has cited good cause for seeking legal counsel as to the appropriateness of the seller's proposed documents, and the small amount charged for her attorney's services is undoubtedly reasonable. The cost of these services is therefore reimbursable.

Seller administration fee

The builder from whom Ms. Pope bought her home charged a small "seller administration fee." According to the company through which the employee secured her mortgage, this particular builder charges the fee on all home purchases. The employee and the agency agree that no other builder in the area charges a similar fee.

Neither the Board nor the General Accounting Office has ever been asked to decide whether a charge called a "seller administration fee" is reimbursable to the employee. The FTR does not say explicitly whether such a charge is reimbursable or not. The regulation does provide for reimbursement of charges which are "similar in nature" to those fees it explicitly makes reimbursable, but this fee is not similar to any of those. See 41 CFR 302-6.2(d)(1)(vi). We think the "seller administration fee" assessed by Ms. Pope's builder is best viewed as merely an incremental portion of the sales price. As such, it is not a charge which the agency ought to pay.

In summary, we conclude that the agency has properly implemented the FTR with regard to all but two of the fees submitted for our review by the employee. The agency must reimburse Ms. Pope for the attorney fee she incurred. It should also reimburse her for the lender's inspection fee she paid, unless it determines that such a fee is not customarily paid in the Tempe, Arizona, area, or that the amount she paid exceeded the customary charge in that area.

STEPHEN M. DANIELS
Board Judge