UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

June 4, 2024

CBCA 8018-RELO

In the Matter of PETER G.

Peter G., Claimant.

Lisa L. Kennedy, Chief, Permanent Change of Station, Financial Management Directorate, Interior Business Center, Department of the Interior, Lakewood, CO, appearing for Department of the Interior.

CHADWICK, Board Judge.

The agency relocated claimant from Wyoming to Arizona in early 2018. It partially denied reimbursement under two vouchers in March 2018. Claimant sought the Board's review in February 2024, itemizing six expenses still in dispute, which totaled $11,740.77. The largest expenses are for mortgage insurance and a "seller credit." We address the expenses in ascending dollar value and grant the claim in part for the reasons that follow.

Recording fee. The American Land Title Association (ALTA) settlement statement for the sale of claimant's home in Wyoming lists a "Recording Fee to" the lender as a debit to the seller of $12. The agency originally denied reimbursement on the grounds that "Recording Fees part of loan payoff are not a reimbursable expense." Before the Board, the agency does not defend the disallowance on that basis. The agency notes, instead, that although the recording fee appears in the settlement statement, it does not appear in the closing disclosure provided earlier by the lender. "In order to determine whether an employee has incurred and paid an expense, we usually look to the settlement statement." *Christy L. Paulk*, CBCA 5669-RELO, 18-1 BCA ¶ 36,961, at 180,090 (2017). The agency apparently now does not dispute that the recording fee, if paid, is reimbursable under 41 CFR 302-11.200(d) (2017) ("[t]he cost of . . . related . . . [customarily charged] recording fees"). Claimant satisfies his burden to support reimbursement.

Tax service fee. The settlement statement for claimant's purchase of a home in Arizona lists a debit to claimant of $21.50 for "Tax Service to" a limited liability company. The agency says this fee is not reimbursable because it is "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), [and not] specifically authorized in [41 CFR] 302–11.200." 41 CFR 302-11.202(g). Claimant argues that the tax service fee is allowable as a charge "assessed in lieu of a loan origination fee and reflect[ing] charges for services similar to those covered by a loan origination fee." 41 CFR 302-11.200(f)(2). The Board has determined that "[r]eimbursement of . . . tax service fees is not specifically authorized in 41 CFR 302-11.200" and that "[i]n the absence of evidence to the contrary"—which claimant does not provide—we will consider a "tax service fee [to be] a finance charge" rather than a charge for services similar to loan origination. *William S. Gregory*, CBCA 2724-RELO, 12-2 BCA ¶ 35,134, at 172,486. Accordingly, "the agency properly denied reimbursement" here. *Id*.

Commitment fee. The closing disclosure for claimant's purchase of the Arizona home lists a debit to claimant of $870 for a "Commitment fee to" the lender. The agency states that "this expense was not claimed on a travel voucher," and we do not see it in either of the two vouchers that claimant advised us are at issue when we inquired. Although we could, therefore, decline to consider this fee under Board Rule 401(c) (48 CFR 6104.401(c) (2023) ("The agency shall initially adjudicate the claim.")), we will exercise our discretion to resolve the issue. *See Michael P. Strand*, CBCA 5776-TRAV, 18-1 BCA ¶ 36,993, at 180,161. The agency is correct that, like the tax service fee, "a loan commitment fee is a finance charge and is therefore not reimbursable by the agency." *Saleem M. Mian*, CBCA 3867-RELO, 15-1 BCA ¶ 35,821, at 175,178 (2014) (citing *Hwai-Tai Lam*, CBCA 703-RELO, 07-2 BCA ¶ 33,665, at 166,695; *David P. Brockelman*, GSBCA 14604-RELO, 98-2 BCA ¶ 29,971).

Loan origination (points). The ALTA settlement statement for claimant's purchase of the Arizona home lists an "origination charge" to claimant of $1012.57. "Under [41 CFR 302-11.200(f)(2)], loan origination fees not exceeding one percent of the loan amount are reimbursable expenses." *Stephen G. Tryon*, CBCA 6364-RELO, 19-1 BCA ¶ 37,451, at 181,980. This charge is below the one percent limit. The agency contends, however, that the facts show that this charge actually represents "points" that an agency cannot reimburse under 41 CFR 302-11.202(d). The agency cites an email in which the lender explained that claimant received a "discount" of $1000 against loan application costs and that claimant "used this credit to buy his rate down . . . which cost him an extra $1012.57 in origination cost . . . . After the credit, [claimant] had a remaining cost of $12.57 which was paid . . . at closing." Consistent with this, the lender's closing disclosure itemized the $1012.57 as "0.375% of Loan Amount (Points)."

We agree with the agency that claimant paid a precisely calculated amount for a lower interest rate, i.e., prepaid interest or points, rather than a fee for loan services as such. *See William S. Gregory*, 12-2 BCA at 172,486 (an origination fee "compensate[s] a lender for administrative-type expenses"); *Gerald Bates, Jr.*, CBCA 2789-RELO, 12-2 BCA ¶ 35,080, at 172,283 ("The fees in issue were not administrative-type expenses that would normally be reimbursed as loan origination fees."). Claimant's argument that he could have applied the discount to other closing costs is unavailing, as is his argument that itemized fees require no "clarification" if they total less than one percent of the loan. Agencies cannot pay "points" in any amount. 41 CFR 302-11.202(d). Reimbursement was properly denied.

Mortgage insurance. In connection with obtaining mortgage insurance to purchase the Arizona home, claimant paid $4644.07, which is described in the record in two ways. The settlement statement lists the $4644.07 as a "Mortgage Insurance Application Fee." The closing disclosure lists the amount as "FHA UFMIP," that is, an upfront mortgage insurance premium that a lender remits to the Federal Housing Administration (FHA). *See* 24 CFR 203.259a(b) (2017); www.hud.gov/program_offices/housing/comp/premiums/ufmain (last visited May 31, 2024). The amount of this expense—precisely 1.75% of the base loan amount—confirms that it was calculated and collected as a UFMIP, as stated in the lender's disclosure. *See* Department of Housing and Urban Development, FHA Single Family Housing Policy Handbook 4000.1 (Dec. 2015) at 161. Claimant calls the $4644.07 a loan fee. The agency calls it an insurance premium. Although FHA fees can be reimbursable, *see* 41 CFR 302-11.200(f)(1), mortgage insurance premiums are not. *Id.* 302-11.202(c).

The Federal Reserve Board, the author of Regulation Z (cited above), has not adopted either party's characterization of a UFMIP. Instead, that Board determined that a UFMIP "meets the definition of a prepaid finance charge." 76 Fed. Reg. 27390, 27399 (May 11, 2011) (preamble to proposed amendment to Regulation Z); *see also* 77 Fed. Reg. 49090, 49159 (Aug. 15, 2012) (Consumer Financial Protection Board preamble to proposed real estate disclosure rule) ("[U]pfront mortgage insurance premiums . . . are not 'points and fees,' even though they are finance charges under [12 CFR] 1026.4(a) and (b)."). Because a UFMIP is a finance charge under Regulation Z, a UFMIP is not reimbursable under 41 CFR 302-11.202(g), given that no such mortgage insurance expense is specifically allowed by 41 CFR 302–11.200. *Cf. William S. Gregory*, 12-2 BCA at 172,486 (similar analysis for tax service fee). The travel regulation specifically authorizes reimbursement of FHA "fees for the loan application," 41 CFR 302-11.200(f)(1), but a UFMIP is a charge for insurance (based on the borrowed amount) and not for the loan application itself.

Claimant suggests it is significant that the UFMIP "is a subsequent responsibility of the lender" under 24 CFR 203.259. "[T]he mortgagee," not the borrower, claimant notes, "is required to pay the UFMIP" to the FHA. This is true, but, as seen here, the charge may

be passed through and "financed as part of the mortgage," 24 CFR 203.18c, making it, per regulation, an unreimbursable finance charge to claimant for the reasons just given.

Seller credit. The settlement statement for the sale of claimant's Wyoming home lists a "Seller Credit" to the buyer of $5180.63. The agency argues "there is not enough evidence to prove [such] seller concessions are customary." Claimant must show that credits of this kind and amount are "customarily paid in the locality of the [sold] residence." 41 CFR 302-11.200(f). Absent evidence that a seller's concession was customary, it "would not be a reimbursable expense under [41 CFR] 302-11.200 but rather a negotiated reduction to the net cost of the house to entice the buyer to purchase it." *Joseph D. Han, Jr.*, CBCA 3882-RELO, 15-1 BCA ¶ 36,061, at 176,090. "The term 'customary' must be applied strictly." *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533, at 174,133; *see Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001). "An expense is 'customarily' paid [only] if, by long and unvarying habitual actions, constantly repeated, such payment has acquired the force of a tacit and common consent within a community." *Christopher L. Chretien*, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701, at 143,315–16 (1996), *quoted in Erwin Weston*, CBCA 1311-RELO, 09-1 BCA ¶ 34,055, at 168,412.

We directed claimant's attention to relevant Board decisions and invited him to submit evidence of custom with his reply. He did not do so. Claimant writes, "Appropriate supporting documentation was provided and [the credit] meet[s] the criteria of the regulations" as the buyer's closing costs, citing 41 CFR 302-11.200(a) and (f). Claimant relies on evidence he submitted to the agency that other local sellers made similar concessions in the same time period. Such evidence does not satisfy his burden to show (for example, by statements of long-term market participants) that a practice of sellers paying buyers' closing costs was longstanding, habitual, and constant, rather than a temporary reaction to market conditions, i.e., a buyers' market. The agency cannot reimburse claimant for the credit.

In their filings with the Board, the parties also discussed a seeming disagreement related to per diem for claimant's spouse. We decline to reach that issue, as it was not first presented either to the agency as a dispute or to us in the notice of claim. *See* Rule 401(c).

Decision

We grant the claim in the amount of $12 and otherwise deny it.

Kyle Chadwick
KYLE CHADWICK
Board Judge