DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220133 **DATE:** *March 13, 1986*

MATTER OF: Robert F. Novak - Real Estate Expenses - Loan Origination Fee - Mortgage Discount

DIGEST:

In connection with his purchase of a house at his new duty station, a transferred employee was advised that he would have to pay a 3 percent loan origination fee. However, at the closing the fee was stated and collected as a 1 percent loan origination fee and a 2 percent discount fee. The agency permitted reimbursement of only the 1 percent fee. Since HUD states that the customary and reasonable rate for a loan origination fee is 3 percent; since there is no indication that the interest rate on the employee's mortgage was adjusted downward upon payment of the 2 percent fee; and since both the lending institution and the settlement agent state that the percentage split is solely a function of the lender's accounting method, we find that the 2 percent fee is not a finance charge. Therefore, the employee is entitled to recover the additional 2 percent fee to the extent his total recovery will not exceed the statutory limit.

Conrad R. Hoffman, Director, Office of Budget and Finance, Veterans Administration (VA), requests our decision concerning Mr. Robert F. Novak's reclaim for a 2 percent fee classified by the employee as a "loan origination fee." For the reasons stated below, we find that the 2 percent fee does represent a part of the loan origination fee and Mr. Novak may be reimbursed to the extent that his recovery will not exceed the statutory limit.

BACKGROUND

Effective April 2, 1984, Mr. Novak was transferred from Marion, Indiana, to Butler, Pennsylvania, where he purchased a new home for $48,000. Incident to his transfer

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and subsequent purchase, Mr. Novak submitted an application for reimbursement of real estate expenses in the amount of $3,033.50. However, his gross recovery was only $2,079.50 of the $3,033.50 claimed. Mr. Novak's only challenge to the reimbursement amount concerns the loan origination fee.1/

When Mr. Novak entered into a conventional loan agreement with Merrill Lynch Mortgage Corporation (Merrill Lynch), he was informed that a 3 percent loan origination fee of $1,365 was required. Nonetheless, at the time of closing on November 30, 1984, Merrill Lynch requested that the $1,365 be collected as a 1 percent origination fee of $455 and a 2 percent discount fee of $910. The Disclosure/ Settlement Statement lists item No. 801 as a loan origination fee of "1%," and item No. 802 as a loan discount of "2%."

The VA reimbursed Mr. Novak for the 1 percent loan origination fee of $455, apparently concluding that the discount fee represented a nonrecoverable finance charge. In suspending reimbursement for the additional 2 percent, the agency did acknowledge that the Pittsburgh, Pennsylvania, Office of the Department of Housing and Urban Development (HUD) reported that a 3 percent loan origination fee is reasonable and customary for the Butler area. It nevertheless accepted Pittsburgh HUD's ambiguous instruction that the term "loan origination fee" as used by conventional lenders is not necessarily synonymous with that term as used by government-supported lenders in concluding that the discount fee was a nonreimbursable finance charge. The agency also noted that none of the information provided lists the percentage rate for the administrative costs incurred in processing the loan.

Mr. Novak reclaimed reimbursement for the disallowed 2 percent fee. He asserts that discount fees normally apply to VA loans, and since he secured a conventional loan, the 2 percent could only represent a part of the reimbursable loan origination fee. In addition, Mr. Novak submitted correspondence from both Merrill Lynch and the settlement agent, Lawyer's Abstract Company, which states that the percentage split is purely an internal function of

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1/ The VA's denial of a $10 Airborne fee and a $34 tax service fee was properly accepted by Mr. Novak and is not at issue here.

Merrill Lynch's accounting method; Merrill Lynch's home office accounting department requires the division to determine the respective amounts to credit the home and branch offices. Further, Mr. Novak submitted the Pittsburgh HUD office letter stating that a 3 percent loan origination fee for a conventional home mortgage is reasonable and customary for the area.

Against this background, the VA questions whether Mr. Novak may recover an amount in excess of the 1 percent loan origination fee already remitted.

DISCUSSION

Under 5 U.S.C. § 5724a(a)(4) (1982), an employee may be reimbursed for expenses incurred in the sale and/or purchase of a residence pursuant to a permanent change of duty station. Effective October 1, 1982, the implementing regulations were amended to permit reimbursement for loan origination fees. Specifically, para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (Supp. 4, August 23, 1982), incorp. by ref., 41 C.F.R. § 101-7.003 (1983) (FTR), was altered to read, in relevant part, as follows:

> "d. Miscellaneous expenses.
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> "(1) Reimbursable items. The expenses listed below are reimbursable in connection with the sale and/or purchase of a residence, provided they are customarily paid by the seller of a residence in the locality of the old official station or by the purchaser of a residence at the new official station to the extent they do not exceed amounts customarily paid in the locality of the residence.
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> "(b) loan origination fee;
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> "(2) Nonreimbursable items. Except as otherwise provided in (1), above, the following items of expense are not reimbursable.
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"(b) interest on loans, points, and mortgage discounts; * * *."

In commentary accompanying the amended provisions of FTR para. 2-6.2d, the General Services Administration explained that the term "loan origination fee" refers to a lender's administrative expenses in processing a loan. 47 Fed. Reg. 44,566 (1982). Similarly, we have held that the term "loan origination fee" as used in FTR para. 2-6.2d(1)(b), refers to a fee which is assessed on a percentage-rate basis to compensate the lender for expenses of originating the loan, processing documents, and related work. See Robert E. Kigerl, 62 Comp. Gen. 534 (1983); 62 Comp. Gen. 456 (1983). Furthermore, we recently noted that the term "loan origination fee" has been used by lending institutions not only to refer to a charge for administrative expenses, but also to mortgage discounts or "points." Roger J. Salem, 63 Comp. Gen. 456, 458 (1984). Simply stated, the discount represents prepaid interest and is intended to compensate the lender for the fact that the interest rate on the mortgage is lower than that available from alternative investment opportunities.

Consistent with the well-established policy prohibiting payment of interest expenses, the provisions of FTR para. 2-6.2d(2)(b) supra, expressly preclude reimbursement for interest, points, and mortgage discounts. Based on this specific prohibition, we have disallowed reimbursement for any charge that represents a mortgage discount. See, e.g., Mark W. Spaulding, B-214757, September 5, 1984; 63 Comp. Gen. at 458.

However, in Mr. Novak's situation, we find that the 2 percent fee must be regarded as a reimbursable loan origination fee rather than a mortgage discount. In short, the record amply demonstrates that the 2 percent fee is not a finance charge.

We have already, in effect, held that we will not be bound by a lending institution's characterization of a particular payment. See Roger J. Salem, 63 Comp. Gen. at 458. Thus, the conclusion that the 2 percent fee in question is in fact a discount fee does not necessarily follow simply because the Disclosure/Settlement Statement

denominates it as such. Moreover, the record reveals several factors that strongly support Mr. Novak's claim that the 2 percent discount fee is actually part of the loan origination fee.

In contrast to the vast majority of cases where similar claims have been denied, there is nothing in the file that indicates that the interest rate on Mr. Novak's mortgage was adjusted downward once the $910 fee was paid. See, e.g., Christopher P. Jolly, B-217081, March 8, 1985. We note here, as we did in Jolly, B-217081, supra, that this lack of evidence does not mean that the entire fee is reimbursable. FTR para. 2-6.2(d)(1) limits reimbursement for loan origination fees to the amount customarily charged in the area of the employee's new residence. The record, even on this point, clearly favors Mr. Novak. It is well established that the rate provided by the local HUD office gives rise to a rebuttable presumption as to the amount customarily charged. See, e.g., Jolly, B-217081, supra. According to a letter written by the Pittsburgh HUD office, the customary and reasonable loan origination fee for the Butler, Pennsylvania, area is the exact amount claimed by Mr. Novak, 3 percent.2/

In addition, there is no confirmation by the lending institution that the 2 percent fee represents an interest charge. Cf. Barry C. Nilson, B-218946, November 12, 1985. On the contrary, letters from both Merrill Lynch and the Lawyer's Abstract Company state that the 2 percent fee is a part of the loan origination fee; the percentage split is due solely to Merrill Lynch's accounting system.

While noting that Mr. Novak is incorrect in his assertion that discount fees do not normally apply to conventional loans, we nevertheless find, based on the foregoing evidence, that the 2 percent fee is not a finance charge, rather it is a part of the loan origination fee. Thus, Mr. Novak is entitled to reimbursement for the 2 percent fee. However, we must limit his recovery to $320.50.

2/ Further, we note the instances in which we have permitted the recovery of loan origination fees based only on HUD's statement of the customary rate. See Thompson and LoSoya, B-217603, B-217584, September 4, 1985.

Under 5 U.S.C. § 5724a(a)(4) (Supp. I 1983), an employee may be reimbursed for expenses incurred in purchasing a residence pursuant to a permanent change of station, but that reimbursement cannot exceed 5 percent of the purchase price or $7,500, whichever is less. 5 U.S.C. § 5724a(a)(4)(B)(ii) (Supp. I 1983). In Mr. Novak's case, 5 percent of the $48,000 purchase price, $2,400, is the statutory ceiling on his recovery and, because he has already received $2,079.50, Mr. Novak is not entitled to recover an amount exceeding $320.50. Patricia A. Grablin, B-211310, October 4, 1983.

for Milton J. Socolar
Comptroller General
of the United States