



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 8, 2016

CBCA 5493-RELO

In the Matter of JEPHREY L. SOUTH

Jephrey L. South, Corpus Christi, TX, Claimant.

Thomas Spahr, Director, Travel Functional Area, Enterprise Solutions and Standards, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

An employee who was transferred in the interest of the Government from a position overseas to one in the United States sold the home in which he had resided at his previous United States duty station. He paid the buyer a sum which was used to cover some of the buyer's closing costs. The employee claims that his agency should reimburse him for a portion of this payment. The employee has not shown, however, that in the community where the residence is located, these buyer's closing costs are customarily charged to the seller. We consequently deny the claim.

Background

Jephrey L. South was transferred by the Department of the Army from Germany to Texas in October 2015. In March 2016, he sold the home in which he had lived while at his previous United States duty station in Georgia. The contract for this sale required Mr. South to contribute \$7500 at closing. He actually paid \$6967.89 for what the settlement sheet terms "seller contribution to closing."

A garrison counsel in the Office of the Staff Judge Advocate at Fort Stewart, Georgia, reviewed Mr. South's voucher seeking reimbursement for the costs of selling his former

home. According to the lawyer, Mr. South should have been reimbursed for the following expenses:

Expenses incurred by him as seller:

Real estate sales commission	\$15,750.00
Seller mail away fee	50.00
Title clearance fee	50.00
Tracking and release fee	<u>35.00</u>
Subtotal	\$15,885.00

Expenses incurred by the buyer:

Release recording fee	\$ 66.00
Document preparation fee	95.00
Post-closing compliance fee	195.00
Settlement services fee	540.00
Intangible tax (half)	150.00
Transfer tax (half)	<u>131.25</u>
Subtotal	\$ 1,177.25

The garrison counsel stated that “[t]he seller did indeed pay these expenses [shown on the settlement sheet as the buyer’s responsibility] as part of the [\$6967.89] in unspecified costs applied against the seller at closing.” Counsel did not provide any further analysis of those costs, however.

When the Defense Finance and Accounting Service (DFAS) reviewed the matter, it allowed payment to Mr. South of all of the above expenses which were incurred by the seller, but denied payment of all of the above expenses which were incurred by the buyer. Payment for the latter group of expenses is in dispute.

Discussion

By statute, when an agency transfers an employee, in the interest of the Government, from a post of duty located outside the United States to one within this country, the employee is entitled to be reimbursed for expenses he incurs in selling his residence at the United States duty station from which he was earlier transferred. 5 U.S.C. § 5724a(d)(2) (2012). Congress has permitted the Administrator of General Services to define which expenses will be reimbursable. *Id.* In so doing, however, the legislature has imposed various constraints. One of them is that “[r]eimbursement for . . . expenses . . . may not exceed those customarily

charged in the locality where the residence is located.” *Id.* § 5724a(d)(4). The Administrator has faithfully implemented the statute by prescribing, in the Federal Travel Regulation (FTR), that certain expenses are reimbursable “[p]rovided [that they] are customarily charged to the seller of a residence in the locality of the old official station.” 41 CFR 302-11.200 (2015).

The Defense Department’s Joint Travel Regulations (JTR) are consistent with the FTR in providing:

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]) . . . , to the extent they do not exceed . . . amounts customarily paid in the residence locality with appropriate supporting documentation provided by the employee.

JTR 5912-A.4.a.

As we explained in *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533:

“The term ‘customary’ must be applied strictly, for the statute on which the regulatory phrase is based makes agencies responsible for paying transferred employees’ closing costs only where those costs ‘are required to be paid.’” *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001). That strict application has resulted in our holding that “[a]n expense is ‘customarily’ paid if, by long and unvarying habitual actions, constantly repeated, such payment has acquired the force of a tacit and common consent within a community.” *Erwin Weston*, CBCA 1311-RELO, 09-1 BCA ¶ 34,055 (quoting *Christopher L. Chretien*, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701 (1996)).

We explained the law regarding claims implicating the issue of customariness in *Walker*:

The burden is on the claimant to establish by a preponderance of the evidence that it is customary for the seller to assume some or all of the buyer’s closing costs in the locality where the residence is located. *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930 (citing *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727). This burden may be met in several ways. These include showing that a cost is allocated to the seller by state law or in a pre-printed sales form, submitting historical data which show that over a number of years a commanding percentage of sellers have contributed to buyers’ closing costs,

and submitting letters from real estate professionals confirming that a particular cost is invariably assumed by the seller for the buyer. *Delbert C. Steorts, II*, CBCA 2468-RELO, 12-1 BCA ¶ 34,890 (2011) (citing *Weston*). General, conclusive statements of customary practice and data from a limited period of time, however, are not persuasive. *Molton*; *Theresa M. Grimm*, CBCA 2231-RELO, 11-1 BCA ¶ 34,729; *James E. Miller*, GSBCA 16123-RELO, 04-1 BCA ¶ 32,450 (2003). This is especially so where the principal purpose of the seller's payment to the buyer appears not to have been to cover particular closing costs, but rather, as an inducement to entice the buyer to purchase the house. *Mahmood Ramzan*, CBCA 3287-RELO, 13 BCA ¶ 35,386; *Bradley K. Fossey*, CBCA 3049-RELO, 13 BCA ¶ 35,327, *reconsideration denied*, 13 BCA ¶ 35,388.

In denying Mr. South's claim for reimbursement of the expenses he incurred on behalf of the buyer in selling his house in Georgia, DFAS summarized this law, with citation to *Bradley N. McDonald*, CBCA 5025-RELO, 16-1 BCA ¶ 36,345, and several of the cases we have noted: *Walker*, *Trout*, *Molton*, and *Steorts*. The basic principle enunciated in these decisions – that the burden is on the claimant to prove the customariness of the seller's payment of the buyer's costs for which he seeks reimbursement – stems from Board Rule 401(c). This Rule states that “[t]he burden is on the claimant to establish the timeliness of the claim, the liability of the agency, and the claimant's right to payment.” 48 CFR 6104.401(c) (2015).

Mr. South would turn this burden on its head. His response to DFAS's accurate summary of the law is, “My position is that the [Fort] Stewart Office of the Staff Judge Advocate (OSJA) adjudication of my claim explicitly meets the burden of proof. Additional substantiation would only be required if I were requesting reimbursement for expenses not approved by the OSJA review.”

The claimant's theory is not correct on several levels. The Fort Stewart office did not adjudicate his claim. To adjudicate is “to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised; to settle judicially; to come to a judicial decision.” *Webster's Third New International Dictionary* at 27 (1986). The garrison counsel is not a court, and his conclusions are merely his own thoughts. Even if the garrison counsel's memorandum could be considered akin to a court decision, a reviewing tribunal, such as this Board, could accept his factual conclusions only if they were supported by substantial evidence. The counsel's memorandum provides no basis for its conclusions. In any event, the agency decision from which the claimant seeks review was made by DFAS, not the garrison counsel. The fact that the counsel's opinion differs from DFAS's determination does not alter the rule that the burden is on the claimant to prove the

customariness of the seller's payment of the buyer's costs for which he seeks reimbursement. Mr. South has not met (or even attempted to meet) his burden.

Decision

The claim is denied.

STEPHEN M. DANIELS
Board Judge