



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 5, 2017

CBCA 5641-RELO

In the Matter of WILLIAM C. NUSBAUM

William C. Nusbaum, Englewood, OH, Claimant.

Dominique C. Jeter, Civilian Personnel Officer, Department of the Air Force, Joint Base Andrews Air Force Base, MD, appearing for Department of the Air Force.

KULLBERG, Board Judge.

Claimant, Mr. William C. Nusbaum, seeks reimbursement in the amount of \$8250 for his payment toward the buyer's closing costs when he sold his home at his previous permanent duty station (PDS). Mr. Nusbaum contends that it was customary in the area of his former PDS for the seller of a home to pay a portion of the buyer's closing costs. His agency, the United States Air Force (USAF), contends that Mr. Nusbaum has not met his burden of proof in establishing that payment of such costs was customary. For the reasons stated below, the claim is denied.

Background

By orders dated January 21, 2015, the USAF transferred Mr. Nusbaum from his former PDS at Fort Lee, Virginia, to Wright Patterson Air Force Base, Ohio, and he reported to his new duty station on March 8, 2015. On October 14, 2015, Mr. Nusbaum submitted his claim for reimbursement of expenses related to the May 1, 2015, sale of his home at his former PDS. Mr. Nussbaum's claim included reimbursement for his payment of a portion of the purchaser's closing costs, which totaled \$8250. The USAF denied that part of his

claim because he had not shown that his payment was customary in the area in which the sale took place.

By letter dated November 18, 2016, Mr. Nusbaum requested that the USAF reconsider its denial of his claim for paying part of the buyer's closing costs. He also submitted a November 18, 2016, letter from a real estate agent that stated, in pertinent part, the following:

In regard to your inquiry about the seller paid closing costs on behalf of the Buyer for your home at the above referenced property, these closing costs are normal and customary concessions for a buyer in our market place.

Most local bank owned and foreclosure properties allow for a 3 – 3.5% closing cost concession.

The majority of our local buyers are [Federal Housing Administration (FHA)] and [Department of Veterans Affairs (VA)]. With little or no money down and a seller paying these costs, greatly improves the possibility and affordability of home ownership.

The USAF denied Mr. Nusbaum's request for reconsideration, and on February 14, 2017, Mr. Nusbaum submitted his claim to the Board. Included with his claim was a copy of an electronic mail message, which was dated February 14, 2017, from the Virginia FHA/[Department of Housing and Urban Development (HUD)] Resource Center. That message stated that sellers, "may contribute up to 6 percent of the sales price toward the borrower's origination fees, other closing costs and discount points."

Discussion

At issue in this matter is whether Mr. Nusbaum is entitled to reimbursement for the buyer's closing costs, which totaled \$8250, that he paid in connection with the sale of his home. The Federal Travel Regulation (FTR) provides that an employee will be reimbursed for real estate transaction expenses "[p]rovided the residence transaction expenses are customarily charged to the seller of a residence in the locality of the old official station." 41 CFR 302-11.200 (2014) (FTR 302-11.200). The Joint Travel Regulations (JTR), which also apply to Mr. Nusbaum, similarly provide that reimbursement of real estate transaction expenses requires a finding that such expenses "are . . . [r]easonable in amount, and . . . [c]ustomarily paid by the seller or buyer (as appropriate) in the locality where the property is located." JTR 5914-C.1.

The Board's discussion, accordingly, turns to the meaning of the term "customarily" as it relates to reimbursement for a seller's payment of closing costs on behalf of the buyer in a real estate transaction. "[T]he term 'customarily' refers to what is 'usual, normal, habitual, or routine' and reflects 'a common tradition or usage, so long established that it has the force or validity of law.'" *Charity Hope Marini*, CBCA 4760-RELO, 16-1 BCA ¶ 36,192, at 176,574 (2015). The following is well established:

Sellers who pay a closing cost which might be thought to be generally the responsibility of the buyer have met their burden in a variety of ways. The fact that state law makes payment of a particular cost an obligation of the seller is clear proof of customary practice. Showing that a preprinted settlement form calls for the seller to pay a specific cost is also persuasive. Letters from a real estate broker and the local board of realtors confirming that in the relevant area, a particular cost is invariably paid by the seller for the buyer, have been found convincing. We have additionally accepted, as proof of customary practice, extensive sales data on similarly-priced properties in the community in question showing that over a period of years, ninety-three percent of sellers contributed to purchasers' closing costs. Similarly, a real estate agent's statement that the type of cost paid by the seller for the buyer had been paid by sellers in ninety percent of residential sales transactions in the community for the past five years has been acceptable proof of local custom.

On the other hand, a bald assertion that many sellers in the community, during the relevant time, paid buyers' closing costs does not establish that the payment of these costs was "customary," as we comprehend the meaning of that term. Even if a practice is common, that is not enough to raise it to the status of being customary. The payment may simply have been a means of lowering the total cost to the buyer in order to make the purchase more attractive, an expense that the FTR makes non-reimbursable 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."

Id. at 176,575 (quoting *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744, at 156,827-28 (2001) (citations omitted)). The claimant has the burden of proving by a preponderance of evidence that such costs incurred in a real estate transaction are customarily paid in that locality. See *Michael Vincelli*, CBCA 1828-RELO, 10-1 BCA ¶ 34,461, at 170,019.

Mr. Nusbaum has not met his burden to establish that the closing costs he paid on behalf of the buyer of his home were customarily paid in the area of his former PDS. Although Mr. Nusbaum provided a letter from a realtor that asserts that a seller's payment of a buyer's closing costs is customary, the letter provides no supporting data or other information to establish why such closing costs are customarily paid by the seller. At most, the realtor's letter suggests that such payment enables more buyers to purchase homes. Moreover, the assertion that such a payment is customary does not, as discussed above, establish that those costs are customarily paid. Similarly, the electronic mail message that Mr. Nusbaum provided from the Virginia FHA/HUD resource center only shows that a seller may pay some of the buyer's closing costs and doing so helps to facilitate the sale of a home. Nothing in that message even asserts that such a payment is customary. Neither of the documents that Mr. Nusbaum provided, consequently, show that his payment of some part of the buyer's closing costs was customary.

Finally, Mr. Nusbaum contends that the Board should grant his claim in light of two General Services Board of Contract Appeals (GSBCA) decisions, *Steven D. Ward*, GSBCA 14306-RELO, 98-2 BCA ¶ 29,813, and *Brian E. Cooper*, GSBCA 14269-RELO, 98-1 BCA ¶ 29,427 (1997). Both of those decisions, however, are distinguishable from this matter in that the GSBCA found that the claimants had provided documentary evidence that showed the percentage of sales in their respective localities in which sellers had paid some portion of buyers' closing costs as well as other documentary evidence that showed that such payments had become customary. *Ward*, 98-2 BCA at 147,635-36; *Cooper*, 98-1 BCA at 146,148. Those cases, consequently, do not support Mr. Nusbaum's claim.

Decision

The claim is denied.

H. CHUCK KULLBERG
Board Judge