UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 11, 2019

CBCA 6226-RELO

In the Matter of TIMOTHY C. FUDGE

Timothy C. Fudge, Corydon, IN, Claimant.

Veronica A. Hiriams, Chief, Real Estate Division, United States Army Corps of Engineers, Louisville, KY, appearing for Department of the Army.

O'ROURKE, Board Judge.

Claimant, Timothy C. Fudge, is an employee with the Army Corps of Engineers who transferred in February 2018 from Arlington, Tennessee, to Louisville, Kentucky, pursuant to official travel orders. Claimant sold his home in Tennessee due to the transfer and requested reimbursement of authorized real estate expenses. The agency denied certain closing costs after determining they were not customary for the area. We affirm the decision.

Background

Claimant received a purchase offer on his residence before it was officially on the market, and the amount offered was more than the asking price. As part of the home sale transaction, the buyer requested that the seller (claimant) pay a portion of the closing costs—also known as a "seller's credit." Claimant agreed to a $7000 seller's credit, which was 2% of the sale price. On April 2, 2018, claimant submitted his request for real estate expenses in the amount of $30,004. The seller's credit was listed under a category of expenses entitled "Other Incidental Expenses," which included "other expenses that are reasonable and customary charges or fees paid as may be authorized, and not properly included in the items listed above." To support his request, claimant provided a letter from a title company stating that "seller contributions to closing costs is a normal, customary practice in Shelby County and the surrounding areas." The title company representative estimated that 65%-70% of all closings have seller-paid closing costs. Claimant also provided an email from his real estate agent, who said "80% of sold homes are paying some of [the] buyer's closing costs." His agent furnished data from thirty-four home sales over a three-year period, in which the sales included a seller's credit toward closing costs.

On June 19, 2018, the agency denied the $7000 seller's credit, stating that claimant failed to demonstrate that paying a seller's credit was a customary practice in the region:

> [f]or this expense to be reimbursable, the percentage of sellers paying buyers' costs in the area would have to be very high—90% or close to it. The percentages that were provided vary—one source said 80% and the other said 65-70%. Neither percentage is high enough to show that this practice is customary, rather than a negotiated item.

Claimant requested the Board's review of the agency's decision. In his request, claimant stated that he was operating in a seller's market and agreed to the credit because his real estate agent said the expense was common practice in the area—not to make the purchase more attractive to the buyer. He also provided additional documentation to support his claim: information on 486 local home sales over a three-year period (2016, 2017, and 2018) in which the seller contributed to the closing costs.

Discussion

Substantial precedent exists on this issue. We begin our analysis with the premise that "Congress provided federal employees with certain relocation benefits to alleviate the costs associated with an official transfer." *Alphonso S. Hamilton*, CBCA 5109-RELO, 16-1 BCA ¶36,441, at 177,607. The relevant statute reads, in part:

> [A]n agency shall pay . . . an employee who transfers in the interest of the government, expenses of the sale of the residence . . . at the old official station and purchase of a residence at the new official station that are required to be paid by the employee, when the old and new official stations are located within the United States. . . . Reimbursement for brokerage fees on the sale of the residence and other expenses under this subsection may not exceed those customarily charged in the locality where the residence is located.

5 U.S.C. §5724a(d)(1),(4) (2012).

The Federal Travel Regulation (FTR) implements this statutory directive by establishing procedures that agencies use to process claims for real estate transaction expenses. The FTR "has the force of law and must be followed." *Alphonso S. Hamilton*, 16-1 BCA at 177,607. (citing *Stephen F. Fischer*, CBCA 875-RELO, 08-1 BCA ¶ 33,771). Chapter 302 of the FTR provides agencies and employees with guidance for reimbursable expenses related to residential transactions. The regulation does not identify a seller's credit as a reimbursable expense, but a catch-all provision allows for reimbursement of "other expenses of sale . . . for required services that are customarily paid by the seller of a residence at the old official station." 41 CFR 302-11.200(f)(12) (2017). The Joint Travel Regulations (JTR), which apply to claimant as a Department of Defense employee, also limit reimbursement of certain costs related to the sale of a home to those "customarily paid in the residence locality with appropriate supporting documentation provided by the employee." JTR 5912-A.4.a. (2017); *James W. Orr*, CBCA 6218-RELO, (Nov. 20, 2018).

Here, claimant's orders authorized residential expenses, and the amount of the credit was reasonable. The only issue is whether it was customary to offer a seller's credit in the area. The Board has long held that "[t]he 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, at 156,828 (2001). Consequently, the Board has consistently defined the term "customary" as "long and unvarying habitual actions, constantly repeated, such [that the] payment has acquired the force of a tacit and common consent within a community." *Erwin Weston*, CBCA 1311-RELO, 09-1 BCA, ¶ 34,055, at 168,412 (quoting *Christopher L. Chretien*, GSBCA 13704-RELO, 97-1 BCA, ¶ 28,701 (1996)).

The burden of meeting this standard is on the employee bringing the claim. 48 CFR 401(c)(2018). *Jephrey L. South*, CBCA 5493-RELO, 16-1 BCA ¶ 36,547, at 178,028. It can be met in several ways, such as by showing that state law requires a seller's credit, in a pre-printed sales form, for example, or by showing "specific evidence of the number and percentage of sales in the same community, over a substantial period of time, that involved seller contributions to buyer's closing costs." *Charity Hope Marini*, CBCA 4760-RELO, 16-1 BCA ¶ 36,192, at 176,575 (2015). We note that bald assertions by real estate professionals that home sales in a particular community customarily involve a seller's credit have been found insufficient to meet this burden unless supported by concrete data. *Thomas D. Martin*, CBCA 5082-RELO, 16-1 BCA ¶ 36,324, at 177,087. This is also true when a seller's credit has been used as an incentive during negotiations in declining markets. *Anthony J. Kress*, CBCA 877-RELO, 08-2 BCA ¶ 33,903, at 167,778. In such cases, the Board found that the credit was used as an inducement to purchase the home, rather than offered as a matter of custom. *Mahmood Ramzan*, CBCA 3287-RELO, 13 BCA ¶ 35,386, at 173,631.

In this case, there is no evidence of a declining market or the need for a buyer's incentive. Claimant received an immediate purchase offer for *more* than the requested sales price. Claimant maintained that he offered the credit simply because his agent advised him that it was customary practice to do so. The agency was not persuaded by this assertion, or the data presented to support it, and denied the claim. In response to the agency's concerns, claimant provided substantial additional evidence to the Board to support his request: data on 486 residential sales spanning three years (2016, 2017, 2018). Each of those transactions included a seller's credit. In his letter to the Board, claimant stated:

> Based on house sales data (provided by Zillow), for the Arlington, TN area, the data provided for seller paid closing costs for homes sold over the past three years, in the $250,000 to $350,000 price range, account for over 50% of total house sales from January 2016 to present. [Based on this data], it can be reasonably deduced that seller[-]paid portions of a buyers [sic] closing costs is a reasonable and routine [practice] for real estate transactions in this area.

While the additional data represents a significant improvement over the original evidence, we do not agree that "over 50% of total house sales" constitutes a custom. The percentage is too ambiguous. Both 51% and 99% are quantities "over 50%," but one easily qualifies as an "unvarying habitual action, constantly repeated," whereas the other does not. Claimant also uses words such as "common" and "routine" to describe the inclusion of a seller's credit in home sales. These words are not synonymous. An action that transpires 50% of the time may be considered common, whereas a 99% transaction rate is routine. Although there is no set time period or percentage prescribed by regulations, the Board has granted claims that included seller's credits in 75% - 80% of home sale transactions in a particular area, and denied claims where 61% of the home sales involved seller-paid closing costs. *See James W. Orr,* slip op. at 3. Without a definitive percentage supported by the evidence, we cannot determine whether the practice is customary.

Decision

The claim is denied. If claimant is able to provide more compelling proof that it is customary to pay a portion of the buyer's closing costs, he may ask the agency to reconsider.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge