



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 11, 2015

CBCA 3882-RELO

In the Matter of JOSEPH D. HAN, JR.

Joseph D. Han, Jr., Overland Park, KS, Claimant.

Susan C. Lauga, Treasury Certifying Officer, Office of the Chief Financial Officer, Department of Agriculture, New Orleans, LA, appearing for Department of Agriculture.

ZISCHKAU, Board Judge.

The agency requests that pursuant to 31 U.S.C. § 3529 (2012), we answer the question of whether a federal civilian employee, selling the residence at his old duty station, may be reimbursed for a “seller’s concession” payment he provided a buyer at closing to cover some of the buyer’s closing costs. We conclude that under the Federal Travel Regulation (FTR), the employee must show that the seller’s concession here is an expense customarily paid by the seller in the locality. Based on the record presented here, the employee has not yet met his burden of showing that the seller’s concession was customarily paid in the locality. We remand the matter to the agency to decide the employee’s claim for reimbursement with any additional information the employee may submit.

Mr. Joseph D. Han, Jr., is a civilian employee of the Department of Agriculture, Federal Grain Inspection Service, who was authorized a permanent change of station from Rochester, New York, to Washington, D.C. In connection with his transfer, Mr. Han entered into an agreement to sell his residence. He was reimbursed for his broker’s fee and various other customary seller’s fees. One fee questioned by the auditor was a fee of \$3935.36 (equaling three percent of the sale price), entitled “seller’s concession” (found at block 506 of the HUD-1 settlement statement), for paying a portion of the buyer’s closing costs. A handwritten provision in the sales contract provided: “Seller to pay all of Buyer’s Closing Costs up to . . . \$4,500.” However, it appears in the record that the buyer’s actual closing costs exceeded the amount of the “seller’s concession” amount.

The agency travel auditor suspended the reimbursement of the seller's concession expense, noting that clarification was needed from the employee pursuant to 41 CFR 302-11.306 (FTR 302-11.306). FTR 302-11.306 provides that for an employee to determine if residence transaction expenses are reasonable and will be reimbursed by the agency, the employee should contact the local real estate association, or, if not available, at least three different realtors in the locality, and request the current schedule of closing costs which applies to the area and information concerning local customs and practices with respect to closing costs and whether such costs are customarily paid by the seller or purchaser.

In response to the agency audit, the employee submitted a letter from his real estate broker involved in the sale, which stated that "approximately 20 years ago the use of seller concessions for buyer's closing costs was [a] very common practice" and that "ever since the market dip that began in late 2006, buyer's closing costs have been paid by the seller almost 100% of the time" and "[i]t certainly has become the standard and a customary norm that a seller will pay the buyer's closing costs."

Discussion

FTR 302-11.200 states that the agency will reimburse an employee for certain residence transaction expenses provided the expenses are "customarily" paid by the employee seller at the old official station, as shown by appropriate supporting documentation. As stated in *Diedra D. Cordell*, CBCA 3981-RELO, 14-1 BCA ¶ 35,755, quoting from our earlier decision in *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533 (citations omitted):

"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.'" 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."

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. 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. General, conclusive statements of customary practice and data from a limited period of time, however, are not persuasive. 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.

Here, the HUD-1 settlement statement lists the amount as a "seller's concession" on line 506 of the first page and that credit amount presumably was to offset a portion of the buyer's closing costs. No specific closing cost items are mentioned as being covered. The amount is simply a lump sum credit provided by the seller to the buyer in negotiating an agreement to enter into the sales contract. The information presented by the employee in our record does not satisfy the employee's burden of showing that the "seller's concession" was customarily paid by sellers for buyers' closing costs in the locality. Without more evidence meeting the standards discussed above, the seller's concession here would not be a reimbursable expense under FTR 302-11.200 but rather a negotiated reduction to the net cost of the house to entice the buyer to purchase it.

We remand the matter to the agency to decide the employee's claim for reimbursement with any additional information the employee may submit.

JONATHAN D. ZISCHKAU
Board Judge