



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 24, 2016

CBCA 5025-RELO

In the Matter of BRADLEY N. MCDONALD

Bradley N. McDonald, Nolanville, TX, Claimant.

Chelan Vanno, Division Chief, Civilian Relocation, Defense Finance and Accounting Service, Rome, NY, appearing for Department of the Army.

GOODMAN, Board Judge.

Claimant, Bradley N. McDonald, is a civilian employee of the Department of Defense. He has requested this Board to review the agency's denial of reimbursement of real estate expenses incurred during a permanent change of station (PCS). The agency initially transmitted claimant's request to this Board, and claimant has submitted comments to the agency's submission.

Factual Background

On July 25, 2014, claimant was issued PCS orders for a transfer from Fort Benning, Georgia, to Fort Hood, Texas. Incident to the transfer, claimant sold his home in Georgia. Included in the purchase and sale agreement was the statement: "Seller's contribution at closing: \$8,600.00." Line 513 of the HUD-1 settlement statement identifies an amount of \$8600 as "Seller Paid Closing Costs."

Claimant submitted his relocation voucher and requested a total of \$22,523.93 for reimbursement comprised of \$15,600 sales commission plus an additional amount of \$6923.93 identified as closing costs that he believes are reimbursable for the sale of his home. The agency reimbursed claimant \$15,600 for the sales commission and denied the remainder, advising him that closing costs are customarily charged to the buyer. In order to be reimbursed for these costs, the agency further advised that claimant would be required to

obtain proof that these costs are customarily paid by the seller in the locality in which the sale of the residence occurred.

Claimant submitted information to the agency, and the agency describes this information as follows:

[Claimant] has provided the agency with three letters from various independent parties in an effort to provide the requested proof that it is customary in Columbus, Georgia for the seller to pay some of the buyer^[1]'s closing costs. These parties included Georgia Real Estate Commission and Appraiser's Board, The Columbus Board of Realtors and an independent mortgage lender. Both the Georgia Real Estate Commission and Appraisers Board and the Columbus Board of Realtors state in their correspondence that they do not have that kind of information. The correspondence from the independent mortgage lender stated: "Although the amount of "Closing Cost" that a seller pays for a buyer is something that the agents negotiate, it seems that in our market area of Columbus, the Sellers are typically paying all Closing cost in order to sell their homes. It is very common and that has been the trend here for several years now." Although this states it is a trend in house sales, no supporting data has been provided to substantiate that these costs are customarily paid the by the seller in Columbus, Georgia.

The agency therefore denied the claim for reimbursement of the closing costs paid.

Discussion

The issue in this matter is whether claimant is entitled to reimbursement in the amount of \$6923.93, which he contends were the buyer's closing costs that he paid incident to the sale of his residence at his old duty station. 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). The Joint Travel Regulations (JTR), which also apply to claimant, 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 5698-C.1.

In *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533, we held:

“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)).

Id. at 174,133.

We recently reiterated that “the 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 employee has the burden of proving by a preponderance of evidence that payment of an expense related to a real estate transaction is customary in that locality. *Michael Vincelli*, CBCA 1828-RELO, 10-1 BCA ¶ 34,461, at 170,019. 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. *Walker*; *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 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, *motion for reconsideration denied*, 13 BCA ¶ 35,388. In such circumstances, the employee’s offer to pay the buyer’s closing costs when the employee sells his or her residence is viewed, in essence, as merely a reduction in the sales price.

We have reviewed the information submitted by claimant to the agency, and agree with the agency that it is not sufficient to meet claimant’s burden of proof that payment of

the buyer's closing costs by the seller is customary in that locality. Claimant's sales agreement contains the promise to make an \$8600 "contribution at closing," not specifically allocated to closing costs. At closing, this contribution was recorded as a payment of closing costs. This circumstance appears to be an enticement of sale with an \$8600 price reduction at the time the contract is executed. Of the three letters from independent parties submitted by claimant to the agency, two offer no information, and the other offers a general conclusive statement that while closing costs are negotiated, it is typical that sellers will pay all closing costs and "it is very common and that has been the trend now for several years." No supporting historical data for a specific time frame has been submitted.¹ Claimant has not met his burden of proof by a preponderance of the evidence that the seller customarily pays the buyer's closing costs in the locale.

Decision

The claim is denied.

ALLAN H. GOODMAN
Board Judge

¹ To support its position that claimant did not meet the burden of proof, the agency adverts to specific examples in which claimants have submitted historical data over a period of five years indicating that sellers have paid closing costs in more than ninety percent of transactions in the specific locale. *See, eg., Dey*. These examples were not meant to set a minimum standard for submission of historical data. In this case, however, claimant offers no historical data.