



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 20, 2018

CBCA 6218-RELO

In the Matter of JAMES W. ORR

James W. Orr, Sun Lakes, AZ, Claimant.

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

KULLBERG, Board Judge.

The Defense Finance and Accounting Service (DFAS) submitted this matter to the Board on behalf of the claimant, James W. Orr. Mr. Orr seeks reimbursement of expenses related to the sale of his home that included a credit for the buyer's closing costs and owner's title insurance. For the reasons stated below the claim is denied.

Background

By orders dated September 15, 2016, Mr. Orr, a supervisory auditor, transferred from Fort Richardson, Alaska, to the United States Property and Fiscal Office, Arizona Army National Guard, Phoenix, Arizona, with a reporting date of January 17, 2016. In December 2016, Mr. Orr sold his home in Anchorage, Alaska. Mr. Orr claimed reimbursement for various expenses that he incurred from that sale. DFAS denied reimbursement for two of Mr. Orr's expenses, a credit of \$5778.47 for the buyer's closing costs and a payment of \$1161 for owner's title insurance.

Mr. Orr submitted to DFAS two letters from a realtor, both dated October 26, 2017, in support of his claim for the payment of the buyer's closing costs and owner's title insurance. The realtor represented that "[i]n 2016 two-thirds of the homes in this district had seller paid closing costs of an average of 2.4% of the home sales price." Also, the realtor represented that "in Alaska the Owner's Title Insurance policy is commonly a seller['s] expense." DFAS, however, determined that Mr. Orr had not met his burden of proof in showing that the payment of either of those expenses was customary and submitted this matter to the Board on Mr. Orr's behalf.

Discussion

At issue in this matter is whether Mr. Orr has met his burden of proof in support of his claimed expenses for the buyer's closing costs and owner's title insurance. The "authority to reimburse relocation costs 'is grounded in subchapter II of chapter 57 of title 5, United States Code, and the regulations issued by the Administrator of General Services (under express Congressional charge) to implement that statute.'" *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727, at 170,991 (quoting *Teresa M. Erickson*, GSBCA 15210-RELO, 00-1 BCA ¶ 30,900, at 152,473). The Federal Travel Regulation (FTR), which applies to Mr. Orr, states that reimbursement for certain costs related to the sale of real estate are allowed, "[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 (2016) (FTR 302-11.200). The Joint Travel Regulations (JTR), which also apply to Mr. Orr, similarly 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.

The claimant has the burden of proof "to establish by a preponderance of evidence that a cost incurred in a real estate transaction is customarily paid in that locality." *Michael Vincelli*, CBCA 1828-RELO, 10-1 BCA ¶ 34,461, at 170,019. "An 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." *Bryan Trout*, 11-1 BCA at 170,991 (quoting *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744, at 156,827 (2001)). In those instances where a seller agrees to pay some portion of the buyer's closing costs, the seller can meet his or her burden of proof in the following manner:

[T]here are various ways in which to meet the burden of showing that it is "customary" for a seller to assume a particular cost. These include showing that a cost is allocated to a particular party in a preprinted sales form, submitting letters from local realtors and brokers confirming that a particular cost is invariably assumed by the seller for the buyer, providing data showing

that over the years a commanding percentage of sellers have contributed to buyers' closing costs, and the like. In contrast, letters from realtors simply asserting that many sellers contribute to buyers' closing costs do not establish that a practice is customary. *Dey*, 02-1 BCA at 156,827-28. A common occurrence does not necessarily rise to the level of a custom, although over time a custom may be determined to have evolved.

Erwin Weston, CBCA 1311-RELO, 09-1 BCA ¶ 34,055, at 168,412 (quoting *Joseph B. Wade*, GSBCA 15889-RELO, 03-1 BCA ¶ 32,128, at 158,815-16 (2002)). "As for proof, a letter from a real estate broker is acceptable if it includes '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.'" *Kevin T. Lyster*, CBCA 5853-RELO, 18-1 BCA ¶ 36,924, at 179,882 (2017) (quoting *Charity Hope Marini*, CBCA 4760-RELO, 16-1 BCA ¶ 36,192, at 176,575 (2015), *rev'd on reconsideration*, 16-1 BCA ¶ 36,455 (claim granted following submittal of additional documentation)).

This Board and the General Services Board of Contract Appeals (GSBCA), which previously decided relocation cases, have recognized that a seller's payment of a buyer's closing costs is customary only when such a practice occurs in the course of a high percentage of transactions. *See Charity Hope Marini*, 16-1 BCA at 177,670 ("in virtually all transactions, sellers have contributed to buyers' closing costs"); *Robert P. Azinger, Jr.*, GSBCA 15350-RELO, 00-2 BCA ¶ 31,062, at 153,357 (seventy-five to ninety percent of real estate transactions); *Byron D. Cagle*, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903, at 152,476 (ninety-three percent of transactions); *Steven D. Ward*, GSBCA 14306-RELO, 98-2 BCA ¶ 29,813, at 147,635 (seventy-five to eighty percent of transactions). In contrast, such a practice was not customary where sellers paid the buyers' closing costs in sixty-one percent of all transactions. *James E. Miller*, GSBCA 16123-RELO, 04-1 BCA ¶ 32,450, at 160,525 (2003) ("assumption of buyers' closing costs by the sellers in some sixty-one percent of sales falls well short of the levels previously accepted as supporting the conclusion that a custom existed").

Mr. Orr's evidence, which is a letter from a realtor, asserts that since 2016, sellers have paid some portion of the buyers' closing costs in two-thirds of the real estate transactions in the area where he sold his home. Such evidence falls short of establishing that Mr. Orr's payment of some portion of the buyer's closing costs is customary. In light of the above discussion, Mr. Orr has not shown that such payments have occurred with the necessary frequency over a lengthy enough period of time to establish that such payments have become customary. Accordingly, Mr. Orr has not met his burden of proof, and he is not entitled to reimbursement for his payment of the buyer's closing costs.

Our discussion turns to the issue of whether Mr. Orr should be reimbursed for the expense of owner's title insurance. The FTR allows reimbursement of a seller's payment of owner's title insurance if such a payment is customary and "it is a prerequisite to financing or the transfer of the property; or if the cost of the owner's title insurance policy is inseparable from the cost of other insurance which is a prerequisite." FTR 302-11.200(f)(9). The JTR reiterates that requirement. JTR 5912-A.4.a(9). Mr. Orr's letter from a realtor only represented that the payment of owner's title insurance was "commonly" a seller's expense, and that statement, consequently, falls short of showing that such a payment for owner's title insurance was customary and that it met any of the prerequisites set forth in the FTR and JTR.

Finally, Mr. Orr states that, "[w]hile the law may or may not be on my side, it is my hope that your ruling will place more responsibility on DFAS, or the authors of the JTR, to improve their operations and quantify what is meant by customary in the case of paying for buyer[']s closing costs and title insurance." Mr. Orr, however, does not explain why the Board's ruling in this matter should place more responsibility on either DFAS or the drafters of the JTR for the purpose of quantifying the meaning of the word customary, and he does not explain why such a shift in responsibility would alter the result in this matter. As discussed above, previous Board decisions have addressed whether a seller's payment of buyer's closing costs is customary in light of evidence that shows the percentage of transactions over specific periods of time, and those decisions are available to both agencies and employees to "serve an educational purpose as well as resolving particular disputes." *Willo D. Lockett*, GSBICA 16391-RELO, 04-2 BCA ¶ 32,722, at 161,882.

Decision

The claim is denied.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge