



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

August 20, 2020

CBCA 6862-RELO

In the Matter of JEFFERY P. HERMAN

Jeffery P. Herman, Claimant.

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

DRUMMOND, Board Judge.

The Defense Finance and Accounting Service (DFAS) has submitted this claim on behalf of claimant, Jeffery P. Herman, a civilian employee of the Department of Defense. In June 2019, the agency transferred claimant from one duty station to another. Claimant sold his home at his old duty station and sought reimbursement of \$29,011 for real estate expenses he incurred due to the sale. The agency granted the majority of his claim, but denied \$9792. It denied the expense listed as a seller credit that gave the buyer \$9297 towards the cost of closing and \$495 for environmental testing (water and septic testing/inspection) because it considered these expenses unallowable under the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR).

Claimant challenges the denial on the grounds that (1) the FTR allows the seller of a residence reimbursement for costs that are customarily paid in the location of the residence when the employee has provided supporting documentation of this custom; and (2) the FTR and JTR allow reimbursement for environmental testing when it is required by the lender as a precondition of the sale.

Discussion

Seller's Credit

Claimant seeks \$9297 for the seller-paid closing costs. Under the FTR, the seller of a residence is entitled to reimbursement for costs that are “customarily paid by the seller of a residence at the old official duty station.” 41 CFR 302-11.200 (2019) (FTR 302-11.200). The JTR similarly limit reimbursement of certain costs related to the sale of the home to those “customarily paid in the location of the residence . . . with . . . appropriate supporting documentation provided by the . . . employee.” JTR 054504-D. “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*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727 (quoting *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001)).

The burden of proof to show custom may be met by 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 majority percentage of sellers have contributed to buyers’ closing costs, and submitting letters from real estate professionals confirming that a particular cost is assumed to be covered by the seller. *Erwin Weston*, CBCA 1311-RELO, 09-1 BCA ¶ 34,055. General statements regarding practice or data from a limited period of time, however, are not persuasive. *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930; *Theresa M. Grimm*, CBCA 2231-RELO, 11-1 BCA ¶ 34,729; *James E. Miller*, GSBCA 16123-RELO, 04-1 BCA ¶ 32,450 (2003).

Claimant provided three emails from realtors with general statements that in the local market it is customary for sellers to pay the buyer’s closing costs. These emails are unaccompanied by any concrete or 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 and therefore fail to meet the well-established burden of proof required by the JTR. *See Thomas D. Martin*, CBCA 5082-RELO, 16-1 BCA ¶ 36,324; *Joseph H. Molton*; *Theresa M. Grimm*; *James E. Miller*. We cannot conclude that the home sellers in the area of his former residence customarily pay some portion of a buyer’s closing costs.

Environmental Testing

Claimant also seeks reimbursement for expenses incurred for environmental testing; that is, the costs incurred to demonstrate that the well and septic system were compliant with lender requirements for compliance with state laws on potability and safety. Under JTR

054504-D.11, these costs are covered when required by a lender as a precondition to sale. The claimant has demonstrated that the buyer's lender required the testing as a precondition for receiving the loan. The water supplies from wells must be shown as potable by third party testing. Claimant thus meets the standard as laid out in the JTR regarding reimbursement for environmental testing expenses.

Decision

Claimant's request is denied regarding the \$9297 toward the cost of closing. 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. Claimant's request is granted regarding the \$495 toward the environmental testing expenses.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge