



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 4, 2021

CBCA 6869-RELO

In the Matter of MECIA H.

E. Ray McKee, Jr., Owens Cross Roads, AL, appearing for Claimant.

David C. Hoffman, Deputy General Counsel, Defense Contract Audit Agency, Department of Defense, Fort Belvoir, VA, appearing for Department of Defense.

KULLBERG, Board Judge.

Claimant, Mecia H., claims reimbursement of a portion of the purchaser's closing costs in the amount of \$2000 that she paid when she sold her home at her previous duty station. The agency, the Defense Contract Audit Agency (DCAA), contends that claimant has not shown that such a payment is customary and reasonable in the location where the sale took place. For the reasons stated below, the claim is denied.

Background

By orders dated September 30, 2019, claimant transferred to her present duty station. Claimant's orders provided for reimbursement of real estate expenses. On December 17, 2019, claimant executed an agreement on a form used by the state realtors association for the sale of her home at her previous duty station. Block three on the first page of the agreement included the heading "closing costs" and the additional words "sellers contribution at closing" with the inserted amount of \$2000. A handwritten note on page seven of the agreement stated that "[s]eller has the right to choose the closing items she pays for in order to get reimbursed by the relocation company."

Settlement for the sale of claimant's home took place on January 27, 2020. The closing disclosure form showed at line 08, "Seller Credit," the amount of \$2000. The purchaser's settlement statement showed a seller's credit of \$2000. Additionally, the purchaser paid a loan origination fee of \$1295 and a closing fee, which was one of the title and settlement charges paid to the closing attorney, of \$775.

A January 27, 2020, letter signed by the closing attorney stated the following:

The seller . . . agreed in the Purchase and Sale Agreement for the above-referenced property closing today to contribute \$2000 as a Contribution at Closing. This amount is being applied toward the buyers' Origination Fee in the amount of \$1295.00 and Closing Fee in the amount of \$705.00. These fees could not be credited individually due to software limitations. These fees are reasonable and customary in the [state].

In an email, which was dated March 25, 2020, the closing attorney represented, "We do not track percentages of closings in which sellers contribute toward closing costs or as to the amounts of such contributions." He noted, however, that his statement was "based upon [his] 25 years of residential real estate closing experience in [that state]."

On February 3, 2020, claimant submitted to DCAA her claim for costs related to the sale of her home, and DCAA denied that portion of her claim for reimbursement of the \$2000 amount paid toward the purchaser's closing costs. Claimant subsequently submitted her claim to the Board, and DCAA submitted its agency report. Claimant's response to the agency report included a July 29, 2020, letter from a real estate broker that provided information for sales during the period from June 1, 2019, to June 1, 2020, within a price range from \$250,000 to \$400,000. That letter stated, in pertinent part, the following:

There was a total of 517 single family detached residential properties that were reported in our . . . listing service as sold d[ur]ing the period referenced. Of these 517 properties, the Seller paid all closing costs on 322 of them. Also, the Seller paid part of the closing costs on another 80. There were only 115 sales that the Seller did not contribute to the closing costs.

I think it's easy to see that over 77% of the Sellers are paying closing costs even in the higher price ranges. In lower price ranges about 90% of all Sellers pay the closing costs. This is very true for the entire metro area.

Claimant contended that the real estate broker's findings showed that sellers paid all or a portion of the purchaser's closing costs in seventy-eight percent of those transactions.¹

Discussion

At issue in this matter is whether claimant has shown that she is entitled to reimbursement of the amount she paid toward the purchaser's closing costs. Statute provides that the Government will reimburse an employee for "expenses of the sale of the residence . . . of the employee at the old official station . . . that are required to be paid by the employee." 5 U.S.C. § 5724a(d)(1) (2018). The Federal Travel Regulation (FTR), which applies to claimant, 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 (2019) (FTR 302-11.200). The Joint Travel Regulations (JTR), which also apply to claimant, similarly limit reimbursement of certain costs related to the sale of a home to those "expenses . . . reasonable in amount and customarily paid by the seller . . . in the location of the property." JTR 054506-B.1.

The claimant has the burden of proof to show by a preponderance of evidence that an incurred cost is customary in the locality in which the real estate transaction occurred. *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727. "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." *Id.* (quoting *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001)). This Board has recognized the following:

[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. [*Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001).] A common occurrence does not necessarily rise to the

¹ The Board computed (rounded to the second decimal) the percentage of such payments of all or a portion of the purchaser's closing costs in 402 (322 plus 80) out of 517 sales at 77.76%.

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 (quoting *Joseph B. Wade*, GSBCA 15889-RELO, 03-1 BCA ¶ 32,128 (2002)). “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.’” *Bradley N. McDonald*, CBCA 5025-RELO, 16-1 BCA ¶ 36,345 (quoting *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533 (quoting *Monika J. Dey*)).

Claimant has shown, through documentary evidence that in one year sellers in the locality where she sold her home paid all or a portion of the purchaser’s closing costs in approximately seventy-eight percent of those sales. This Board has found that a claimant’s evidence that was based upon sales data for a two-year period in which eighty percent of the sellers paid the purchaser’s costs failed to show that the payment of those costs was customary. *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930, *reconsideration denied*, 12-1 BCA ¶ 34,932. Claimant has presented data for only a one-year period, and such information, consequently, covers too brief of a period of time to show that such a payment was customary.

Decision

The claim is denied.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge