



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 2, 2021

CBCA 6954-RELO

In the Matter of JONATHAN P.

Jonathan P., Claimant.

Nicholas Fischer, Office of General Counsel, National Security Agency, Fort Meade, MD, appearing for Department of Defense.

DRUMMOND, Board Judge.

Claimant, Jonathan P., seeks review of the denial of his claim in the amount of \$13,550 related to the sale of his former home. The Department of Defense contends that claimant has not met his burden of proof that such a payment is customary in the location where the sale took place. Because of a failure of compelling proof, claimant does not recover the costs sought.

Background

In early 2019, claimant received orders transferring him from one duty station to another. In preparation for his transfer, claimant listed his former home for sale. After ninety-nine days on the market and several reductions in the asking price, claimant sold his

former home.¹ As part of the home sale transaction, claimant agreed to credit² to the buyer 3%³ of the home's purchase price "as a contribution," purportedly to cover the buyer's closing costs and prepaid items. The seller credit claimant paid was in the amount of \$13,550. The closing cost addendum to the contract stated that the buyer had the sole right to choose how the credit was allocated at closing.

The documentary record of the sale included a closing disclosure form and an American Land Title Association (ALTA) settlement sheet. The ALTA settlement sheet showed a \$13,550 debit to claimant and a credit to the buyer. The closing disclosure form showed, at line 09, a "seller closing fee" in the amount of \$13,550. These documents, like the closing cost addendum, are devoid of any detail showing how the credit was allocated.

Claimant sought reimbursement for \$39,084 in real estate expenses associated with the sale, including the \$13,550 seller's credit, \$20,919 sales/broker's commission fees, \$55 certification fee, \$510 escrow agent's fee, \$2025 city/county/state tax stamps, and \$2025 sales or transfer taxes and mortgage tax. To support his request, claimant provided a form 1705 prepared by him which lists, at item 24, \$13,550 as "legal and related fees." The record, however, includes no evidence that the credit was used to reimburse the buyer for legal and related fees. In addition, claimant submitted sales data for fourteen homes sold within a 2.5-mile radius of his home for a six-month period as evidence of customary practice. For twelve of the fourteen homes sold, the seller paid a percentage of the purchase price as a contribution to the buyer's closing cost, with the percentage ranging from less than 2% up to 4%. However, the sales data lacks detail showing how the credits were allocated.

The agency reimbursed claimant for most of his real estate expenses but denied him reimbursement of \$13,550 because it determined that the seller's credit was not reimbursable under the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR). Specifically, the agency determined that claimant failed to demonstrate that paying a seller's

¹ The listing price prior to sale was lowered to \$399,900. The final sale price was \$405,000, a \$30,000 reduction from the original listing price. There is no evidence in the record that explains why the final sale price was \$5100 over the listing price.

² The various documents in the record use different terminology for this credit. The American Land Title Association statement uses "seller credit." The closing disclosure uses both "seller credit" and "seller closing fee." In the sale contract, the parties use the term "seller assistance." For uniformity, the Board will use the term "seller credit."

³ Three percent of \$405,000 is \$12,150, not \$13,550 as claimed by claimant.

credit was customary in the locality and failed to demonstrate the purpose of the specific costs paid.

Claimant requested the Board's review of the agency's decision. Claimant provided additional documentation to the Board to support his claim. Specifically, claimant provided a letter from a real estate sales manager stating that in the State of Maryland it is customary for a seller to pay a portion of the buyer's closing costs. The manager stated further that the "Seller Contribution Addendum" form used for this sale is evidence that a seller's credit is customarily paid in the location of claimant's former home. As support for his opinion, the manager notes that the addendum states, in part, "Seller shall credit Buyer at the time of settlement with the sum of \$XX or XX of Purchase Price towards Buyer's settlement costs." He also provided additional information on 123 local sales within a 2.5-mile radius for a five-year period in which the seller contributed to the closing costs. The data consists of information from twenty-one different listing brokerages and thirty-six different sales brokers. The concession percentages ranged from 0.001% of the purchase price to 19%. The data is not supported by information from the brokers involved in those sales explaining why the credits were needed or how the credits were applied at closing.

The agency argues that the new evidence fails to demonstrate that seller concessions are customarily used to pay for the buyer's closing costs.

Discussion

When an agency transfers an employee from one duty station to another within the United States and the transfer is in the agency's interest, federal law requires the agency to pay some of the employee's real estate purchase transaction expenses. 5 U.S.C. § 5724a(d) (2018). The FTR implements this statutory directive by establishing procedures that agencies use to process claims for real estate transaction expenses. The FTR "has the force of law and must be followed." *Alphonso S. Hamilton*, CBCA 5109-RELO, 16-1 BCA ¶ 36,441. The FTR provides agencies and employees with guidance for reimbursable expenses related to residential transactions. The FTR does not identify a seller's credit as a reimbursable expense, but a catch-all provision allows for reimbursement of "other expenses of sale . . . for required services that are customarily paid by the seller of a residence at the old official station." 41 CFR 302.11.200(f)(12) (2019) (FTR 302-11.200(f)(12)). One of the limitations on the reimbursement of such expenses is that the employee must actually incur and pay an expense in order to be reimbursed. FTR 302-11.303. The 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 (July 2019).

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. The Board has long held 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.” *Id.* (quoting *Monika J. Dey*, GSBICA 15662-RELO, 02-1 BCA ¶ 31,744 (2001)).

From the record described above, we cannot conclude that claimant has met his burden of proof. The evidence suggests that the \$13,550 was simply a lump sum credit provided to the buyer to reduce the sales price, rather than a payment by claimant of specific settlement charges customarily paid by the seller in that locality. The assertions in the letter from the sales manager are too general and conclusive and do not suffice to establish the practice is customary. The sentence referenced in the addendum allows the parties to indicate that, through negotiation, the seller has agreed to make a cash payment to the buyer and that payment may be for any of a number of purposes, only one of which is to cover closing costs. The sales data similarly provides no insight into whether the payment made by claimant was customary, rather than a cash payment to lower the sales price. Claimant has failed to show that it was customary for the seller to pay certain closing costs for the buyer; rather, the record shows that claimant agreed to pay a \$13,550 credit as part of the bargain to arrive at a sales price. *See Erwin Weston*, CBCA 1311-RELO, 09-1 BCA ¶ 34,055.

Decision

We deny the claim; claimant has not demonstrated entitlement to additional payment.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge