



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 6, 2014

CBCA 3501-RELO

In the Matter of SHARON J. WALKER

Sharon J. Walker, South Chesterfield, VA, Claimant.

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

DANIELS, Board Judge (Chairman).

An employee who was transferred in the interest of the Government sold her residence. She paid the buyer a sum, part of which was used to cover the buyer's closing costs. The employee claims that her agency should reimburse her for this payment. We conclude that she has not shown that in the community where the residence is located, a buyer's closing costs are customarily charged to the seller. Consequently, we deny the claim.

Background

Sharon J. Walker accepted a position with the Defense Contract Management Agency (DCMA) in Virginia in March 2010. The position involved a transfer from her former position with the Department of the Army. DCMA authorized relocation benefits, including real estate transaction expenses, in conjunction with the move.

In November 2012, Ms. Walker sold her former residence in Fayetteville, North Carolina. In the negotiations for this sale, the buyer requested that Ms. Walker pay \$9000 in closing costs and \$3000 in additional incentives. Ms. Walker agreed to pay a total of \$7000. She made this payment, which is identified on the HUD-1 settlement statement as

being for closing costs, although the total amount of such costs shown on the statement was only \$5590.75.

Discussion

Congress has directed agencies to pay, to an employee who is transferred in the interest of the Government, expenses the employee incurs in selling a residence at an old duty station. 5 U.S.C. § 5724a(d)(1) (2012). The legislature has permitted the Administrator of General Services to define which expenses will be reimbursable. *Id.* In so doing, however, the legislature has imposed various constraints. One of them is that “[r]eimbursement for . . . expenses . . . may not exceed those customarily charged in the locality where the residence is located.” *Id.* § 5724a(d)(4). The Administrator has faithfully implemented the statute by prescribing, in the Federal Travel Regulation, that certain expenses are reimbursable “[p]rovided [that they] are customarily charged to the seller of a residence in the locality of the old official station.” 41 CFR 302-11.200 (2012).

“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*, GSBICA 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*, GSBICA 13704-RELO, 97-1 BCA ¶ 28,701 (1996)).

The burden is on the claimant to establish by a preponderance of the evidence that it is customary for the seller to assume some or all of the buyer’s closing costs in the locality where the residence is located. *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930 (citing *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727). 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. *Molton*; *Theresa M. Grimm*, CBCA 2231-RELO, 11-1 BCA ¶ 34,729; *James E. Miller*, GSBICA 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, as an inducement 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, *reconsideration denied*, 13 BCA ¶ 35,388.

Ms. Walker has provided us with three pieces of evidence in an effort to persuade us that her payment to the buyer of her former residence was customary in Fayetteville, North Carolina. Two of these items are letters from veteran realtors in the Fayetteville area. The first says, “In our market right now buyers are expecting the sellers to pay a large portion (if not all) of their closing cost, primarily because builders are paying a large portion (if not all) of the buyers['] closing cost[s] as an incentive to purchase. A lot of buyers are told that on a VA [Department of Veterans Affairs] loan they do not have to pay closing cost[s] so they expect the seller to pay them.” The other letter, from the buyers’ agent on the sale of Ms. Walker’s former residence, makes the same points. It continues by recounting the negotiation process which led to the agreement that Ms. Walker would pay \$7000 to the buyers, and concludes, “If Ms. Walker did not pay any closing cost, my buyers might have placed a contract on another home and [she] could have lost the sale.” Ms. Walker’s third piece of evidence is a pre-printed North Carolina real estate sales contract form which includes this provision: “**Agreement to Pay Buyer Expenses:** Seller shall pay at Settlement \$_____ toward any of Buyer’s expenses associated with the purchase of the Property. . . . **NOTE:** Examples of buyer’s expenses associated with the purchase of the Property include, but are not limited to, discount points, loan origination fees, appraisal fees, attorney’s fees, inspection fees, and ‘pre-paids’ (taxes, insurance, owners’ association dues, etc.).”

This evidence does not persuade us that a seller’s payment of a buyer’s closing costs was customary in Fayetteville, North Carolina at the time Ms. Walker sold her home there. The realtors’ statements are merely conclusive; they are not supported by any hard data. The statements are also unhelpful to the claimant in that they pertain to a moment in time; they do not demonstrate a pattern of “long and unvarying habitual actions, constantly repeated, [which show that] such payment has acquired the force of a tacit and common consent within [the] community.” The cited provision on the pre-printed form 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 buyers’ agent’s letter confirms that in this particular case, such negotiation did occur, to induce the buyer to purchase the house, and that the payment of \$7000 was simply a cash payment which did not correlate with any particular closing cost.

Decision

We consequently conclude that the agency was correct in denying the reimbursement sought. The claim is denied.

STEPHEN M. DANIELS
Board Judge