UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 7, 2019

CBCA 6229-RELO

In the Matter of KEVIN D. COX

Kevin D. Cox, San Antonio, TX, Claimant.

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

RUSSELL, Board Judge.

Kevin D. Cox, a civilian employee of the Department of the Army, seeks reimbursement for real estate expenses he incurred when selling his home in connection with a permanent change of station. For the reasons set forth below, we deny his claim.

Background

In November 2016, Mr. Cox received a management-directed reassignment, which he accepted the same month. On January 4, 2017, the Department of the Army issued him a permanent change of station (PCS), which authorized reimbursement of real estate expenses related to his transfer from Herlong, California, to Houston, Texas. Mr. Cox was required to report to his new permanent duty station on February 5, 2017.

Before his reassignment, Mr. Cox owned a residence in Reno, Nevada—just across the state line from his original permanent duty station. Mr. Cox listed his home for sale on January 9, 2017, and sold it on May 5, 2017, to the first and only offeror. As part of the sale, Mr. Cox granted the buyer a seller credit of $5878 toward the closing costs. Mr. Cox also purchased an extended owner's title insurance policy and an extended lender's title insurance

policy for $902.40 and $564, respectively. Notably, the residential offer and acceptance agreement stated that Mr. Cox had agreed to pay just for standard insurance policies.

Following the sale, Mr. Cox submitted a claim for real estate costs totaling $23,449.90. In support of his claim, he appended a letter from his realtor that stated in part, "[i]t is not uncommon for buyers to ask and sellers to grant a buyers [sic] credit, in a slow market, of up to 3% credit at close of escrow." The Defense Finance and Accounting Service (DFAS) approved reimbursement for $16,039.50 of these expenses. However, DFAS denied reimbursement for the seller credit and the insurance policies, because Mr. Cox failed to prove that it was customary for a seller to pay for such expenses in the area where he sold his residence.

Before he submitted his appeal to the Board, DFAS personnel apprised Mr. Cox—who is an attorney—of the evidentiary standard which must be met to establish that an expense is customarily paid by a seller so that he or she may qualify for reimbursement. Mr. Cox failed to supplement his appeal with any such evidence. Instead, he argues that because his PCS was due to a management-directed reassignment, the circumstances of his claim are so unique that the Board should depart from its well-established precedent for reimbursement of real estate expenses in connection with a PCS. Moreover, Mr. Cox also requests that the Board apply the common law principles of equity in deciding his appeal.

Discussion

Under the Federal Travel Regulation (FTR), the seller of a residence is entitled to reimbursement for costs that 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. Cox, 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. In *Thomas D. Martin*, CBCA 5082-RELO, 16-1 BCA ¶ 36,324, we summarized how a claimant can establish that a seller's credit toward a buyer's closing costs is an expense customarily paid by the seller:

> This Board has long recognized 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, at 168,412 (quoting *Christopher L. Chretien*, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701 (1996)). The claimant must prove by a preponderance of the evidence that a buyer's

> closing costs are "customarily" paid by the seller in the community where the residence is located. *Charity Hope Marini*, CBCA 4760-RELO, 16-1 BCA ¶ 36,192, at 176,574 (2015). This burden may be met by showing "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." *Id.* at 176,575. On the other hand, "[l]etters from realtors asserting only that many, or even most, sellers contribute to buyers' closing costs, unaccompanied by concrete data, do not generally suffice to establish that a practice is customary." *Id.*

16-1 BCA ¶ 36,324, at 177,087. Alternatively, a claimant may meet the burden of proof by showing "that a cost is allocated to a particular party in a preprinted sales form." *Joseph B. Wade*, GSBCA 15889-RELO, 03-1 BCA ¶ 32,128, at 158,815 (2002).

In the present appeal, Mr. Cox has not met his burden. The letter from his realtor is not supported by any evidence of sales in the community over a period of time. The letter does not even allege that sellers customarily provide a seller's credit at closing. Rather, it states that it is "not uncommon." This letter fails to satisfy Mr. Cox's burden of proof, because of its language and lack of reference to specific and substantial facts over a period of time. *See Martin*, 16-1 BCA at 177,088 (holding that a letter from title insurance company failed to satisfy evidentiary burden, because it did not reference a substantial period of time). Generally, a claimant must prove that an expense is customary based on a high frequency of sellers paying such expenses over a period of years. *Compare Brian E. Cooper*, GSBCA 14269-RELO, 98-1 BCA ¶ 29,427, at 146,148 (1997) (accepting as evidence of custom a realtor's letter explaining seller's credit for closing cost was the type "paid by sellers in ninety percent of residential sales transactions for approximately five years"), *with Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930, at 171,747–48 (holding that letter from realtor asserting that "sellers paid their buyers' closing costs in [eighty percent] of the transactions in the relevant area" during the previous two years was insufficient to meet the burden of proof).

Turning to Mr. Cox's claim for the owner's title insurance policy, Mr. Cox has failed to provide evidence which would establish his entitlement to reimbursement. The FTR allows reimbursement of a seller's payment for an owner's title insurance policy if such payment is customary; does "not exceed specifically stated limitations, or if not specifically stated, the amounts customarily paid in the locality of the residence"; and, "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), (f)(9). The JTR reiterates this requirement. *See* JTR 5912-A.4.a(9). Mr. Cox has not put forth any evidence that payment for an owner's title insurance policy is customarily a seller's

expense in the locality of his former residence. *See, e.g.*, *James W. Orr*, CBCA 6218-RELO, slip op. at 4 (Nov. 20, 2018) (holding that letter from realtor representing that payment of owner's title insurance was "commonly" a seller's expense fell short of showing such a payment was customary).

As for the lender's title insurance policy, Mr. Cox, as a seller, cannot be reimbursed for such an expense. The FTR provides that, when customary and not exceeding limitations, a lender's mortgage title insurance policy is reimbursable if "paid by [the claimant] on a residence [the claimant] purchased for the protection of, and required by, the lender." FTR 302-11.200(f)(8). The JTR reiterates this requirement. *See* JTR 5912-A.4a(8). Here, Mr. Cox paid for a lender's title insurance policy for a residence he was selling—not for one he was purchasing. Therefore, the agency cannot reimburse Mr. Cox for the extended lender's title insurance policy.

With respect to Mr. Cox's request that we treat his appeal as falling outside the scope of our established precedent or apply the common law principles of equity, we are constrained from doing so by regulation. "[T]his Board does not have the authority 'to waive, modify, or depart from the Government's official travel regulations for the benefit of any federal employee who is subject to them.'" *Connie J. Holliday*, CBCA 1866-RELO, 10-1 BCA ¶ 34,439, at 169,962 (quoting *Myles England*, CBCA 1244-RELO, 09-1 BCA ¶ 34,045, at 168,382 (2008)). Neither the FTR nor the JTR makes an exception to the applicability of the rules for PCS when they arise from a management-directed reassignment. Hence, we cannot treat Mr. Cox's PCS any differently.

Decision

For the above-stated reasons, we deny the claim.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge