UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 17, 2020

CBCA 6962-RELO

In the Matter of CAROLYN G.

Carolyn G., Claimant.

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

LESTER, Board Judge.

Claimant asks that we require her employer, the Defense Contract Audit Agency (DCAA), to reimburse a general excise tax (GET) that she was required to pay for her real estate broker when she sold her house at her old permanent duty station (PDS). Because claimant has been unable to establish that it is customary for sellers in the locale of her old PDS to pay GET, we deny her claim.

Background

In the June 2020 travel authorization associated with claimant's permanent change of station from Hawaii to El Segundo, California, DCAA authorized reimbursement of real estate expenses that claimant incurred as part of the transfer. In the reimbursement request that claimant submitted to DCAA after completing her relocation, claimant sought reimbursement of the six-percent commission that she paid to the real estate brokers for the sale of her house in Hawaii, as well as a $1806.58 GET charge. In Hawaii, real estate brokers are required to pay GET to the state on the commissions that they are paid, and, in the real estate listing contract that claimant and her husband had signed with their real estate broker, they agreed to pay the broker "six percent (6%) of sales price + GET" upon the sale of their house.

DCAA approved reimbursement of the six-percent commission payment, but determined that it lacked authority to pay the $1806.58 GET charge. DCAA notified claimant that GET is "a tax paid to the State of Hawaii by the real estate brokers" and "is not a tax that is charged to the Seller." It indicated that it could find no evidence that brokers in Hawaii customarily required sellers to reimburse their brokers' GET charges on top of the standard six-percent commission and that, as a result, DCAA could not reimburse the GET fee. Claimant asks us to review DCAA's determination.

Discussion

Federal Travel Regulation (FTR) 302-11.200 (41 CFR 302-11.200 (2019)) identifies the residence transaction fees that an agency will reimburse an employee who has sold a residence at the old duty station incident to a relocation. Although the identified reimbursable expenses include the "broker's fee or real estate commission that [the employee] pay[s] in the sale of [his or her] residence at the last official station, not to exceed the rates that are generally charged in the locality of [the employee's] old official station," *id.* 302-11.200(a), a cost that DCAA has already authorized for claimant, nowhere does FTR 302-11.200 expressly discuss or authorize reimbursement of excise taxes incurred by the broker, but passed through to the seller. Nevertheless, FTR 302-11.200 contains a "catch-all" provision allowing for reimbursement, in some circumstances, of seller expenses that are not otherwise identified in the regulation, but any such reimbursement is limited to expenses "that are customarily paid by the seller of a residence at the old official station." *Id.* 302-11.200(f)(12). Paragraphs 054504(D) and (E) of the Joint Travel Regulations (JTR) similarly allow for reimbursement of miscellaneous and incidental expenses incurred in selling the residence if they are "customarily paid by a seller at the old PDS."

"The burden of proof is on the claimant to establish by a preponderance of evidence that a cost incurred in a real estate transaction is customarily paid in that locality." *Michael Vincelli*, CBCA 1828-RELO, 10-1 BCA ¶ 34,461. "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." *Christopher L. Chretien*, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701 (1996). The mere fact that a cost is common does not necessarily mean that it "rise[s] to the 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)). "[E]vidence of customary practice in a locality includes the preprinted sales contract form or historical data showing that a cost was assumed by a particular party in a commanding percentage, [at least] seventy-five to ninety percent, of the transactions from that locality." *Michael Vincelli*; *see James W. Orr*, CBCA 6218-RELO, 19-1 BCA ¶ 37,370 (2018) (A payment "is customary only when such a practice occurs in the course of a high percentage of transactions."); *James*

E. Miller, GSBCA 15123-RELO, 04-1 BCA ¶ 32,450 (2003) (relying on the seventy-five- to ninety-percent standard for defining "customary"). "General statements as to customary practice . . . are not as persuasive as sales data from independent real estate firms." *Michael Vincelli* (quoting *Deborah A. Bentley*, GSBCA 16752-RELO, 06-1 BCA ¶ 33,197).

Although claimant clearly made a substantial effort to find evidence showing that sellers customarily reimburse their brokers for GET, even she recognized in her communications with DCAA that "[t]here doesn't seem to be publicly available information on the percent of brokers that pass on the [GET]." The pre-printed portion of the listing contract that claimant and her husband signed with their broker—a standard form drafted by the Hawai'i Association of Realtors—does not mention GET, and claimant had to pay the broker's GET only because, in the part of the contract addressing the broker's specific compensation agreement, the parties typed in "six-percent (6%) of sales price + GET." Although the "Seller's Pre-Contract Package," which claimant's broker provided claimant before she and her husband signed their listing contract, stated that it was that broker's policy to transfer the GET charge to the seller, that does not necessarily make the practice customary in the industry. In a website blog to which claimant cites, a real estate agent indicated that "[a]bout half of the listings I see in my market do not include GET, leaving that burden on the agents and brokerage firms," but that statement, even if we could rely on it without other supporting evidence, does not establish the seventy-five- to ninety-percent regularity that we have previously held is necessary for a "customary" charge. To the extent that claimant has presented other evidence, it is simply insufficient to establish that sellers of residential property customarily pay GET in Hawaii.[1]

Decision

For the foregoing reasons, claimant's reimbursement request is denied.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

[1] To the extent that claimant is arguing that the GET charge should be viewed as an extension of the commission that the broker receives, there is no evidence that brokers in Hawaii customarily are paid commissions that exceed six percent. *See Theresa M. Grimm*, CBCA 1743-RELO, 11-1 BCA ¶ 34,720 (rejecting request for reimbursement of commission higher than six percent because the higher commission was not customary in the locality).