



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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January 20, 2012

CBCA 2572-RELO

In the Matter of JOSEPH H. MOLTON

Joseph H. Molton, Alexandria, VA, Claimant.

Kimberly A. Mlinaz, Office of the Staff Judge Advocate, Warner Robins Air Logistics Center, Department of the Air Force, Robins Air Force Base, GA, appearing for Department of the Air Force.

**GOODMAN**, Board Judge.

Claimant, Joseph H. Molton, a civilian employee of the Department of the Air Force, asks this Board to review the agency's denial of certain costs incurred when he sold his residence at his old duty station due to a permanent change of station (PCS) move.

Background

Claimant was issued PCS orders to transfer in November 2010 from Warner Robins Air Force Base, Georgia, to the Pentagon in Arlington, Virginia. His orders authorized reimbursement of real estate expenses relating to his transfer. The agency denied reimbursement to claimant of his payment of the buyer's closing costs in the amount of \$3958, alleging that it is not customary in the Warner Robins area for the seller to pay the closing costs incurred by the buyer.

Claimant has submitted statements from two realtors in the Warner Robins area. The first realtor provides information that she asserts is from the Multiple Listing Service indicating that since April 2009, sellers paid their buyers' closing costs in 80% of the transactions in the relevant area. She also states that in her estimation, sellers paid their buyers' closing costs in 80% of the transactions in which she had been involved in the last ten years. The second realtor states that it is "customary" and "typical" for sellers to pay

their buyers' closing costs in the relevant area, and that the seller has paid the buyer's closing costs in approximately 90% of the contracts and loans she has processed.

The agency has reviewed the claim and has acknowledged that it is responsible for \$1095 of the \$3958 in closing costs as follows: appraisal fee - \$370; flood certification - \$10; Georgia residential mortgage loan fee - \$10; attorney fees - \$545; transfer tax on deed - \$160.

The agency asserts the following costs totaling \$2863 are not reimbursable, as they are customarily paid by the buyer in the locale of claimant's old duty station: loan origination fee - \$2085; lender's title insurance - \$288; recording fee - \$88; transfer tax on mortgage - \$432. Alternatively, the agency asserts that if the costs are found to be customarily paid by the buyer, reimbursement of the loan origination fee must be limited by regulation to one percent of the loan.

### Discussion

The Federal Travel Regulation (FTR) states that reimbursement for certain costs related to real estate transactions is allowed, "[p]rovided that [the costs] are customarily paid by the seller of a residence at the old official station or by the purchaser of a residence at the new official duty station." 41 CFR 302-11.200 (2010) (FTR 302-11.200).

The burden of proof is on the claimant to establish by a preponderance of evidence that "it is customary for the seller to assume a large percentage of the buyer's closing costs in the locality of the residence sold." *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727. In *Deborah A. Bentley*, GSBCA 16752-RELO, 06-1 BCA ¶ 33,197, our predecessor board in deciding these matters held that "[g]eneral statements as to customary practice, particularly by real estate firms that have participated in the real estate transaction involved, are not as persuasive as sales data from independent real estate firms." *Id.* at 164,568. Such evidence of customary practice in a locality includes providing "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." *James E. Miller*, GSBCA 16123-RELO, 04-1 BCA ¶ 32,450, at 160,525 (2003). "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." *Monika J. Dey*, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744, at 156,827 (2001) (quoting *Christopher L. Chretien*, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701, at 143,315-16 (1996)).

Reimbursement for a seller's payment of a portion of buyer's closing costs has been allowed where it was established that such a practice had been customary in the area where the sale took place for a period of five years in ninety percent of all real estate transactions. *Brian E. Cooper*, GSBCA 14269-RELO, 98-1 BCA ¶ 29,427, at 146,148 (1997).

The agency's assertion that the costs at issue are not customarily paid by the buyer in the locale of the claimant's old duty station is conclusory and does not cite to specific information. Rather, the agency states that its "research into the question . . . over the past several years" indicates that the costs in question are normally and consistently paid by the buyer and not the seller. While the agency states that its research "has included input from numerous local real estate attorneys and agents," no sources are identified.

Claimant's information, while purporting to establish that closing costs at issue are customarily paid by the seller in the locale of his old duty station, also fails. The information relied upon by the first realtor is only two years of data, supplemented by her experience for the transactions she participated in previously. The second realtor offers an estimate based upon experience from an undefined period. This information is insufficient to meet claimant's burden of proof.

### Decision

Accordingly, the portion of the claim that remains in dispute is denied.

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ALLAN H. GOODMAN  
Board Judge