



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 18, 2011

CBCA 2138-RELO

In the Matter of BRYAN TROUT

Bryan Trout, Lawrence, KS, Claimant.

Sheila A. Fant, Chief, Fiscal Services Branch, Budget Division, Department of Agriculture, Washington, DC, appearing for Department of Agriculture.

KULLBERG, Board Judge.

Claimant, Bryan Trout, D.V.M., an employee of the Department of Agriculture (USDA), seeks reimbursement for closing costs related to the sale of his residence at his previous duty station in the amount of \$1102.75. For the reasons stated below, the claim is denied.

Background

Dr. Trout sold his home in Kearney, Nebraska, as a result of his relocation to his new duty station in Lawrence, Kansas. The settlement statement (HUD-1) for the sale of Dr. Trout's home indicated that he paid closing costs for the buyer that totaled \$1490. Dr. Trout submitted a claim for costs related to the sale of his home, which totaled \$1909, that included the closing costs he paid for the buyer and the closing costs he paid as the seller. USDA reimbursed Dr. Trout for the seller's closing costs, \$441.75, but his claim for the buyer's closing costs, \$1490, was denied.

Dr. Trout subsequently submitted to this Board his claim, which totaled \$1102.75, for most of the closing costs that he paid on behalf of the buyer. An undated statement from

Vintage Escrow Company (Vintage) listed the following buyer's closing costs, which totaled \$1490, that were paid by Dr. Trout:

Adjusted Origination Charge	\$200.00
Appraisal Fee	\$450.00
Credit Report	\$ 20.00
Flood Certification Fee	\$ 12.00
Request for Tax Returns	\$ 22.75
Government Recording Charge	\$ 68.00
Real Estate Closing Fee	\$125.00
Loan Closing Fee	\$275.00
Document Download Fee	\$ 35.00
Courier Fee	\$ 15.00
Owners Policy Premium (1/2)	\$187.25
Lenders Policy Premium (1/2)	\$ 37.50
Lender Endorsement (1/2)	\$ 42.50

The letter from Vintage stated that “[i]n Nebraska it is not unusual for the buyer and seller to negotiate that the seller will pay 2% of the buyer's closing costs.” The two charges shown on the list of buyer's closing costs from Vintage that Dr. Trout did not include in his claim submission to the Board were an adjusted origination charge, \$200, and an owner's policy premium, \$187.25.

After USDA filed its agency report in this matter, Dr. Trout submitted additional documentary evidence in support of his claim. A letter dated October 27, 2010, from an assistant vice president at the U.S. Bank in Lawrence, Kansas, stated, “I am aware that it is usual for a seller to pay the buyer's closing costs typically from 1-3% of the sales price, but again would not be able to be specific to this situation as I wasn't involved.” An undated statement from a realtor stated the following:

During the last 3 years, a downturn in the real estate market has made the transaction of a seller paying a portion of a buyer's closing costs common place during real estate closings. In the Nebraska/Kansas area this is a usual and customary practice. In my experience, a seller pays buyer closing costs in a large percentage of real estate transactions. Due to recent changes in the HUD 1 form completion regulations, an adjustment is made to the HUD 1 ledger when this occurs. This has allowed for greater efficiency as negotiations about which specific costs are to be covered are no longer needed. However, prior to this

change, the sellers customarily paid for the buyer's [closing] costs including, but not limited to:

- Appraisal
- Advertising
- Title search cost
- Preparing abstracts and title opinion
- Cost of preparation conveyances or other instruments and contracts
- Notary charges, cost of making surveys, preparing drawing or plats
- Recording taxes, and other charges incident to recording including:
 - Lender appraisal fees
 - Loan origination fees
 - FHA and VA loan application fees
 - Credit reports
 - Sales, transfer and mortgage taxes
 - State revenue stamps
- Lenders title insurance policy
- And other fees (courier fee, flood certification fee, etc)

Discussion

The issue before the Board is whether Dr. Trout can be reimbursed for the closing costs that he paid on behalf of the buyer when he sold his home. This Board has recognized that the authority to reimburse relocation costs “is grounded in subchapter II of chapter 57 of title 5, United States Code, and the regulations issued by the Administrator of General Services (under express Congressional charge) to implement that statute.” *Teresa M. Erickson*, GSBCA 15210-RELO, 00-1 BCA ¶ 30,900, at 152,473. “Those regulations have the force of law and must be followed.” *Id.* Our authority extends no further. *See Edward B. Giagni*, GSBCA 16972-RELO, 07-1 BCA ¶ 33,476, at 165,938 (2006). 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 (2009) (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.” *Deborah A. Bentley*, GSBCA 16752-RELO, 06-1 BCA ¶ 33,197, at 164,568. “General 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.* 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)).

Sellers can be reimbursed under certain circumstances for the payment of a buyer’s closing costs. It has been recognized that a seller’s payment of a buyer’s closing costs is customary if such a payment is a requirement of state law. *Matthew D. Freeman*, GSBCA 14416-RELO, 98-1 BCA ¶ 29,606, at 146,742. A seller can also be reimbursed for paying a buyer’s closing costs where such costs appear on a preprinted sales form and documentary evidence is provided to show that such payment is customary. *Robert Messie*, GSBCA 13807-RELO, 97-1 BCA ¶ 28,924, at 144,185-86. 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).

There is, however, a distinction between those instances in which a seller pays a buyer’s closing costs as the result of a practice that has become customary and those instances in which buyer’s closing costs are paid by the seller in response to conditions in the housing market. This Board has recognized the following:

[T]he fact that a seller paid the purchaser’s closing costs does not in and of itself establish a customary practice. This is so even if, due to an economic downturn in the housing market, a claimant had to agree to pay the buyer’s closing costs in order to sell the residence at all. The term “customarily” is unrelated to the strength or weakness of the real estate market; rather, it simply refers to what is usual, normal, habitual, or routine.

Michael K. Daniel, CBCA 1762-RELO, 10-1 BCA ¶ 34,400;
Anthony J. Kress, CBCA 877-RELO, 08-2 BCA ¶ 33,903, at
167,778.

Shen L. Lin, CBCA 1827-RELO, 10-2 BCA ¶ 34,521, at 170,252. It is proper, consequently, for an agency to deny a claim “based solely on [the] perception that the current economic downturn has created a circumstance where large numbers of sellers must agree to assume some portion of the buyers’ closing costs in order to sell their residences.” *Id.* Additionally, this Board has rejected as unworkable any attempt to determine that the real estate market was “‘so good’ or ‘so bad’ that the customary costs paid for in a real estate transaction had shifted from buyers to sellers, or sellers to buyers.” *Anthony J. Kress*, 08-2 BCA at 167,778.

The record establishes that a seller’s payment of a portion of the buyer’s closing costs in Nebraska was the result of the housing market changes during the last three years, and Dr. Trout’s payment of certain closing costs cannot be deemed a customary practice for that reason. Although the realtor’s letter provided by Dr. Trout states that payment of the seller’s closing costs by the buyer is “customary,” it also states that such a practice has resulted from a “downturn” in the housing market. However, as discussed above, such a practice as the seller paying the buyer’s closing costs is not customary when it is in response to the condition of the housing market. Additionally, the letters from Vintage and the bank vice president show that the amount of a buyer’s closing costs paid by a seller varies as a percentage of the sale price and is subject to negotiation. The documentary evidence before the Board fails to establish that the buyer’s closing costs paid by Dr. Trout were customary and, therefore, reimbursable.

Dr. Trout has argued that the guidance in the Food Safety and Inspection Service (FSIS) Directive 3820.1 provides for the reimbursement of the closing costs that he paid. It is well established that the FTR, and not an agency’s directive, determines an employee’s reimbursement for relocation costs. *Kimberly A. Smith*, GSBCA 16615-RELO, 05-2 BCA ¶ 33,039, at 163,761. (FTR controlled where there was a conflict with FSIS Directive 3820.1). The “FTR is a ‘legislative rule,’ promulgated at the direction of Congress. . . . and agency rules which do not conform to it must give way.” *Id.* Accordingly, the FTR, not FSIS Directive 3820.1, determines whether Dr. Trout can be reimbursed.

Finally, Dr. Trout contends that the procedures for completing the HUD-1 form have changed, and, as a result, the specific closing costs paid by the seller on behalf of the buyer are not shown on that form. For that reason, Dr. Trout argues that his claim was denied initially by USDA because the HUD-1 form did not show the specific buyer’s closing costs that he paid. Reimbursement in this matter, however, rests upon whether his payment of the

buyer's closing costs was customary. As discussed above, Dr. Trout has not shown that such payments were customary.

Decision

The claim is denied.

H. CHUCK KULLBERG
Board Judge