



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 17, 2017

CBCA 5491-RELO

In the Matter of SAMANTHA J. INGRAM

Samantha J. Ingram, Peachtree City, GA, Claimant.

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

BEARDSLEY, Board Judge.

Claimant, Samantha J. Ingram, a civilian employee of the Department of Defense Education Activity Americas (DODEA Americas), requests that the Defense Finance and Accounting Service (DFAS) reimburse her for certain closing costs in the amount of \$5374.77 that she paid in conjunction with the sale of her house.

Factual Background

In April 2016, claimant was issued permanent change of station (PCS) orders for a transfer from Fort Stewart, Georgia, to Peachtree City, Georgia. As part of her move, claimant sold her house located in Richmond Hill, Georgia, which is minutes from metropolitan Savannah, Georgia. Her travel authorization provided that she would be reimbursed for real estate expenses incurred as a result of the transfer. Claimant requested reimbursement of costs she paid as the seller in the amount of \$27,654.86, including \$17,994 for the sales commission, \$85 in legal fees, \$1571.24 for city/county/state tax stamps, and \$8004.62 in closing costs. The agency reimbursed claimant a total of \$18,079, which consisted of the sales commission and legal fees. The agency denied reimbursement for \$9575.86, which consisted of city/county/state tax stamps and closing costs.

In her most recent submission to the Board, claimant asks us to decide if she is entitled to reimbursement for the following closing costs in the total amount of \$5374.77:

1. Loan charges
 - A. Paid to Primary Residential Mortgage, Inc.
 - a. Loan origination fee — \$1069.05
 - b. Processing fee — \$350
 - c. Underwriting fee — \$400
 - B. Paid to Corelogic Flood Data Services
 - a. Flood certification fee — \$9
2. Title charges and escrow/settlement charges
 - A. Paid to closing attorney — McManamy Jackson, PC:
 - a. Post-closing compliance fee — \$195
 - b. Settlement services fee — \$540
 - c. Title binder fee — \$85
 - d. Document preparation/notary — \$95
 - e. Copies/overnight/wire — \$89
 - B. Paid to Chicago Title Insurance Company:
 - a. Owner's title insurance — \$688.75
 - b. Lender's title insurance — \$691.25
 - c. Closing protection letter (CPL) fee — \$35
 - C. Paid to Public Title, LLC
 - a. Title examination — \$225
3. Government recording and transfer charges
 - A. Paid to the clerk of superior court:
 - a. Fees paid to record mortgage — \$48
 - b. Intangible recording tax — \$854.72

In her original claim to the agency, claimant presented the settlement agreement, a State of Georgia pre-printed purchase and sale agreement, three letters from real estate agents, one letter from the closing attorney, and her purchase and sale agreement in an effort to prove that it is customary in Georgia for a seller to pay the buyer's closing costs. The agency determined that "[a]lthough the letters all state that [sic] is customary or common practice for a seller to assume buyers closing costs in the Georgia area; [sic] they did not provide any supporting data to substantiate that these costs are customarily paid the [sic] by the seller in Georgia."

Claimant's real estate agent stated, "It is common procedure when representing a buyer in a residential real estate transaction for the purchase and sale agreement to contain a provision whereby the seller agrees to pay a certain dollar amount of the closing costs of the buyer." He pointed to the Georgia Association of Realtors pre-printed purchase and sale agreement that contains a box in which to put the amount of costs seller will contribute at closing. The real estate agent representing the buyer stated that "it is usual and customary for the buyer to request that the seller pay" closing costs, and that in this case, the buyer asked that the seller cover the closing costs of \$8997 or 3% of the contract amount, a "normal closing cost." A letter from another Georgia real estate agent stated that based on his seven years as an agent, he believes "it is a common procedure" for the seller to agree "to pay a certain dollar amount of the closing cost of the buyer." He also pointed to the pre-printed purchase and sale agreement as proof that the seller customarily pays a buyer's closing costs. In his letter, the closing attorney located in Savannah indicated that "[i]t is customary for the Seller to assume some or all of the buyer's closing costs in the Georgia area where the above-residence is located."

In her response to the Board, claimant included a new letter from the managing broker of the real estate agency that handled the sale of claimant's property. He stated that he has overseen over 25,000 home sales in his career, and in the Savannah metropolitan service area "it is a usual and customary practice for sellers to incent [sic] buyers to purchase their home by offering to pay a portion of the purchasers [sic] closing costs." He said that sellers in Georgia "frequently contribute between 2% and 3% of the sales price." He also stated that "[o]ver the last 5 years, I can confidently state that sellers provide concessions to buyers in the form of purchaser closing costs in over 90% of home purchases in the Savannah" metropolitan area. He attached documents evidencing six house sales from the Savannah area from 2016 in which the seller paid the buyer's closing costs. Claimant also provided three listings in the Savannah area in which the seller offered to pay some closing costs to incentivize buyers.

The purchase and sale agreement executed by claimant contained a box titled “Seller’s Monetary Contribution at Closing.” The amount inserted in claimant’s agreement was \$10,000. This agreement also stated:

Items Paid By Seller: At closing, Seller shall make the referenced Seller’s Monetary Contribution which Buyer may use to pay any cost or expense of Buyer related to this transaction. Buyer acknowledges that Buyer’s mortgage lender(s) may not allow the Seller’s Monetary Contribution, or the full amount thereof, to be used for some costs or expenses. In such event, any unused portion of the Seller’s Monetary Contribution shall remain the property of the Seller. In addition, Seller shall pay all costs, fees and charges necessary to clear title encumbrances and/or defects necessary to allow Seller to be able to convey good and marketable title to the Property and any extra costs, fees and charges resulting from Seller not being able to attend the closing in person.

Per the settlement statement, the seller contributed \$8997 to the buyer’s closing costs. The settlement statement shows that the buyer used the money contributed by claimant at closing to pay some of the buyer’s closing costs. Claimant also noted that for most of the costs claimed, “DoD [the Department of Defense] does not contend that the amount exceeds the fee customarily paid.”¹

Discussion

This claim is governed by the Federal Travel Regulation (FTR), and since the claimant is an Air Force employee, the Joint Travel Regulations (JTR) also apply to the extent they are consistent with the FTR. *Michael R. Lujan*, CBCA 4613-RELO, 15-1 BCA ¶ 36,096, at 176,235.

Under the FTR, the seller of a residence is entitled to reimbursement for certain residence transaction expenses if the expenses are “customarily charged to the seller of a residence in the locality of the old official station” and appropriate supporting documentation is provided by the seller. 41 CFR 302-11.200 (2015). Consistently, the JTR states that certain expenses are reimbursable in connection with the sale of a house “if customarily paid” by the seller of the residence at the old permanent duty station (PDS). JTR 5912-A.3, -A.4.a.

¹ Claimant made this assertion for all of the costs claimed except for the loan origination fee, the processing fee, the underwriting fee, and the flood certification fee.

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.*

Thomas D. Martin, CBCA 5082-RELO, 16-1 BCA ¶ 36,324, at 177,086.

In support of her claim, claimant points to the case of *Terry L. Hood*, GSBCA 16061-RELO, 03-2 BCA ¶ 32,314, decided by this Board’s predecessor, the General Services Board of Contract Appeals. In *Hood*, the GSBCA found claimant “established that it was customary for a seller in her area to make [such] a contribution . . . toward a purchaser’s closing costs.” *Id.* at 159,864. There are many similarities between *Hood* and this case. In both cases, the sale of the house at issue was located in Georgia, and claimant provided the pre-printed purchase contract from the Georgia Association of Realtors on which there is a box in which to include the amount of closing costs to be paid by the seller. In both cases, a Georgia real estate agent stated that in Georgia a seller usually negotiates a contribution that is customarily between two and three percent of the purchase price of the house toward a buyer’s closing costs, and claimant provided several house listings showing closing costs paid by the seller. Also as in this case, the terms of the sales contract provided that claimant had no control over how the buyer would use the closing costs, but the settlement statement showed that the buyer did, in fact, use the money for closing costs, making this an issue that would not prevent reimbursement.

Here, claimant has provided even more evidence to support her claim that the costs are customarily paid by the seller in the metropolitan Savannah area. In addition to the pre-printed sales contract and the house listings, she provided statements from five different real estate professionals involved in the sale of houses in the Savannah area, and each one agreed that a seller paying a buyer’s closing costs was customary. Most convincingly, one real estate broker, having seen more than 25,000 home sales in his career, stated that sellers contributed

between two percent and three percent of the sales price in closing costs in over ninety percent of home purchases in the Savannah metropolitan area over the last five years. To support his assertion, he provided six house contracts from the Savannah area in which the seller paid the buyer's closing costs.² Similarly, "[r]eimbursement 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." *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930, at 171,748 (citing *Brian E. Cooper*, GSBCA 14269-RELO, 98-1 BCA ¶ 29,427, at 146,148 (1997)); *Martin*, 16-1 BCA at 177,087. Moreover, the agency provided no evidence to rebut claimant's assertions. Thus, we find that at least some of the buyer's closing costs are customarily paid by the seller in the Savannah metropolitan area.

In addition to requiring that closing costs are customarily paid by a seller of a residence in the locality at issue, the FTR and the JTR have additional requirements for reimbursement of specific closing costs. Generally, the burden is on the claimant to establish by a preponderance of the evidence that the costs incurred are reimbursable and not in excess of the amount generally assessed in the locality.³ *Jephrey L. South*, CBCA 5493-RELO, 16-1 BCA ¶ 36,547, at 178,026; *John W. Bodford*, CBCA 1006-RELO, 08-1 BCA ¶ 33,862, at 167,611 (citing *Vernon K. Register*, CBCA 871-RELO; 08-1 BCA ¶ 33,790, at 167,236); Board Rule 401(c) (48 CFR 6104.401(a) (2015)) ("The burden is on the claimant to establish the timeliness of the claim, the liability of the agency, and the claimant's right to payment."). Since the agency did not consider each cost claimed, however, and claimant asserted that each cost met the individual requirements without providing any proof, we require the agency to determine each item of the claim after providing claimant the opportunity to submit additional substantiation of each cost in light of the guidance provided below.

The FTR specifically allows that a loan origination fee and similar charges, although paid incident to and as a prerequisite to the extension of credit, are reimbursable. 41 CFR 302-11.200(f)(2); *Verna Pope*, GSBCA 15718-RELO, 02-1 BCA ¶ 31,822, at 157,252; *Larry W. Poole*, GSBCA 15730-RELO, 02-1 BCA ¶ 31,776, at 156,917. "A loan origination fee

² It is important to note that the agency did not have this letter or the attached contracts in making its determination that there was no supporting data to substantiate that these costs are customarily paid by the seller in Georgia.

³ Claimant does not meet her burden by only asserting, without any proof, that the agency did not contend that the amount exceeded the fee customarily paid. Although in *Hood*, the Board found similar assertions met claimant's burden for certain costs, the facts of *Hood* are distinguishable because the agency had already reimbursed the claimant for certain closing costs and had provided its own information as to what was customary.

is intended to compensate the lender for administrative expenses incurred in originating and processing a loan.” *Willo D. Lockett*, GSBCA 16391-RELO, 04-2 BCA ¶ 32,722, at 161,882 (citing *Pope*; *Kathleen M. Lewis*, GSBCA 15613-RELO, 01-2 BCA ¶ 31,616, at 156,209; *Joseph Thompson*, GSBCA 15077-RELO, 00-1 BCA ¶ 30,615, at 151,132 (1999)). The loan processing fee may be considered similar in nature to a loan origination fee. *Id.* The total amount claimed for these administrative costs, however, must be less than one percent of the purchaser’s loan amount to allow for reimbursement without further itemization. 41 CFR 302-11.200(f)(2); JTR 5912-A.4.a.(2); *Shaun L. Blocker*, CBCA 1588-RELO, 09-2 BCA ¶ 34,296, at 169,417; *Hood*, 03-2 BCA at 159,865.

The Board has recognized that underwriting fees are charges that are imposed “incident to and as a prerequisite to the extension of credit, and they are consequently not reimbursable.” *William L. King, Jr.*, CBCA 457-RELO, 07-1 BCA ¶ 33,504, at 166,036 (quoting *Lockett*). “This fee is not akin to a loan origination fee and cannot be reimbursed in lieu of a loan origination fee.” *Id.* (citing *Shane Douthitt*, GSBCA 16819-RELO, 06-1 BCA ¶ 33,262). Therefore, an underwriting fee is generally not reimbursable.

A flood certification fee is reimbursable if it was required by the lender and does not exceed amounts customarily paid in the locality of the residence. 41 CFR 302-11.200(f)(12); JTR 5912-A.6; *Hood*, 03-2 BCA at 159,865.

The cost of the title examination is reimbursable if it has not been included in other related transaction costs (i.e. broker’s fees or real estate agency fees) and the fee does not exceed the charges for such expenses that are customarily paid in the locality. 41 CFR 302-11.200(e); JTR 5912-A.3.a.

The cost of the owner’s title insurance is reimbursable to the extent that it does not exceed the amounts customarily paid in the locality and only if it was a prerequisite to financing or the transfer of the property or was inseparable from the cost of other insurance. 41 CFR 302-11.200(f)(9); JTR 5912-A.4.a.(9); *Jeffrey B. Hicks*, GSBCA 15860-RELO, 03-1 BCA ¶ 32,083, at 158,607. The JTR specifically requires that claimant provide “appropriate supporting documentation” to prove that the amount claimed is customarily paid in the residence locality. JTR 5912-A.4.a.

The cost of the lender’s title insurance is reimbursable if it was required by the lender for the protection of the lender and the amount of the insurance does not exceed the amounts customarily paid in the locality of residence. 41 CFR 302-11.200(f)(8); JTR 5912-A.4.a.(8); *Hicks*, 03-1 BCA at 158,607.

A closing protection letter (CPL) is “insurance that indemnifies a buyer, lender, or seller in transactions where title to real estate is being conveyed solely against losses not to exceed the amount of the settlement funds.” Ga. Code Ann. § 33-7-8.1 (2012). The cost of a title insurance policy, such as the CPL fee, is reimbursable if the fee is not included in other residence transaction fees, and does not exceed amounts customarily charged in the residence locality. 41 CFR 302-11.200(d); JTR 5912-A.3.a. A source of such proof that the fee is customary may be the Georgia insurance commissioner since “[t]he premium charged by the title insurer for closing protection letters shall be filed with and approved by the Commissioner.” Ga. Code Ann. § 33-7-8.1.

Similarly, legal fees and related costs are reimbursable to the extent that they are not included in the broker’s or similar services for which reimbursement has been claimed, and they do not exceed amounts customarily charged in the residence locality. 41 CFR 302-11.200(d); JTR 5912-A.3. The FTR and JTR specifically allow for reimbursement of several stated categories of legal expenses and of similar expenses. Notary fees are specifically allowed, assuming the costs meet the other requirements for reimbursement. 41 CFR 302-11.200(d); JTR 5912-A.3.c; *Ioan V. Sere*, GSBCA 16815-RELO, 06-2 BCA ¶ 33,412, at 165,663. Additionally, the title binder⁴ fee is a cost of a title insurance policy and is reimbursable, again assuming the costs meet the other requirements for reimbursement. FTR 302-11.200(d); JTR 5912-A.3; *Register*, 08-1 BCA at 167,237.

Claimant needs to explain the nature of the settlement services fee and the post-closing compliance fee. The FTR allows for reimbursement of “[o]ther expenses of sale and purchase made for required services that are customarily paid by the seller of a residence at the old official station.” 41 CFR 302-11.202(f)(12). Although the claimant has not identified what a post-closing compliance fee “represents, such a fee could conceivably be a reimbursable ‘other expense’.” *Lockett*, 04-2 BCA at 161,882. The same may be said for the settlement services fee.

Claimant needs to provide additional detail regarding the charges for copies/overnight/wire to the closing attorney. There are certain instances in which fees incurred for delivery of documents to facilitate closing are reimbursable, such as when someone could not physically attend settlement or the charges were incurred by claimant as the result of other than personal convenience. JTR 5912-A.3.e; *Register*, 08-1 BCA at 167,238. However, if the wire fee was incurred by the lender, it is an unallowable finance charge under the Truth in Lending Act and Regulation Z and not reimbursable.

⁴ A title insurance binder is a “separate charge reflecting the title company’s commitment to issue insurance.” *Register*, 08-1 BCA at 167,237.

41 CFR 302-11.202(g); *David R. Williamson*, CBCA 1825-RELO, 10-1 BCA ¶ 34,395, at 169,838 (citing *Jack E. Hudson*, GSBCA 16053-RELO, 03-2 BCA ¶ 32,351, at 160,053).

The recording fee and intangible recording tax paid to the clerk of the superior court to record the mortgage are reimbursable if the fees were not included in other residence transaction fees and did not exceed the charges for such expenses normally charged in the locality of the residence. 41 CFR 302-11.200(d); JTR 5912-A.3.c; *Hicks*, 03-1 BCA at 158,608.

Decision

For the foregoing reasons, the Board grants the claim as to entitlement but directs the agency to determine the amount of reimbursement for each item, taking into account whatever additional information claimant may present to it.

ERICA S. BEARDSLEY
Board Judge