



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 25, 2017

CBCA 5751-RELO

In the Matter of GARY J. MAYNARD

Gary J. Maynard, Vail, AZ, Claimant.

Candy L. Nimey, Travel Functional Area, Enterprise Solutions and Standards, Defense Finance and Accounting Service, Indianapolis, IN, appearing for Department of Defense.

RUSSELL, Board Judge.

Claimant, Gary J. Maynard, a civilian employee with the Department of Defense, requests that the Board review the decision of the Defense Finance and Accounting Service (DFAS or agency) denying him reimbursement of a real estate expense incurred during a permanent change of station. For the reasons set forth below, we grant the claim.

Background

On March 17, 2016, Mr. Maynard received orders transferring him from Maryland to Arizona. As a result, he sold his home located in La Plata, Maryland. DFAS reimbursed Mr. Maynard for most of his real estate expenses but denied him reimbursement of \$13,000 for an expense listed as a seller credit. DFAS explained that it could not reimburse him for this cost unless he could establish by a preponderance of the evidence that provision of a seller credit, whereby the seller gives the buyer an amount towards closing costs, is a customary practice in the locality where the residential property sold is located.

DFAS's position is that Mr. Maynard failed to provide sufficient documentation to support his request for reimbursement of the seller credit. Specifically, Mr. Maynard

provided a list of twenty homes sold in his Maryland neighborhood in 2016 as evidence of customary practice. The list included the seller subsidy for each home.

Relying on the Board's decision in *Thomas D. Martin*, CBCA 5082-RELO, 16-1 BCA ¶ 36,324, DFAS explained the basis for its denial:

CBCA 5082-RELO addresses a situation similar to this and states that the burden of proof may be met by showing specific evidence of the number and percentage of sales in the same community that involved seller contributions to buyer's closing costs over a *substantial* period of time. The evidence Mr. Maynard has provided to support his position does not [meet this burden].

After DFAS denied his claim, Mr. Maynard sought additional guidance from the agency on the type of documentation that would sufficiently evidence that the provision of a seller credit was a customary practice for real estate transactions in his former community. In his email message requesting guidance, Mr. Maynard stated:

Having been told over and over again that the [permanent change of station] would be a "free move", and to "offer closing help so that your house can sell quicker" – and having a [Joint Travel Regulation (JTR)] that is largely unreadable unless you have a law degree – I'm sure you can understand why losing \$13,000 is something I'm not going to sit back and just let happen. I'd appreciate a complete understanding of what is required to make my case, so that I can provide a cogent response prior to the . . . deadline.

The agency responded by summarizing certain CBCA decisions discussing the burden of proof required to establish that the provision of a seller credit is a customary practice for real estate transactions in a locale:

The fact that state law makes payment of a particular cost an obligation of the seller is clear proof of customary practice. Showing that a preprinted settlement form calls for the seller to pay a specific cost is also persuasive. Letters from a real estate broker and the local board of realtors confirming that in the relevant area, a particular cost is invariably paid by the seller for the buyer, have been found convincing. We have additionally accepted, as proof of customary practice, extensive sales data on similarly-priced properties in the community in question showing that over a period of years, ninety-three percent of sellers contributed to purchasers' closing costs. Similarly, a real estate agent's statement that the type of cost paid by the seller for the buyer

had been paid by sellers in ninety percent of residential sales transactions in the community for the past five years has been acceptable proof of local custom.

1) What time period would be considered “substantial” enough? 2 years? 3 years? More? There is no set period, other than over a period of years to show that it is customary in your area. Some letters from a real estate broker backed with substantiating data to confirm that it is customary in your area will help your appeal.

2) Is just my old neighborhood sufficient, or would surrounding neighborhoods be required? The entire town? County? From your local area should be sufficient, if you can get enough supporting documentation to confirm that it is customary for a seller to pay some of the [buyer’s] closing costs.

DFAS submitted Mr. Maynard’s claim to the Board for adjudication, and Mr. Maynard provided additional documentation to the Board to support his claim. Specifically, Mr. Maynard provided a letter from his broker and a list of homes sold in his former community reflecting the provision of a seller credit. His broker’s letter stated that a seller concession of 3% is standard for the market in the area, and that her data indicates that 90% of homes sold in the area included a seller concession when the seller was not the builder. The list provided by Mr. Maynard reflects data for an almost five-year period, from February 2012 to September 2016, for the sale of fifty-nine homes. The data shows, as noted by Mr. Maynard’s broker, that 90% of the homes sold in Mr. Maynard’s former town included a seller subsidy, and that the average subsidy was 2.43% of the average sale price. In terms of dollars, the average seller subsidy was \$9623.45, with the lowest and highest amounts at \$2450 and \$28,919.74, respectively.

The Board provided DFAS an opportunity to submit a response to the additional information provided by Mr. Maynard, but the agency declined.

Discussion

By statute, a federal employee who is transferred in the interest of the Government is entitled to reimbursement for real estate expenses incurred in selling a residence at an old duty station. *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533, at 174,133 (citing 5 U.S.C. § 5724a(d)(1) (2012)). The statute, however, imposes various constraints on such reimbursement, one of them being that “[r]eimbursement for . . . expenses . . . may not exceed those customarily charged in the locality where the residence is located.” 5 U.S.C.

§ 5724a(d)(4). The General Services Administrator is responsible for prescribing regulations implementing the statute and has done so in the Federal Travel Regulation (FTR). *Sharon J. Walker*, 14-1 BCA at 174,133. The FTR implements the statutory provision allowing for reimbursement of certain real estate expenses, including closing costs, provided that the costs “are customarily charged to the seller of a residence in the locality of the old official station.” 41 CFR 302-11.200 (2015). The JTR, which also apply to Mr. Maynard as a Department of Defense employee, incorporate by reference the FTR provision on closing costs. JTR 5914 (citing 41 CFR 302-11.301 and .302). Pursuant to the JTR, the agency official responsible for reviewing the claimed expense and supporting documentation must determine that the expense is reasonable in amount and that the expense is one that is customarily paid by the seller or buyer (as appropriate) in the locality where the property is located. JTR 5914-C(2).

The burden is on the claimant to establish by a preponderance of the evidence that “it is customary for the seller to assume . . . [some or all] of the buyer’s closing costs in the locality of the residence sold.” *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930, at 171,748 (quoting *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727, at 170,991). The burden may be met in several ways. *Sharon J. Walker*, 14-1 BCA at 174,133. “These include showing that a cost is allocated to the seller by state law or in a pre-printed sales form, submitting historical data which show that over a number of years a commanding percentage of sellers have contributed to buyers’ closing costs, and submitting letters from real estate professionals confirming that a particular cost is invariably assumed by the seller for the buyer.” *Id.* However, “[g]eneral, conclusive statements of customary practice and data from a limited period . . . are not persuasive.” *Id.*

Here, we wish to note that DFAS’s guidance to Mr. Maynard on the type of evidence required to support his claim was admirably thorough and, more importantly, correct. We agree with DFAS that Mr. Maynard’s original submission of data covering a one-year period was not sufficient to support his claim. However, with his submission to the Board, Mr. Maynard has met his burden demonstrating that the credit at issue is customarily paid by sellers in the area of his former residence. Mr. Maynard submitted both a letter from his broker and a home sales list with data covering nearly a five-year period. The broker confirmed that the provision of a seller credit is a customary practice in real estate transactions in the area in which Mr. Maynard’s former residence is located. The data indicates that, in 90% of home sales in his former community, residential sellers provided an approximate 2.4% credit to home buyers. Mr. Maynard provided a credit of \$13,000 to the buyer of his Maryland property, around 3% of the sales price. This amount is slightly above, but close to, the average seller subsidy of 2.4% (or \$9623.45) provided in the locality. Because the credit provided by Mr. Maynard to his buyer was fairly close to the average, we do not find the credit to be unreasonable.

Decision

The claim is granted.

BEVERLY M. RUSSELL
Board Judge