

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

September 22, 2003

GSBCA 16123-RELO

In the Matter of JAMES E. MILLER

James E. Miller, Wakefield, RI, Claimant.

W. B. Wagoner, Director, Human Resources Department, Naval Air Warfare Center, Department of the Navy, Patuxent River, MD, appearing for Department of the Navy.

HYATT, Board Judge.

Claimant, James E. Miller, seeks reimbursement of \$3697.50, representing the amount of closing costs he as seller of a residence paid to the buyer in conjunction with his permanent change of station. Because claimant has not demonstrated that the closing costs he paid are customarily assumed by sellers in the locality of his former residence, we conclude that the agency properly disallowed the claim.

Background

Claimant transferred, in the interest of the Government, from the Naval Air Station in Patuxent River, Maryland, to the Navy Warfare Development Command in Rhode Island in October 2001. Incident to this transfer, he sold his house in Mechanicsville, Maryland, also in October 2001. Subsequently, he filed a claim for reimbursement of the allowable real estate transaction expenses he incurred with respect to the sale of the house. Although the Navy paid most of the claimed expenses, it disallowed Mr. Miller's claim for \$3697.50, an amount he paid to the buyer to assist with the buyer's closing costs, with the caveat that the agency's policy regarding payment of such costs was under review and that he would be contacted if it was determined that he could recover this amount. After considerable time had lapsed, claimant again contacted the agency to inquire about the status of the policy review. After determining that no resolution had yet been reached, claimant filed a claim with the Board.

In support of his position that the amount he claims should be allowed, Mr. Miller submitted a letter from the realtor who listed his house for sale, confirming the high level of

closing costs in southern Maryland and addressing the seller's need to absorb some of these costs for the buyer:

We are currently the second highest [in amount of closing costs] in the nation, therefore, it is not unusual for the seller to pay closing costs to get their home sold. In the case of Mr. Miller, I recommended to them, when I did the market analysis, that providing closing costs to the purchaser was not only a marketing strategy, but a necessity in selling the house.

After describing the factors that contribute to high closing costs for the purchaser, claimant's realtor added: "It is not unusual and is customary for the seller to pay a good portion of these fees in this area."

The agency disagrees with claimant's contention that it is customary for a seller to contribute to the buyer's closing costs in southern Maryland. The agency canvassed two local realtors who both stated that in their experience it was not particularly common for a seller to have to pay all or a portion of the buyer's closing costs in southern Maryland. Claimant counters these statements with assertions that the individuals with whom the agency consulted had relatively few sales of their own during the relevant period so as to have a suitable level of expertise to back up their opinions. In challenging the validity of the opinions asserted by the agents consulted by the Navy, Mr. Miller notes that while it may be proper to characterize the market in 2002 and early 2003 as a "seller's market" in which there is less pressure for sellers to assume some part of the buyer's closing costs, in 2001, when he sold his house, houses took substantially more time to sell than they have in later years. Claimant further asserts that for 2001, when he sold his house, his realtor has data showing that in sixty-one percent of total house sales taking place in southern Maryland some degree of closing costs assistance was provided by the seller to the buyer, as compared to sales in 2002, when sellers made such contributions only fifty percent of the time.

Discussion

Under the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR), the Air Force may reimburse a transferred employee for certain miscellaneous expenses incurred in the sale of a residence at the old permanent duty station, provided they are customarily paid by the seller of a residence in that locality and to the extent the amount claimed is within the limits of the amounts customarily paid in the locality of the residence. 41 CFR 302-6.2(d) (2001); JTR C14002-A.4. It is the claimant's burden to establish through persuasive 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. E.g., Joseph B. Wade, GSBCA 15889-RELO, 03-1 BCA ¶ 32,128; Sandra L. Wilks, GSBCA 15669-RELO, 02-2 BCA ¶ 31,962; Evan E. Zillmer, GSBCA 15728-RELO, 02-2 BCA ¶ 31,958; Monika J. Dey, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001); Byron D. Cagle, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903. In Cagle, we recognized that simply because it is common for a seller to assume a buyer's closing costs by contract does not mean that the practice is customary. A common practice does not necessarily equate to established custom, but over time it can become so. Id.

As we explained in Dey, there are a variety of ways in which claimants may meet the burden of showing that it is "customary" for a seller to assume a particular cost. These include showing that a cost is allocated to a particular party in 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. In contrast, letters from realtors simply asserting that many sellers contribute to buyers' closing costs do not establish that a practice is customary. Dey, 02-1 BCA at 156,827-28.

In Zillmer the Board found that the claimant had not demonstrated that it was customary for sellers of property in Calvert County, Maryland, which, like Mechanicsville, is in southern Maryland, to contribute to buyers' closing costs in 2001. The evidence supplied by claimant here prompts us to the same conclusion for the same period in question. Although Mr. Miller's realtor uses the term customary, the data she provides and other statements she makes do not serve to establish that what may be a common practice has become the custom in the area. The assumption of buyers' closing costs by the sellers in some sixty-one percent of sales falls well short of the levels previously accepted as supporting the conclusion that a custom existed. Robert P. Azinger, Jr., GSBCA 15350-RELO, 00-2 BCA ¶ 31,062 (assumption by sellers of a portion of buyers' closing costs in seventy-five to ninety percent of sales in the relevant period considered sufficient to establish a custom). The information offered by Mr. Miller does not establish that it was customary in 2001 for sellers to assume part of the buyers' closing costs, but rather suggests that this practice was commonly adopted because of local market conditions and was part of the give and take in negotiating a sufficiently attractive price to facilitate the sale. Wade, 03-1 BCA at 158,816; Dey, 02-1 BCA at 156,828.

To conclude, claimant has not established that during the time period in question these costs were customarily assumed by sellers in southern Maryland. The Navy properly disallowed this claim.

CATHERINE B. HYATT
Board Judge