

**Board of Contract Appeals**  
General Services Administration  
Washington, D.C. 20405

---

December 20, 2001

---

GSBCA 15662-RELO

In the Matter of MONIKA J. DEY

Monika J. Dey, Lehigh Acres, FL, Claimant.

Joseph P. Givhan, Jr., Senior Attorney, Real Estate Division, Mobile District, United States Army Corps of Engineers, Mobile, AL, appearing for Department of the Army.

**DANIELS**, Board Judge (Chairman).

After the Army Corps of Engineers transferred Monika J. Dey to Florida in June 1999, she and her husband sold the house in which they had lived at her former duty station in Phenix City, Alabama. The Corps reimbursed Ms. Dey for most of the costs she incurred in selling the residence, but denied reimbursement for other expenses. The employee has asked us to review the agency's determination as to five of the items for which it denied reimbursement – title insurance premium, recording fees, costs of preparing a credit report, a loan origination fee, and the cost of a survey. We conclude that the agency's determination, as modified in its response to the Board, was correct.

All of these types of expenses may be reimbursable when incurred by an employee who sells her house at her old duty station after having been transferred in the interest of the Government. The Federal Travel Regulation (FTR) and the Department of Defense's Joint Travel Regulations (JTR) limit the circumstances in which the expenses may be reimbursed, however. Among the limitations is this one: each of the costs is to be paid by the employee's agency only if it is customarily paid by the seller of a residence at the location in question. 41 CFR 302-6.2(c)(2) (1998), JTR C14002-A.3.a (June 1, 1999) (title insurance premiums); 41 CFR 302-6.2(c)(2), JTR C14002-A.3.c (recording fees); 41 CFR 302-6.2(d)(1)(i), JTR C14002-A.4.a(2) (loan origination fees); 41 CFR 302-6.2(d)(1)(iii), JTR C14002-A.4.a(3) (credit report preparation costs); 41 CFR 302-6.2(c)(2), JTR C14002-A.3.d (survey costs).<sup>1</sup>

---

<sup>1</sup>Ms. Dey notes that standard operating procedures issued by the Corps' Finance Center in Millington, Tennessee, do not contain this limitation. They say only that the items in question (and others) are reimbursable "to the extent they do not exceed amounts customarily (continued...)

In support of her position that the expenses she incurred are customarily paid by the seller of a residence at the place where she used to live, Ms. Dey has provided us with a letter from the attorney who represented her in the transaction. The attorney says that in that area, "it is very common for the Buyer to ask the Seller to pay these [costs] and incorporate that into the sales contract as part of the offer to purchase. It has been my experience that most Sellers in our area do pay the closing costs as you did."

The Corps' Mobile District, which processed this claim, took the initiative to investigate the situation itself. It contacted the Department of Housing and Urban Development office which services the State of Alabama, the listing agent for Ms. Dey's former residence, and a mortgage broker in the Phenix City area. From each of these sources, the Mobile District learned that while sellers of residential real estate in Phenix City do indeed usually pay some of the buyers' closing costs, the amount and kind of costs paid by sellers is negotiable and varies from contract to contract. The agency concluded, based on this information, that "the items submitted by Claimant for reimbursement in the sale of her residence are not payable because they are not customarily paid by the seller in the locality of the old official duty station." The agency did admit to one exception to this conclusion: because the survey of the property had to be made in order to demarcate the boundary line between the parcel to be conveyed and land to which Ms. Dey and her husband retained title, the cost of the survey should be reimbursed.

"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." Christopher L. Chretien, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701 (1996). The burden is on the claimant to show that a contested settlement cost meets this standard. 48 CFR 6104.4(c) (1998); e.g., Kathleen M. Lewis, GSBCA 15613-RELO, 01-2 BCA ¶ 31,616; Ernestine S. Canty, GSBCA 15541-RELO, 01-2 BCA ¶ 31,612; Byron D. Cagle, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903; Chretien.

Sellers who pay a closing cost which might be thought to be generally the responsibility of the buyer have met their burden in a variety of ways. The fact that state law makes payment of a particular cost an obligation of the seller is clear proof of customary practice. Matthew D. Freeman, GSBCA 14416-RELO, 98-1 BCA ¶ 29,606. Showing that a preprinted settlement form calls for the seller to pay a specific cost is also persuasive. Robert Messie, GSBCA 13807-RELO, 97-1 BCA ¶ 28,924. 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. Canty. We have additionally accepted, as proof of customary practice, extensive sales data on similarly-priced

---

(...continued)

paid in the locality of the residence" – a limitation which is also contained in the FTR and JTR, but is not at issue in this case. The fact that the Finance Center's standard operating procedures do not include the constraint of importance here does not mean that the constraint may not be considered. The FTR, as a "legislative rule," has the force of law, and the JTR, which explain and supplement the FTR, applies to all civilian employees of the Department of Defense. Vera A. Wood, GSBCA 15637-TRAV, et al. (Nov. 13, 2001). The standard operating procedures may not vary the rules established by these controlling regulations.

properties in the community in question showing that over a period of years, ninety-three percent of sellers contributed to purchasers' closing costs. Cagle. 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. Brian E. Cooper, GSBCA 14269-RELO, 98-1 BCA ¶ 29,427 (1997).

On the other hand, a bald assertion that many sellers in the community, during the relevant time, paid buyers' closing costs does not establish that the payment of these costs was "customary," as we comprehend the meaning of that term. Even if a practice is common, that is not enough to raise it to the status of being customary. The payment may simply have been a means of lowering the total cost to the buyer in order to make the purchase more attractive, an expense that the FTR makes non-reimbursable. Jeffery T. Hooghouse, GSBCA 14291-RELO, 98-1 BCA ¶ 29,429 (1997); Gerald Fediw, GSBCA 14256-RELO, 98-1 BCA ¶ 29,513 (1997); Chretien. Unless the claimant can show that the seller's payment of all of the buyer's closing costs is customary in the area and at the time at issue (as in Robert P. Azinger, Jr., GSBCA 15350-RELO, 00-2 BCA ¶ 31,062, and David H. Moore, GSBCA 15091-RELO, 00-1 BCA ¶ 30,748), he must demonstrate that the payment of the particular costs paid by the claimant was customary, rather than having been selected in negotiations to arrive at a net selling price for the house. Donald V. McNamara, GSBCA 14428-RELO, 98-2 BCA ¶ 29,807; see also Albert L. Van Tuinen, GSBCA 14492-RELO, 98-2 BCA ¶ 30,091; Hooghouse. The term "customary" must be applied strictly, for the statute on which the regulatory phrase is based makes agencies responsible for paying transferred employees' closing costs only where those costs "are required to be paid." 5 U.S.C. § 5724a(d)(1) (Supp. IV 1998).

Ms. Dey's claim cannot survive under these established standards. Although the seller's payment of some of the buyer's closing costs may have been common in Phenix City, Alabama, at the time when she sold her house, the claimant has not proved that payment of the particular costs she assumed was customary. Rather, we conclude from the information provided, the selection of those costs was negotiated between the seller and the buyer as part of the give-and-take aimed at reaching a contract price for the house which was acceptable to both parties. We therefore deny the claim except as to the survey costs, which the agency has agreed to pay.

---

STEPHEN M. DANIELS  
Board Judge