

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

July 17, 2002

GSBCA 15706-RELO

In the Matter of WILLIAM J. BOND

William J. Bond, Tallahassee, FL, Claimant.

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

HYATT, Board Judge.

Claimant, William J. Bond, is a civilian employee of the United States Army Corps of Engineers. In the summer of 1999, he relocated from Lawrenceville, Georgia, near Atlanta, to Tallahassee, Florida. In connection with his permanent change of station, he was authorized reimbursement of real estate transaction costs. He was reimbursed most of the allowable costs of selling his home, with one notable exception -- certain of the buyer's closing costs that he was required to pay under his sales agreement. The Corps declined to pay these costs on the basis that they would not normally, or customarily, be paid by the seller of the house. In requesting the Board's review of this decision, Mr. Bond explains that he has learned of a recent Board decision in which these costs were allowed because the claimant demonstrated that in the Atlanta market it has become customary for the seller to defray all or a large part of the buyer's closing costs. See Janeen M. Rosenberg, GSBCA 15591-RELO, 01-2 BCA ¶ 31,614.

In considering Mr. Bond's claim for reimbursement of the expenses of selling his house in Georgia, the Corps determined that certain items were ineligible for reimbursement. These included a loan origination fee of \$1230.93, a Georgia residential mortgage/loan fee of \$6.50, and a mortgage recording fee of \$26, items that the Corps characterized as buyers' expenses. In addition, the Corps disallowed an underwriting fee of \$250, and a tax service fee of \$79, as finance charges, which are not reimbursable. Mr. Bond's application for reimbursement of real estate expenses was accordingly reduced by the amount of \$1592.43. We understand Mr. Bond's request for review to seek only reimbursement of the items considered to be a buyer's closing cost, and not the tax service fee or underwriting fee, which the Corps correctly determined to be part of the finance charge and, as such, not

reimbursable. E.g., Daniel H. Coney, GSBCA 15506-RELO, 01-2 BCA ¶ 31,610; Rosenberg; Richard A. Poisel, GSBCA 15333-RELO, 01-1 BCA ¶ 31,284 (2000).

Mr. Bond makes several points in his request for review of the Corps' disallowance of the buyer's closing costs he paid when he sold his house in Lawrenceville. First, he raises the Board's decision in Rosenberg, which involved the same local area. In that decision, Ms. Rosenberg challenged the decision of the Corps' Savannah District to disallow reimbursement of the buyer's closing costs that she paid in connection with the sale of her house located in Lilburn, Georgia. Like Mr. Bond, the largest individual cost item that Ms. Rosenberg paid on behalf of the buyer was the loan origination fee. Ms. Rosenberg submitted letters from realtors confirming that it is customary in the Atlanta area for sellers to pay all or a large portion of the buyer's closing costs. She also submitted evidence of recent sales in her subdivision showing that sellers had paid all or most of the buyers' closing costs. After Ms. Rosenberg sought the Board's review, the Corps office responding to her claim looked at the information she provided to the Board and also made independent inquiries of realtors in the Atlanta area. Based on the information available to it as a result of Ms. Rosenberg's claim, the Corps agreed that it was customary in this area for sellers to assume this expense.

Mr. Bond has also submitted letters from two realtors stating that it is "reasonable and customary" and "standard practice" for the seller to pay all or a portion of the closing costs in a real estate transaction in the metropolitan Atlanta area. One broker stated that the seller paid all or a portion of buyer closing costs in eighty percent of closings in the office he manages. These letters were written in October 2001, however, while Mr. Bond sold his house in July 1999.

In response, the Corps' Mobile District, which handled claimant's relocation expenses, continues to maintain that the buyer's closing costs are not reimbursable to the seller in this case. The Corps recognizes that certain expenses of this nature may be reimbursed if customarily paid by the seller in a given location, but does not believe the letters submitted by claimant, which do not specify what specific elements of buyer's costs are customarily paid by the seller, suffice to meet his burden.

Discussion

Under the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR), the Corps 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) (2000); 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., Sandra L. Wilks, GSBCA 15669-RELO (July 2, 2002); Monika J. Dey, GSBCA 15662-RELO, 02-1 BCA ¶ 31,744 (2001); Robert P. Azinger, Jr., GSBCA 15350-RELO, 00-2 BCA ¶ 31,062; Byron D. Cagle, GSBCA 15218-RELO, 00-1 BCA ¶ 30,903. As we explained in Dey, there are a variety of ways in which to 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. 02-1 BCA at 156,827-28. A common occurrence does not necessarily rise to the level of a custom, although over time a custom may be determined to have evolved. Cagle.

The Rosenberg decision does not necessarily establish that Mr. Bond is entitled to be paid these expenses. The evidence pertaining to the sale of Ms. Rosenberg's home was generated more than eighteen months after Mr. Bond sold his residence in July 1999. Although the Corps' Savannah District, after examining Ms. Rosenberg's materials and querying several realtors in the Atlanta area on its own, agreed that the practice was customary, this again was based on the time frame when Ms. Rosenberg sold her home -- spring 2001. The additional evidence, letters from local realtors, provided by claimant here is, in some respects, similar in nature to that adduced in Azinger, in which the claimant submitted letters from local realtors attesting that sellers paid closing costs for buyers in some seventy-five to ninety percent of closings in the local area. If the letters supplied by Mr. Bond had addressed the time period when he sold his house -- the summer of 1999 -- we would be persuaded that he had met his burden to show that the practice was customary when he sold his house. Instead the letters, on their face, address the latter part of 2001, rather than the summer of 1999. Although it is possible that the custom indeed prevailed in 1999 as well as in 2001, we cannot come to that conclusion on the information we have. Our decisional law recognizes that at some point a common practice may become customary. The difficulty here is that Mr. Bond has not established that a custom, rather than a common practice, existed in 1999 when he sold his house. As such, we cannot conclude that he has met his burden to show that he is entitled to reimbursement of these costs.

CATHERINE B. HYATT
Board Judge