

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

June 27, 2003

GSBCA 16113-RELO

In the Matter of ROBERT G. CARRELL II

Robert G. Carrell II, Mineral, CA, Claimant.

C. Bruce Shaeffer, Comptroller, Accounting Operations Center, National Park Service, Washington, DC, appearing for Department of the Interior.

BORWICK, Board Judge.

Claimant is an employee of the Department of the Interior, National Park Service, at the Lassen Volcanic National Park. He transferred in the interest of the Government from the Ruby Lake National Wildlife Refuge (RLNWR). The agency denied claimant's request for reimbursement of real estate transaction expenses for any sale of his residence while stationed at the RLNWR because he did not commute daily from that residence, as required by the Federal Travel Regulation (FTR). We grant the claim in part. The FTR permits the agency head or his or her designee to waive regulatory limitations when an employee transfers from a remote or isolated location and when the agency determines that failure to waive the limitations would cause an employee undue hardship. Claimant essentially requested a waiver, but the agency did not consider whether it should grant a waiver given his circumstances. In light of the agency's admission that the RLNWR was in a remote location, we return this matter to the agency for consideration of whether waiver was appropriate.

The facts are as follows. The RLNWR was claimant's official duty station from July 30, 2000, through October 5, 2002. According to the agency, RLNWR is considered a remote location. The RLNWR is ninety miles from the nearest town of Elko, Nevada. Of the ninety-mile route, thirty-five miles consist of graded gravel roads. Claimant states, without dispute, that winter weather lasts from October through May with snow drifts of two to six feet often covering the roads that are not maintained. The controller of the agency's National Park Service confirms that the RLNWR "is considered one of the most remote stations in the lower 48 states within the National Wildlife Refuge System."

Within the RLNWR, there is one school that covers first through eighth grade. The nearest high school is at Elko, Nevada. According to an agency official at the RLNWR, families at the RLNWR, for their children to attend high school, must either maintain a home

in or near Elko, or stay at the RLNWR and board their children with other families in or near Elko.

Claimant lived at the RLNWR until his children reached high-school attendance age, at which time claimant purchased a house in Spring Creek, Nevada, near Elko. He purchased the Spring Creek residence to enable his children to attend high school and so that his family could stay together. Apparently, claimant would stay during the week at the RLNWR and, when possible, return to his residence in Spring Creek on the weekends.

Effective October 6, 2002, claimant was transferred in the interest of the Government to the Lassen Volcanic National Park in California. The agency authorized, among other benefits, reimbursement of claimant's real estate transaction expenses. Claimant wanted "the agency to purchase [his] Spring Creek residence under 41 CFR 302-1.4(k) (2001) and 41 CFR 302-11.100." An agency finance official, however, denied claimant any real estate transaction expenses associated with a sale of claimant's Spring Creek residence, since the residence was not one from which claimant commuted daily. According to claimant, this official determined that claimant's Spring Creek residence was not "remote." Claimant reported for duty at his new station on October 6, 2002.

Claimant then filed a claim with the Board. The agency explains that claimant's Spring Creek residence did not qualify for real estate transaction expenses under 41 CFR 302-11.100 since claimant did not commute from that residence on a daily basis.

Claimant states that as a result of the agency's failure to grant relocation transaction expenses for his Spring Creek residence, claimant has had to bear the financial burden of maintaining separate residences in two states. Additionally, claimant's spouse remains in Nevada, acting as a single parent, and, due to the separation, claimant is unable to be involved in the daily lives of his children.

Discussion

Claimant states that he asked the agency "to purchase" his residence. An agency may not take title to an employee's residence. 41 CFR 302-12.110 (2002). Claimant may have meant that he sought to have his Spring Creek residence included in his agency's home sale program, through which the agency contracts with a real estate relocation services company to purchase the residence at fair market value. The relocation services company then independently markets and sells the residence. 5 U.S.C. § 5724c (2000); 41 CFR 302-14.1.

Regardless, the agency's denial of claimant's request for real estate transaction expenses for claimant's residence at Spring Creek, Nevada, rests not on claimant's possible misidentification of the type of real estate transaction benefit to which he may have been entitled, but on a broader ground. Here the agency determined that the Spring Creek residence did not qualify for any real estate transaction expenses because claimant did not commute daily from that residence as required by 41 CFR 302-11.100. The issue in this case, therefore, is whether claimant may obtain real estate transaction expenses for any sale of that residence.

As noted by the agency, the FTR version effective when claimant reported for duty at the Lassen Volcanic National Park station provides:

You may receive reimbursement for the one residence from which you regularly commute to and from work on a daily basis and which was your residence at the time you were officially notified by competent authority to transfer to a new official station.

41 CFR 302-11.101. The FTR, however, also provides that:

The agency head or his/her designee may waive any statutory or regulatory limitations for employees relocating (to/from a remote or isolated location) when determining that failure to waive the limitation would cause an undue hardship to the employee.

41 CFR 302-2.106. In light of the admittedly remote location of the RLNWR, the agency should have considered whether waiver of the daily commute requirement of 41 CFR 302-11.101 for qualifying any Spring Creek residence transaction as reimbursable has caused or would cause claimant undue hardship. Clearly, claimant sought such a waiver and is entitled to an agency determination on whether waiver is appropriate in this case.

Claimant may not rely on 41 CFR 302-1.4(k) (2001). That section, which defined official station or post of duty, also defined the term "residence" as including the dwelling where an employee's family resided in cases where the official station was "in a remote location where adequate family housing was unavailable." *Id.* However, this provision is not included in the 2002 version of the FTR, which instead contains the waiver provision at 41 CFR 302-2.106 (2002). Claimant's relocation entitlements are determined by the regulatory provisions in effect when claimant reported for duty at his new station, i.e. October 6, 2002. 41 CFR 302-2.3. Those entitlements are not governed by an expired regulatory provision.

This matter is returned to the agency for a waiver determination in accordance with 41 CFR 302-2.106.

ANTHONY S. BORWICK
Board Judge