

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

March 22, 2004

GSBCA 16346-RELO

In the Matter of CHARLES T. OLIVER

Charles T. Oliver, Darby, MT, Claimant.

Harlan Smid, Director, Financial Resources, Northern Region, Forest Service, Missoula, MT, appearing for Department of Agriculture.

NEILL, Board Judge.

Claimant, Mr. Charles T. Oliver, a district ranger employed by the Department of Agriculture, has asked us to review his agency's determination that he is not entitled to certain relocation benefits associated with residence transactions. The agency, although appreciating the difficulties confronting the claimant, has nonetheless denied Mr. Oliver's claim. The agency believes that it lacks the authority to make an exception to the regulation which renders Mr. Oliver ineligible for the benefit he is seeking. Given the unique facts of this case, we are not convinced that there is no basis in regulation for granting an exception. We, therefore, are returning the case to the agency for further consideration along the line suggested herein.

Background

On August 5, 2003, Mr. Oliver was notified that he had been selected for the district ranger position in Darby, Montana. At the time, he was serving as a district ranger in Walden, Colorado. On being assigned to Walden in April 2000, he and his family had lived initially in a Forest Service rental unit. After a prolonged search for suitable housing, he and his wife decided to buy land in the area and build a home.

Construction of Mr. Oliver's home began in June 2001. For a number of reasons, the work did not progress as anticipated. Unexpected problems were encountered almost immediately with the substratum of the site itself. Because proper earth-moving equipment was unavailable in the area at the time, claimant utilized a jackhammer, pick, and shovel to complete the excavation. Prior to pouring the foundation, Mr. Oliver, himself, incurred an injury which temporarily prevented him from continuing work on the house. The unexpected illness of his sister-in-law, who had come to assist Mr. Oliver and his wife, was a cause of further delay.

Throughout the two years following the start of construction, numerous problems were encountered with the procurement of supplies and services. Mr. Oliver readily admits that many of these problems were typical of a construction project. Nevertheless, he points out that they were compounded by the fact that he and his wife had chosen to reside in a small community in a remote location. He explains that the community numbered 700 inhabitants and that the closest town of any significant size (25,000 persons) was sixty-five miles away. Furthermore, the politics of this small community also appear to have contributed to the delay of construction. Mr. Oliver writes that local contractors were upset that he and his wife had initially opted not to work with them. As a result, these contractors were reluctant to assist them in the final phases of construction as the work fell further and further behind.

Mr. Oliver has provided us with convincing evidence that it was definitely his intent to move into his new home no later than June 2003. Nevertheless, owing to the many delays encountered, occupancy by that date was not possible. Although he ultimately moved into his home before his actual transfer, he had not moved in completely nor was he regularly commuting to work from it when he learned of his new assignment in early August 2003. Because the new house was not Mr. Oliver's primary residence at the time he was notified of his transfer, his agency determined that he was not entitled to reimbursement of any expenses associated with its sale.

Mr. Oliver asks that an exception be made to these requirements in view of his obvious intent to move into his home earlier and the frustration of this intent owing to causes outside of his control.

Discussion

The agency has based its rejection of Mr. Oliver's claim on two provisions in the Federal Travel Regulation (FTR). The portion of the first provision which applies to Mr. Oliver reads:

Question: To be reimbursed for expenses incurred in my residence transactions, must I occupy the residence at the time I am notified of my transfer?

Answer: Yes, to be reimbursed for expenses incurred in your residence transactions, you must occupy the residence at the time you are notified of your transfer.

41 FTR 302-11.5 (2003) (FTR 302-11.5).

The second provision, in addition to setting out the requirement that the employee be living in the residence at the time he or she is notified of the transfer, also requires that this be the residence from which the employee commutes to and from work on a daily basis. This provision reads in part:

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.

FTR 302-11.100. In the past, we have not hesitated to insist on compliance with both requirements. E.g., Roger Henry, GSBCA 16300-RELO (Feb. 24, 2004).

Mr. Oliver's agency is sympathetic to his plight. It states that, because of hardship experienced by the claimant, it would be willing to waive the limitations imposed by regulation if it could. The agency, however, does not believe that it has the authority to do so.

It is, of course, well established that, absent a specific provision in statute or regulation granting an exception under certain circumstances, neither an agency nor this Board has the authority to waive, modify, or depart from the Government's official travel regulations for the benefit of any federal employee who is subject to them. E.g., Judith B. Gross, GSBCA 16265-RELO (Dec. 19, 2003); David Mendoza, GSBCA 15921-RELO, 03-1 BCA ¶ 32,082; Thomas A. Riopelle, GSBCA 15722-RELO, 02-1 BCA ¶ 31,820; Daniel M. Coney, GSBCA 15444-RELO, 01-2 BCA ¶ 31,500; Tanya Cantrell, GSBCA 15191-RELO, 00-1 BCA ¶ 30,894.

The unique facts of this case, however, suggest to us that there may be a basis in regulation for granting Mr. Oliver the exception he seeks. In recent years the FTR has been amended to include the following provision:

Question: May we waive statutory or regulatory limitations relating to relocation allowances for employees relocating to/from remote or isolated locations?

Answer: Yes, 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 on the employee.

FTR 302-2.106. This provision became effective February 19, 2002. 66 Fed. Reg. 56,194 (Nov. 20, 2001).

In its report to us, Mr. Oliver's agency has not discussed the possible application of FTR 302-2.106 to this case. From many of the facts in the record, however, it would appear that claimant, in transferring to his present duty station, was relocating from a remote location. Many of the events which precluded Mr. Oliver from qualifying for reimbursement of expenses associated with the subsequent sale of his newly completed home are related either directly or indirectly to the remoteness of its location. Given these circumstances and the fact that the requirements in question stem solely from regulation rather than statute, the agency may well want to consider Mr. Oliver's request in the light of this FTR provision.

As FTR 302-2.106 makes clear, the authority to waive provisions for employees relocating to or from a remote or isolated location rests with the employee's agency and not

with this Board. We have noted in the past that there is no definition of "remote area" in the FTR. The determination of whether a particular location fits this description is also, therefore, a matter left to the reasonably exercised discretion of the employee's agency. William T. Orders, GSBCA 16095-RELO, 03-2 BCA 32,389. Accordingly, we are returning this case to the agency for its own determination of whether the exercise of the waiver authority of FTR 302-2.106 in Mr. Oliver's favor would be appropriate.

EDWIN B. NEILL
Board Judge