117218 20452

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200929 DATE: December 31, 1981

MATTER OF: Lancelot L. Llewelyn - Separation Travel - Actual Residence Determination

DIGEST: Retired employee of Panama Canal Commission was originally recruited from Kingston, Jamaica, and employed as contract "Foreign Labourer" with Panama Canal in 1940. Employee worked continuously for 39 years, first as contract laborer and then as regular Federal employee. He retired in 1979 and traveled to new residence in California at his own expense. He seeks constructive travel costs that would have been payable under original contract for repatriation to Kingston. Employee is only entitled to expenses for separation travel to country of actual residence at time of assignment to duty. However, agency should determine if employee was entitled to negotiate transportation agreement in connection with regular Federal employment and if so, whether actual residence had changed to location in continental United States.

Mr. Fernando Manfredo, Jr., Acting Administrator, Panama Canal Commission, requests our opinion as to whether Mr. Lancelot L. Llewelyn, a retired Commission employee, may be reimbursed the constructive cost of transportation, shipment of household goods, and travel expenses to Kingston, Jamaica, his actual place of residence at the time of employment. Reimbursement on the constructive basis suggested may not be made. However, if the conditions outlined below can be met, some reimbursement may be allowed.

Mr. Llewelyn was hired in December 1940 by the Panama Canal, the Federal agency then operating the waterway, as a contract "Foreign Labourer." Mr. Llewelyn was one of several hundred skilled and unskilled workers who, during the early 1940's were recruited from off the Isthmus of Panama to work under contract for the Panama Canal on various construction projects in the Canal Zone. At the

time he was brought from Kingston, Jamaica, as a British subject, Mr. Llewelyn's rights and obligations of employment derived from the "Foreign Laborer" contract he signed on December 12, 1940. For purposes of our consideration here, Mr. Llewelyn's contract provided for his "repatriation" to his "home port" upon satisfactory termination of his services. More specifically paragraph number 10 of the contract required the agency to "furnish to the employee without charge a steamship ticket for deck or other suitable passage to his home port, such ticket to include meals," and, as security for acceptance of repatriation, Mr. Llewelyn had $60 deducted from his pay.

The agency reports that Mr. Llewelyn was continuously employed (except for an 8-day break in service) by the United States Government agencies which operated the Panama Canal between December 1940 and December 1979, a 39-year period during which he was first a contract laborer and, after an unspecified later date, a regular Federal employee. On December 1, 1979, Mr. Llewelyn retired and traveled at his own expense to California, where he now resides.

Mr. Llewelyn claims reimbursement for the travel costs that would have been incurred had he elected to be repatriated to Kingston, Jamaica, incident to his separation for purposes of retirement. Had Mr. Llewelyn in fact returned to Kingston, his entitlement under the 1940 contract would have made such travel and transportation expenses reimbursable. See 26 Comp. Gen. 679 (1947). And, such reimbursement would not be limited to the contract's provision for a steamship ticket and meals. In 54 Comp. Gen. 814, 816 (1975) we held in part, that while entitlement is determined at the time of employment, the measure of that entitlement is determined by an employee's status at the time the travel is performed.

Here, however, Mr. Llewelyn seeks reimbursement on a constructive basis for separation travel he performed to California, not Jamaica. It would appear that if Mr. Llewelyn's right to separation travel arises solely under the repatriation provision of his 1940 contract, such expenses are reimbursable only for return to his home port of Kingston, Jamaica. Reimbursement of constructive costs would be precluded in this case. This result follows from decisions of this Office which have held that an employee

is entitled to travel and transportation expenses upon separation only to the country of actual residence at the time of appointment to his foreign duty station. See 31 Comp. Gen. 389 (1952); B-170172, July 31, 1970; B-160029, October 4, 1966.

However, Mr. Llewelyn's entitlement must also be evaluated under 5 U.S.C. § 5722 (1976) and the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR) paragraph 2-1.5g. In order to do that it must be determined whether or not there is any legal basis for concluding that at some point in the 39-year period between 1940 and 1979, some location in continental United States became Mr. Llewelyn's "actual residence" under the FTR, or his "home port" under the employment contract, thus permitting Mr. Llewelyn to negotiate a transportation agreement authorizing reimbursement of the expenses sought here.

The record appears to indicate that although Mr. Llewelyn was employed continuously for 39 years by the Federal agencies which operated the Panama Canal, and that at some point he became a "regular Federal employee," he somehow remained subject to the original 1940 "Foreign Labourer" contract for purposes of considering his separation travel entitlement. It would also appear that when Mr. Llewelyn was appointed to a position and became a "regular Federal employee," it should have been determined whether he was eligible to negotiate a transportation agreement under FTR para. 2-1.5g, and if he was, he should have been given the opportunity to do so. See for example 54 Comp. Gen. 816 (1975); and Fred Gutierrez, B-191012, May 17, 1978. Since, as we noted in 54 Comp. Gen. 816, supra, it is clear that benefits arising from a transportation agreement are part of the bargained-for consideration incident to employment, it follows that at the time Mr. Llewelyn became a regular Federal employee his actual residence may have already changed making him eligible to negotiate a transportation agreement, yet there is no indication in the record that such a determination was considered at that time.

Paragraph 2-1.5g(3) of the FTR provides guidance to agencies in determining an employee's actual residence at the time of appointment in order to entitle him to separation travel expenses. We have consistently construed these regulations as placing the responsibility for determining the place of actual residence of an employee on the administrative agency and as requiring the determination to be made on the basis of all available facts. 45 Comp. Gen. 136

(1965); 39 id. 337 (1959); 37 id. 848 (1958); 35 id. 101 (1955). Such a determination must, of necessity, be based on the facts of each case, and ordinarily our Office will not question any reasonable determination of an employee's actual residence made by the agency. 35 Comp. Gen. 244, 246 (1955). However, in 39 Comp. Gen. 337, supra, we stated that the "law and regulations do not preclude correction of errors in the overseas assignment or transfer records, when it is later shown clearly that, in fact, the place of actual residence was other than the place named in the agreement and related papers." See also James E. Brown, B-182226, January 27, 1975; B-178654, April 8, 1974.

One of the guidelines in the FTR, paragraph 2-1.5g (3)(c)(ii), states that the place at which the employee physically resided at the time of his selection for transfer frequently constitutes the place of actual residence and shall be so regarded in the absence of circumstances reasonably indicating that another location may be designated as the place of actual residence. Thus, the fact that Mr. Llewelyn originally came from Jamaica in 1940 would not necessarily control the determination of his actual residence for every successor employment agreement he may have had with a Federal agency. That practice, if transportation agreements were in fact part of his employment history, would have had the effect of preventing Mr. Llewelyn from ever establishing a different actual place of residence. Such action on the part of the agency would be arbitrary and capricious.

Accordingly, the Panama Canal Commission should first clarify the status of Mr. Llewelyn's employment during the 39-year period in question. If Mr. Llewelyn may have been eligible to negotiate a transportation agreement incident to his appointment as "regular Federal employment" or at some later time - and bearing in mind that his retirement evidences satisfactory completion of such an agreement - the agency should make a factual determination as to Mr. Llewelyn's actual residence at that time. As part of this factual determination Mr. Llewelyn should be given an opportunity to submit evidence in support of an actual residence in the continental United States at the time such an agreement should have been negotiated.

It will follow from this determination that if Kingston, Jamaica, remained Mr. Llewelyn's actual residence throughout

the 39-year period of his employment, there will be no legal basis for the negotiation of a transportation agreement and for allowing any constructive costs for his travel to California. However, if intervening circumstances require adjustment of his actual residence to a specific location in the continental United States, then separation travel expenses would be payable either in full from the Canal Zone to that California location, or on a constructive basis if his actual residence is found to be in the continental United States but outside of California.

Harry R. Van Cleve
Comptroller General
of the United States