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

April 19, 2001

GSBCA 15379-RELO

In the Matter of FRED BORAKOVE

Fred Borakove, Prospect, KY, Claimant.

Donald M. Suica and David K. Barnes, General Legal Services, Office of Chief Counsel, Internal Revenue Service, Washington, DC, appearing for Department of the Treasury.

NEILL, Board Judge.

Claimant, Mr. Fred Borakove, an employee of the Internal Revenue Service (IRS), has appealed his agency's determination that the relocation benefits associated with the purchase of a new residence at a new permanent duty station (PDS) should be reduced by fifty percent. The reason given for the reduction is that Mr. Borakove shares title to the purchased residence with another individual who, at the time of purchase, was not a member of his immediate family. We find the arguments previously presented by Mr. Borakove to agency officials unpersuasive. A final argument raised for the first time in this proceeding may have merit. Nevertheless, the argument presents issues which should first be ruled upon by the agency itself. We, therefore, dismiss this case so as to permit the claimant to prepare and submit for agency review the documentary support normally required to support a claim based upon this particular theory of recovery.

Background

In July 1998, Mr. Borakove was transferred from IRS headquarters in Washington, D.C., to the agency's office in Dallas, Texas. The transfer was deemed to be in the Government's interest. At the same time, his fiancee, who also worked at the agency's Washington office, elected to transfer to Dallas as well, for her own convenience and not for the benefit of the Government. On arrival in Dallas, Mr. Borakove and his fiancee shared the same temporary quarters. In early November 1998, they purchased a home. A little less than a year later, they were formally married.

Shortly thereafter Mr. Borakove submitted a relocation voucher claiming closing costs of $6942.63 for the purchase of his new residence near Dallas. The agency paid only $3491.31. The reason behind this fifty percent reduction was that, in addition to his own name, the name of Mr. Borakove's fiancee also appeared on the title to his new residence.

Because he and his fiancee were not married at the time, the agency did not consider Mr. Borakove's fiancee to be part of his immediate family. Under applicable regulation, the agency concluded that the claimant was entitled to reimbursement for only a pro rata share of his interest in the newly acquired residence.

Mr. Borakove contends that he was later advised by an IRS officials that, if he could demonstrate his residence near Dallas was purchased solely with his own funds, the balance of his relocation claim would be paid. Mr. Borakove states that he did in fact submit documentation showing that he fully paid for the new residence from funds acquired prior to cohabitation with his fiancee. Claimant also writes that he was told by the same IRS official that the entire claim would be paid if he could demonstrate that, prior to their formal marriage in 1999, he and his wife had an informal marriage under Texas law. Although he provided the agency with documentation allegedly supporting these facts, the balance of his claim still remains unpaid.

Discussion

At the time of Mr. Borakove's transfer, the statutory authority for reimbursing an employee for real estate expenses incurred incident to a transfer was found in 5 U.S.C. § 5724a(d)(4) (Supp. IV 1998). Then, as now, the Federal Travel Regulation (FTR), which implemented this statute, delineated the conditions and requirements under which real estate expenses could be reimbursed. Among those requirements, the one which is of particular significance here is the requirement that title to the residence or dwelling which is sold or purchased be either in the name of the employee, or in the joint names of the employee and one or more members of the employee's immediate family, or solely in the name of one or more members of the employee's immediate family. 41 CFR 302-6.1(c) (1998) (FTR 302-6.1(c)).

The FTR defines "immediate family" as:

> Any of the following named members of the employee's household at the time he/she reports for duty at the new permanent duty station . . . : (i) Spouse; (ii) Children of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support . . . . ; (iii) Dependent parents . . . of the employee or employee's spouse . . . ; and (iv) Dependent brothers and sisters . . . of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support.

FTR 302-1.4(f).

Claimant objects to the fact that his agency refuses to recognize the unique status of his fiancee as a virtual member of his immediate family even before his formal marriage to her. He argues that there was an inchoate family relationship in effect long before the real estate transaction in question. He calls our attention to the fact that he and his fiancee were

transferred to Dallas as a "unit" and that, because of their close relationship, his fiancee was not permitted to work for him in the district office.

One would, of course, expect that there was a very close relationship between Mr. Borakove and his fiancee at the time he was transferred to Dallas. Real as this relationship may have been, however, it was not one which would render claimant's fiancee a member of his immediate family as that term is defined in the FTR. In the past we have examined this very issue of whether, under the FTR, a close partnership with a person other than one's spouse can render that person a member of a federal employee's immediate family. The conclusion reached, which we must follow here, was that under the definition of "immediate family," as it currently reads in the FTR, the only partner who may qualify as a member of the immediate family is the employee's *spousal* partner. Charles Lister, GSBCA 14673-RELO, 99-1 BCA ¶ 30,167 (1998).

It is well established that, absent a specific provision in statute or regulation which might permit it under certain circumstances, neither an agency nor this Board has the authority to waive the applicability of FTR provisions for any individual federal employee who is subject to them. E.g., Mark Hummel, GSBCA 15205-RELO, 00-1 BCA ¶ 30,901; Tanya Cantrell, GSBCA 15191-RELO, 00-1 BCA ¶ 30,894; Michael J. Kunk, GSBCA 14721-RELO, 99-1 BCA ¶ 30,164 (1998); Defense Intelligence Agency Employee, GSBCA 14745-RELO, 99-1 BCA ¶ 30,117 (1998). We agree with the agency, therefore, that Mr. Borakove's fiancee did not qualify as a member of his immediate family prior to her formal marriage to him.[1]

Claimant also urges us to direct the agency to compensate him fully for his real estate expenses because, at the time he purchased his home in the Dallas area, he was told by an employee in the agency relocation office that he could get full reimbursement of these expenses if he submitted his claim after he and his fiancee were married. The record does indeed show that Mr. Borakove waited until after he and his fiancee were formally married to submit his claim. Unfortunately, the advice given to Mr. Borakove was incorrect. Although Mr. Borakove's fiancee became a member of his immediate family following her marriage, she was not a member of his immediate family when he reported for duty at his new PDS in Dallas. The FTR provision which permits full reimbursement if the title to the new home is in the name of the employee and a member of his or her immediate family precludes reimbursement under this theory. Consequently, payment under that provision would be impermissible notwithstanding the incorrect advice given. Kevin S. Foster, GSBCA 13639-RELO, 97-1 BCA ¶ 28,688 (1996) (citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)).

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[1]Claimant mentions in his claim that, at one time, acting on the recommendation of an IRS official, he submitted documentation allegedly supporting the proposition that, prior to his formal marriage in 1999, he and his wife had an informal marriage under Texas law. The agency advises us in its report that it subsequently determined Mr. Borakove's submission failed to prove this fact. Since the claimant, although mentioning this in his submission, has not challenged this determination of the agency, we conclude that, for purposes of this appeal, he has abandoned this line of argument.

Another and perhaps more promising line of argument now being pursued by Mr. Borakove in his appeal to this Board is that the agency, in determining whether he is entitled to full reimbursement, should look to *equitable* rather than *legal* title. Generally, as we have already noted, an employee's interest in a property is determined by reference to the name appearing on the title documents. Claimant, however, now argues that the agency should recognize that the FTR provisions dealing with reimbursement for real estate expenses distinguish between legal and equitable title.

The provisions to which Mr. Borakove refers are found in FTR 302-6.1(c). Section 6.1(c)(2) discusses legal title interest. It states the general rule that, except as provided in section 6.1(c)(3), title to the residence is determined by the name of the party or parties on the title document. The section containing exceptions, namely, section 6.1(c)(3), discusses various equitable title interests. It describes certain types of title interests which can be considered to be equitable title interests which, regardless of what may be stated on the actual title documents, may still qualify for establishing title to the employee's residence for purposes of determining that the employee is entitled to payment of 100% of all reimbursable real estate expenses. These include title held in trust, title held by a financial institution, and title which includes an accommodation party who signs an employee's financing agreement, such as a mortgage, to lend his or her name to the arrangement for purposes of enhancing credit. Also covered in this section 6.1(c)(3) is the situation where title is retained by the seller who has signed a contract providing for fixed periodic payments and transfer of title upon completion of the payment schedule. A final part of section 6.1(c)(3) deals with "Other equitable title situations" where title is in the name of the employee and/or one or more members of his or her immediate family, and an individual who is not an immediate family member. One requirement of this final provision is that only the employee and/or a member(s) of the immediate family has made payments on the property.

Claimant now contends that, even if his wife cannot be considered a member of his immediate family at the time of transfer, she served as an accommodation party in the purchase of his residence. He states that she was part of the financing agreement and lent her name (i.e., credit) to the arrangement. The lender allegedly required her signature as that of an accommodation party on the financing document. Further, Mr. Borakove states that he fully paid for the new residence from funds acquired prior to his cohabitation with his fiancee and that she held no financial interest in the property unless he defaulted on the financing arrangement.

The agency tells us that the equitable title/accommodation party argument now made by the claimant is one not previously raised or documented at the agency level. Under the FTR it is the agency which is entrusted with the responsibility of making the initial determination of whether an employee has supported his or her claim for equitable title with satisfactory documentation. In the past, it has been our practice to refer cases back to the agency if such a determination has not already been made. E.g., John J. Toal, GSBCA 15206-RELO, 00-2 BCA ¶ 31,054; Robert J. Voltz, GSBCA 13656-RELO, 97-2 BCA ¶ 29,037. Although the agency recognizes that this is our practice, it argues that, in this case, quite apart from any documentary showing which the claimant would be required to make, Mr. Borakove's fiancee simply cannot qualify as an accommodation party because, from the time of purchase, she has shared Mr. Borakove's residence and thus already enjoyed a beneficial interest in the property.

For purposes of the equitable title provisions we are discussing here, the FTR defines accommodation party as: "an individual who signs an employee's financing agreement (e.g. a mortgage) to lend his/her name (i.e. credit) to the arrangement." FTR 302-6.1(c)(3)(iii). The agency, however, would have us focus on additional language contained in the preamble to the publication of the final FTR rule on equitable title provisions, which appeared in the Federal Register on May 27, 1994. After providing the definition of accommodation party, which appears in the actual regulation, the preamble goes on to state:

> Such an individual is a surety, becoming responsible for the payments should the employee not perform, but the individual has no beneficial interest in the property as long as the arrangement is not in default.

59 Fed. Reg. 27,488 (May 27, 1994).

Based upon this additional language in the preamble, the agency is apparently of the opinion that it would be incompatible with the role of an accommodation party to derive any benefit from the property in question. It, therefore, argues that, because Mr. Borakove's fiancee reaped a benefit from the property by sharing the premises prior to her marriage, she cannot be recognized as an accommodation party even if the claimant successfully demonstrates that she would otherwise qualify as one. We find the argument unpersuasive. We view the sentence in the preamble to the final rule as nothing more than an explanation of the definition which precedes it. As a type of surety, the accommodation party does not qualify for a beneficial interest in the property unless or until the contingency which would trigger the creation of such an interest actually occurs. This is easily enough understood and apparent from the definition itself. We are reluctant to conclude that anything more than this was intended. Were this additional sentence in the preamble intended to impose a specific restriction on accommodation parties, namely that they be precluded from sharing in any benefits associated with the property other than the beneficial interest to which they may or may not accede at some future date, then we believe that such a requirement would have been added to the definition itself.

We therefore decline to disqualify Mr. Borakove's fiancee as a possible accommodation party based upon this argument of the agency. Rather, we dismiss the case with the recommendation that the claimant provide the agency with acceptable documentation of the alleged accommodation. See FTR 302-6.1(c)(3)(iii)(G). Since the claimant also contends that the purchase of his residence in the Dallas area was solely with his own funds, he may also wish to consider submitting suitable documentation to the agency that the conditions listed for other equitable title situations have been met. See FTR 302-6.1(c)(3)(v)(E). If the agency denies Mr. Borakove's claim for 100% reimbursement after consideration of the equitable title provisions and claimant's documentation, claimant may again pursue this claim with the Board in accordance with applicable statute and regulation.

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EDWIN B. NEILL
Board Judge