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

March 27, 2002

GSBCA 15737-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), asks that we review his agency's ruling that he is not entitled to reimbursement of more than fifty percent of certain relocation benefits associated with the purchase of a residence at a new permanent duty station (PDS). We affirm the agency determination.

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, Ms. Sultan, 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. In early November 1998, Mr. Borakove and Ms. Sultan took up joint residence in a recently purchased home in the Dallas area. A little less than a year later, they were formally married.

Shortly thereafter Mr. Borakove submitted a relocation voucher claiming closing costs for the purchase of his new residence near Dallas. The agency paid only half of the amount claimed. 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 Mr. Borakove and his fiancee were not married at the time the residence was purchased, the agency did not consider Mr. Borakove's fiancee to be part of his immediate family. Under the applicable provision in the Federal Travel Regulation (FTR), where a name in addition to that of the employee appears on the title to the property being purchased, full closing costs normally will be paid only if that other individual is a member of the employee's immediate family. 41 CFR 302-6.1(c) (1998) (FTR 302-6.1(c)).

Mr. Borakove appealed his agency's determination to this Board. He argued that, even before his formal marriage, he and his fiancee had an informal marriage and that she was already a virtual member of his immediate family at the time the home was purchased. We concluded, however, that the regulation, as written, did not cover the situation described by the claimant and that the agency had, therefore, acted correctly. Fred Borakove, GSBCA 15379-RELO, 01-1 BCA ¶ 31,409.

In initially arguing his claim before the Board for 100% reimbursement of closing costs, Mr. Borakove presented an alternative argument which he had not presented previously to his agency. This alternative argument was based upon one of a limited number of exceptions in the FTR to the general rule that title to the property in question must be in the name of the employee alone or, in the case of joint names, in the name of the employee and one or more members of his or her immediate family. The exception relied upon by Mr. Borakove in making his alternative argument was that which permits full reimbursement of the closing costs if the other person's name is included on the title as an accommodation party. See FTR 302-6.1(c)(3)(iii).

We dismissed Mr. Borakove's claim, based upon this alternative argument, as premature. The claimant had not yet submitted to his agency a fully documented claim based upon this theory and, as a result, the agency had never been given the opportunity to pass on the adequacy of any such submission.

In the course of arguing his case before us, Mr. Borakove had also claimed that he alone had made the payments on the home which he and his fiancee had occupied both before and after their formal marriage. This led us to suggest, on returning the case for further consideration by the agency, that the parties also consider whether the claimant might be entitled to full reimbursement of closing costs based upon another exception to the normal rule, which also appears in the FTR. Specifically, we had in mind the exception which permits reimbursement of all closing costs even if the property is held jointly by the employee and an individual who is not a member of the employee's immediate family when, among other things, it can be demonstrated to the agency's satisfaction that the employee made all payments on the property. See FTR 302-6.1(c)(3)(v).

Following our first decision on Mr. Borakove's claim, the agency did consider whether the claimant was entitled to full reimbursement of the claimed closing costs based upon the theory that his wife's name was on the title to his home only as an accommodation party or based upon the theory that he, notwithstanding her name on the title, had, in fact, made all payments on the property. The agency ultimately concluded that full payment could not be justified on either ground. It is this determination which Mr. Borakove now asks us to review.

Discussion

We turn first to the claimant's contention that his wife's name appears on the title to his home solely as an accommodation party. The FTR states:

> An accommodation party is 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 FTR also lists some specific conditions which must be met before an individual whose name appears with that of the employee on the property title can be considered to be an accommodation party. One condition of particular interest to us in this case is the requirement that the lender actually required that the signature of the accommodation party be on the financing document. Another condition is that the employee be liable for payments under the financing arrangement and that the accommodation party have no financial interest in the property unless the employee defaults on that financing arrangement. A third condition of importance here is that the employee provide acceptable documentation of the accommodation. Id.

In support of his claim that his fiancee, Ms. Sultan, was actually required to sign the financing document as an accommodation party, Mr. Borakove has submitted two letters. The first is from the loan officer who actually assisted him with the loan to purchase the house in which he and his fiancee planned to live. She writes:

> As the loan officer for Mr. Borakove and Ms. Sulten [sic], it was my responsibility to structure this loan so that the process and closing would occur quickly and simply for my customers. After reviewing their financial situation, I determined that it would be in their best interest to add Ms. Sulten [sic] to the loan for income qualification, which would improve the debt to income ratio. Since that was agreeable to both parties, we pursued that avenue for the approval process.
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> As a result, their loan was approved quickly, due to the added strength of using Ms. Sulten's [sic] income for approval purposes.

The second letter provided is from a loan officer associated with a different mortgage firm. She writes:

> As requested, I have reviewed your previous application for a mortgage loan. I've determined that, given the obligations that you had at the time, your ratios would have been beyond our guidelines if we considered your income alone. Having a second Borrower was necessary for the approval.

Mr. Borakove readily admits that there are no documents that would, per se, limit Ms. Sultan's financial interest in the property purchased prior to her formal marriage to him. From this we conclude that there is no documentation of the alleged accommodation itself. This lack of documentation is particularly troublesome when one reads the letter of the loan officer who, by her own admission, was the "loan officer for Mr. Borakove and Ms. Sulten [sic]," who considered both these individuals to be "my customers," and who assisted them in obtaining approval of "their loan." Neither does her letter specifically state that Ms. Sultan's signature on the financing document was required as a condition to approval. Rather it strongly suggests instead that, by including her as an applicant for the loan, the application was of course strengthened and thus expeditious approval assured. From this it appears much

more likely that Ms. Sultan participated in the loan transaction simply as a co-borrower with full expectation of becoming a co-owner of the property rather than as a formal accommodation party.

The warranty deed and the deed of trust, both of which are included in the record, tend to confirm that Mr. Borakove's fiancee figured in the purchase of the new home as a co-borrower and co-owner rather than as an accommodation party. The warranty deed identifies both "Fred S. Borakove, a single person and Terri J. Sultan, a single person" as together being the "Grantee," while the deed of trust identifies the same two parties as together being the "Borrower."

Admittedly, the letter from the second loan officer indicates that the addition of Ms. Sultan to the loan transaction as a co-borrower would have been necessary for purposes beyond that of simply expediting approval for financing. However, in the absence of any documentation confirming the actual existence of an accommodation, the letter can be read as indicating only that, without Ms. Sultan's assistance as a actual co-borrower and co-owner it would have been impossible for Mr. Borakove to obtain his residence of choice. Ms. Sultan's apparent willingness to support the transactions in this capacity is, of course, not to be wondered at since, at the time, she and the claimant apparently considered themselves already informally married and were in fact later formally married.

When the issue of Mr. Borakove's fiancee being an accommodation party was first broached to the Board, the agency argued that, even though this issue had not been raised previously at the agency level, we should rule that this basis for reimbursement was obviously not available to the claimant. In the opinion of the agency, Mr. Borakove's fiancee could not qualify as an accommodation party because, as an accommodation party, she was to have no beneficial interest in the property other than that to which she might accede in the event Mr. Borakove should default on his financing arrangement. We rejected this argument. We agreed that there is undoubtedly a beneficial interest to which a genuine accommodation party has no right unless the actual purchaser defaults on the financing arrangement. However, that interest was not to be confused with the beneficial enjoyment of the premises which an actual owner, on his or her volition, might choose to offer to an accommodation party. Neither did we see such a gratuitous benefit as being in conflict with the potential right of an accommodation party to the premises in the event that the actual owner should default on his financing agreement.

The claimant should not, however, understand our ruling that living with the claimant did not necessarily disqualify his fiancee as an accommodation party as somehow relieving him of his duty to demonstrate that, as an accommodation party, Ms. Sultan met the regulatory requirement that she be free of any financial interest in the premises. Our ruling applied only to the benefit which Ms. Sultan allegedly derived from sharing Mr. Borakove's home with him. We simply held that this fact, in and of itself, did not necessarily disqualify her from serving as an accommodation party. In recommending that Mr. Borakove be given an opportunity to provide the agency with acceptable documentation of the alleged accommodation, we did not intend that he be excused from demonstrating that she was free of any financial interest in the new home.

We, therefore, fully expected the claimant, in making his case to the agency that his fiancee was in fact an accommodation party, to demonstrate, among other things, that she was free of any financial interest in the property unless he should default on its financing. We agree with the agency that he has failed to demonstrate this. In the absence of convincing proof that there was in fact an accommodation, we find that the documentation he has provided indicates rather that, as a co-owner of record of the property, Ms. Sultan, from the time of purchase, has had an undisputed financial interest in the property.

The case made by Mr. Borakove for the theory that he alone made payments on the house is equally unconvincing. The agency is prepared to accept the fact that the down payment on the purchase of the home, although made from a joint account, was derived solely from Mr. Borakove's personal funds. Where the agency contends that the claimant's case fails, however, is in his apparent inability to demonstrate that, prior to his formal marriage, he made all monthly mortgage payments from his own funds. Mr. Borakove states that initial monthly mortgage payments were made with funds from his own checking account but that subsequent payments were made from a joint checking account with co-mingled funds. He argues, however, that this is not a pivotal issue because, at the time he and his fiancee were cohabiting, they were informally married and, later, formally married.

We disagree. The FTR requirement is that the employee or one or more members of his immediate family "made payments on the property." See FTR 302-6.1(c)(3)(v)(C). The agency contends that, despite repeated requests to Mr. Borakove, he has failed to submit financial documents proving that only he or members of his immediate family made payments on the property. There are, of course, two issues here which understandably are of concern to the agency. First is the question of whether the *payments* in question were actually made by the claimant himself. The second is whether this FTR requirement can be considered met if some of these payments, although actually made by the claimant's fiancee prior to their marriage, were nonetheless made with funds readily traceable to him.

Unfortunately, Mr. Borakove has provided nothing which would be responsive to either of these two concerns. He does not challenge the agency's statement that he has failed to submit any documents proving that he or a family member made payments on the property. As to the issue of whether payments – by whomever made – were from his personal funds, he simply states without any documentary support: "Suffice it to say that I had enough funds in the accounts to make the mortgage payments without using Ms. Sultan's funds." In the absence of any documentary evidence relevant to these concerns, the agency cannot be faulted for refusing to allow full reimbursement of closing costs based solely upon the bare but unsubstantiated contention of Mr. Borakove that only he made payments on the property.

The agency's determination that Mr. Borakove's closing costs cannot be paid either on the grounds that his fiancee was an accommodation party or that he alone made payments on the property is affirmed. The claim is denied.

EDWIN B. NEILL

Board Judge