

EXCISED

J. -S.

Foreign Service Grievance Board

August 31, 1973

TO: The Secretary of State
Department of State

SUBJECT: Record of Proceedings No. 71-02-STATE-D2
Remedial Order in the Case of FSSO-2
[Grievant]

[Grievant] forwarded a grievance to the Board on September 16, 1971 in which he maintains that, on his reinstatement to the Foreign Service in 1966 following IS intervening years in the Military, the Department wrongfully placed him in Class FSSO-2, step one, through administrative error. He contends that he was entitled to reemployment in the class and salary comparable to the average attained at the time of his appointment by his 1948, FSS-9 contemporaries, which by his calculation was FSSO-I, step four. The Department's comparability rating, FSSO-2, made on the basis of the advancement of his peer group was, he claims, computed from inaccurate and outdated information. He further states that his restoration to duty should have been accomplished without the attachment to his classification of a medical restriction on his employment.

The remedies he seeks are: (1) adjustment of his November 1, 1966 FSSO-2 grade to FSSO-1, step four with retroactive pay; (2) conversion of his classification from FSSO-DES to PSSO; (3) an assignment to refresher training with subsequent reassignment to an administrative position and (4) certain corrections of his files.

A preliminary investigation by the board, following acceptance of jurisdiction over his grievance, led to the decision to hold a formal hearing. The hearing was conducted on July 5 and 10, 1973 after a series of delays and postponements which do not preclude full consideration of the case on its merits.

A copy of the transcript made of the hearing was given the grievant.

Background

[Grievant], presently a communications specialist in the Office of Communications, entered the Foreign Service in February 1946. He had served in the U. S. Army the preceding seven years and had attained the rank of Reserve Major. In September 1948, while serving in grade FSS-9, he volunteered to return to active duty and

S:

79

the Department granted his military leave. In 1951, at the termination of a three-year period of service, he volunteered for a further three years' duty because of the Korean situation. Prior to this three years of additional volunteer duty, he had been advised officially that indefinite military leave had been granted him and that no extension was required. In August 1953, he wrote the Department and inquired again about his reenployment rights with the Foreign Service and, more specifically, what rights would be available to him upon the expiration in 1954 of his then current tour of duty. The Department replied inter alia, "it does not appear that you now have a right to reinstatement to your Foreign Service position." The letter added: "Current severe budgetary restrictions are requiring a large reduction in force.. and it is not possible to assure you that your employment will be possible when you are released from the military service." From this, the grievant states, he concluded that his job opportunities in the Foreign Service were virtually nil. In any event, he elected to remain in the Army. He continued on active duty into 1956 when he was retired, in the rank of Reserve Colonel, for a disability diagnosed as Parkinson's disease. In May 1966, while undergoing treatment at the Walter Reed Hospital, he read an article in the Army Times from which he gathered that he was entitled to restoration rights in the Foreign Service under provisions of the Reservists' Act. He approached the Department with this information. After some research, the Department notified him in April 1966 that a determination had been made that he had reinstatement rights to the position he held when he was recalled to Army duty in 1948. A series of consultations within the Department followed, centering on an assessment of the officer's qualifications and skills and experience, identification within the Office of Communications of an appropriate position, and the researching and computing of a peer group comparability rating. In this same period, a Medical Division determination was made that he was disqualified for worldwide duty in the Foreign Service. At the request of the Personnel Office, however, he was granted medical clearance for service within the Department. On November 1, 1966, he accepted an appointment in the Foreign Service and a position in the Office of Communications with the classification FSSO-2 MUSD, step one. MUSD, signifying the medical restriction imposed on his services, was later changed to DES, indicating the same limitation. In 1968, the officer first appealed the grade level at which he was reinstated. That initial appeal did not yield any results favorable to [grievant], whereupon he filed this grievance with the Grievance Board soon after its establishment. ■-

Discussion and Findings

; 'V }

The first and most complicated part of this grievance is the, claim

of administrative error as to grade assignment: upon reinstatement in Kovsrober IS66.

It is important to understand at the outset that this is not an ordinary promotion request. By the grievant's clear statements, it is a claim that rests primarily and almost solely on the propriety of the grade assignment made in November 1966.

A second observation is that the Board is not required to interpret with any precision the applicable laws as respects reinstatement rights. It is reasonably clear that [grievant]'s legal rights to reinstatement rested primarily under provisions of the so-called Reservists' Act. The Department had mishandled this matter. Early in his period of military service, [grievant] had been advised in writing that it was unnecessary for him to apply for extension of his leave and that it was 'for an indefinite period'.¹⁷ However, in 1953, he was advised that he had no mandatory reinstatement rights, that he would be considered for voluntary reenlistment if he should choose to reapply, but that his chances were slim. It is apparent that in August 1953 the Department was not adequately aware of the provisions of the Reservists' Act. However, in November 1956, when the matter was raised again, the Department conceded reenlistment rights.

At some point during this long absence, the Department could have insisted on [grievant]'s return to Foreign Service duty if he should wish to preserve reemployment rights. But it did not do so. Moreover, it is understandable that [grievant] should decide to stay in military service when he was advised in 1953, in error, that he had no reemployment rights.

A concluding observation about legal reinstatement rights is that this aspect of the case has no important bearing on the issue in this case. It appears that the Reservists' Act would not have required any grade assignment higher than the grade that Schneider had attained when he left for military service in 1948.

Thus, the claim of administrative error hinges almost solely on conditions, if any, that have been raised by the Department throughout the long processing of this case.

Rank Calculation

Review of the evidence makes it clear that three factors played a part in the Department's grade assignment in November 1966.

Appraisal of [grievant]'s experiences and skills acquired during his military service indicated clearly that many of those skills and abilities were transferable and valuable to the Office of

Communications. The evidence is inadequate to permit any quantitative assessment of this feature of the case but it is not unimportant.

Secondly, a survey was made of the rates of advancement of some 60 employees in [grievant]'s peer group in 1948 and who were still in the Foreign Service in 1956. More will be said about this later. It suffices at this point to say that this survey would support a minimum grade of FSSO-2, with a grade of FSSO-1 if allowance should be made for the fact that the survey was made on the basis of data a year or more out of date.

The third and conclusive factor, as the Board appraises the evidence, was the fact that there was an available vacancy at FSSO-2 in the Office of Communications. Apparently, there was no FSSO-1 vacancy.

Based on the facts up to this point, [grievant] would not have a good case. He was reinstated at a grade well above the legal requirements of the Reservists' Act. It was one grade below optimum application of the peer group method, [grievant] accepted the offer of the peer group method. [grievant] accepted the offer of the FSSO-2 job. The job was a job for which he was qualified by reason of his skills and abilities, acquired in military service. It could well be maintained that this was a fair and just grade assignment considering all the circumstances, especially since it was obvious that the peer group method was not then the sole consideration. That, in essence, was the Department's answer to the pre-Grievance Board complaint.

A further view should be stated about Schneider's initial acceptance of FSSO-2. It seems apparent that he was not then fully aware of all aspects of the Department's peer group computation. When he did examine this feature, he discovered inaccuracies. It was not too late for him, to complain in 1955.

It may also be noted that there was some possible inconsistency in the Department's initial determination. The Office of Communications had been requested to see if there was a job available at about \$15,000 per year which would then have been FSSO-1. It is well known that service ranks are personal ranks. Thus, [grievant] could have been reemployed at FSSO-1 but assigned to an FSSO-2 job. However, this would not be mandatory unless the peer group method should be the sole determinant.

The real strength in Schneider's case developed after the present grievance was filed. In answering this grievance at the informal stage, the Director of Personnel wrote, in part, in a letter dated

September 8, 1971:

"I have reviewed your entire case, and I find, no justification for the record for adjusting either your class or salary. The legislation which granted you restoration rights (5 USC 3203(b)) entitled you solely to the position you held when ordered to active duty. In an effort to be as considerate and forthcoming as possible, the Office of Personnel reviewed the FE list of 1948. We found: the names of 50 persons who were FSS-1's in 1948 and were still in the Service in 1966. Of these, one had risen to Class 1, four to Class 2, 23 to Class 3, 23 to Class A, and nine to Class 5. It was decided to offer you the first step of FSSG-2, which you accepted.

"his answer tended to tie the Department's position with the peer group method.

Of even greater significance than the letter noted above is the fact that at a pre-hearing conference, reaffirmed at the hearing, the Department stipulated that the peer group method would be determinative in determining the rank aspects of the case.

As has been indicated earlier, the Grievance Board has grave reservations about use of the peer group method as the only significant determinative factor in a case of this sort. We do not consider this case to be a precedent, but we do believe that the Grievance Board is substantially bound by the stipulation entered into voluntarily by the parties which, in turn, goes back to the Director of Personnel's letter of September 8, 1971,

Viewed in this light, the general answer is quite obvious. Technical analysis of the peer group method in November 1966, as calculated by [grievant] and not contested by the Department, shows that either by use of average or mean methods the peer group was at FSSO-1 step four.

We do not adopt the "step four" refinement. Stipulation to the peer group method does not necessarily mean such an exact application.

The Board concludes that Echeicer should have been reinstated in November 1956 at FSSO-I, step one.

Correction of this administrative error necessarily means that retroactive pay must be granted to [grievant] in amounts equal to the difference between FSSO-1 and FSSO-2 at each of the step rates that [grievant] has occupied since November 1956 and that his current rank should be FSSO-I at the step rate that he now occupies.

USE Designation

The first and second major issue in the case concerns the USE designation. The grievant has stated that since he had a statutory right to re-employment in the Foreign Service, it follows that the Department cannot uphold its regulations or standards as a bar to his reemployment in the Foreign Service. The Board position in this matter is that the DES restriction resulted from a decision by the Medical Division and that any removal of the medical limitation on his services is a determination appropriate for the Medical Division to make.

interfered with his ability to perform his present work in a

The evidence does indicate that Schneider's physical problems have not been in a fully satisfactory manner. However, there is no basis for the Grievance Board to conclude that the limitation against foreign service is not appropriate. It does not "make sense" to argue that a physical disability acquired while absent from the Foreign Service, should be disregarded when that same disability could be considered as a limitation if it had been acquired while on active duty in the Department.

Other Relief Sought

The grievant has also requested an assignment to refresher training courses and then reassignment to an appropriate position in administration. The Board believes that this matter should be the subject of consultation and determination between the grievant and the Department.

The grievant has requested deletion from his most recent performance evaluation reports of (1) any references to his previous military service and (2) any comments relating to his medical condition. With reference to (1) above, the grievant has admitted that it is a matter of common knowledge that bias against military retirees

exists through the Federal bureaucracy that an outstanding achievement but a handicap to be concealed to avoid discrimination in competing for opportunities for career advancement. Insofar as this grievance is concerned, the above line of argument is not substantiated by any evidence presented to demonstrate that such references in his performance folder are either in violation of regulations or are disadvantageous to him. The Board, therefore, does not support this particular request. With reference to (2) above, the regulations on this subject, as contained in 35 CFR 523, stated under the heading Inadmissible Comments:

"Medical problems which may have affected the employee should be mentioned, but should not be discussed in detail."

for B/O/FCA, with attachments, from J. M. Bushong to
Jules Bassin.

The Department representative has stated that the Department has no objection to removing from the grievant's personnel file the material which led to the present grievance. He explained that prior to the establishment of the new grievance procedures the personnel file was the only proper repository for communications between employees and the Department on matters of complaint. In

The Board has been able to identify only one report in the grievant's performance folder which contains a reference to his medical condition, "The following is stated in the Development Appraisal Report for the period November 1, 1966 - June 15, 1967 under the heading Limiting Factors:

"The only limiting factor I am aware of that may possibly affect Mr. Schneider's career is his health, which was the deciding factor in his retirement from the military service. I can honestly say that in the short time he has worked for me, his present physical condition appears to be good and in no way prevents him from doing a fine job."

The Board finds that the above statement is not an inappropriate remark in the Development Appraisal Report or at variance with regulations.

Finally, the grievant desires the removal from his official personnel folder (administrative file) of the documents listed below relating to his initial request, for an administrative review of his grade level:

- a. Memo of 1/8/68 from [grievant] to John W. Drew, Jr.
- b. Memo of 8/13/68 from Samuel C. Mitchell, Jr. to [grievant].
- c. Memo of 10/23/63 from [grievant] to Howard P. Kace.
- d. Letter of 10/28/68 from [grievant] to Idar Rimestad.
- e. Undated memo containing a detailed chronology for the period 7/7/66 through 3/26/69.
- f. Letter of 8/15/69 from Howard P. Kace to [grievant].
- g. Memo of 8/6/69, with attachments, from J. H. Bushong to Jules Sassin.

The Department representative has stated that the Department has no objection to removing from the grievant's personnel file the material which led to the present grievance. He explained that prior to the establishment of the new grievance procedures the personnel file was the only proper repository for communications between employees and the Department on matters of complaint. In

■this connection, the Director of Personnel is ordered, by separate copy of this Remedial Order, to remove the above-listed material from the grievance's official personnel file and forward it to the Board for storage.

Summary of the Board's Remedial Recommendation and Orders

On the basis of its findings that [grievant] should have been reinstated in November 1966 at FSSO-1, step one, the Board recommends to the Secretary that Schneider's current rank be corrected to FSSO-1 at the step rate that he now occupies and that he be granted retroactive pay in amounts equal to the difference between FSSO-1 and FSSO-2 at each of the step rates that he occupied since November 1966.

The Board's position on Schneider's request for conversion of his classification from PSSO-DSS to FSSO is that any removal of the DSS restriction is a determination appropriate for the Medical Division to make.

With reference to the grievant's request for assignment to refresher training with subsequent reassignment to an administrative position, the Board believes that this matter should be the subject of consultation and determination between the grievant and the Department.

The Board does not uphold the grievant's request for removal from his performance file of references to his previous military service and his medical condition.

However, the Director of Personnel is ordered, by separate copy of this Remedial Order to remove from the grievant's official personnel file and forward to the Board for storage the documents listed at the bottom of Page 7 of this Memorandum relating to his initial request for an administrative review of his grade level.

The Director of Personnel's certification of compliance with the Board's order, directly above, should be submitted to the Board within the next 30 days.

E. Siskin
Chairman

Foreign Service Grievance Board cc;
[grievant] Alan Saywid, Esquire DG/PER - Mr. Blood PEH/CA/CSS
- Mr. Mitchell