

EXCISION NO. 511

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant

and

[Agency]

Record of Proceedings

No. []

Date: June 6, 1980

For the Foreign Service Grievance Board:

Presiding Member: Board Members:

Special Assistant
to the Board:

Representative for the Grievant:

[]

Representative for the Agency: [

1

In order to prevent an unwarranted invasion of privacy names of individuals and other identifying information have been deleted from this material in accordance with Section 552(b) (6) of the Freedom of Information Act. These names and other identifying information are also withholdable under the Privacy Act.

I. GRIEVANCE

[Grievant], a Foreign Service Reserve Officer, Class [J filed a grievance with the Board on August 16, 19--.

[Grievant] contends that the manner in which the [Agency] terminated his time-limited appointment, as a result of a [office] reorganization, violated a number of laws and regulations, and that the final administrative action itself was in reprisal for his having filed grievances with the [Agency]. As remedies, he asks rescission of the termination letter, reinstatement in the [Agency], retention and transfer to another position, either in the [Agency] or abroad and an equitable opportunity to convert to a permanent appointment.

In denying his grievance, the [Agency] pointed out that his termination was decided only after he had been considered for other positions, and that the determination that his skills were no longer needed fell within management discretion, thus being non-grievable. The [Agency] found no evidence that the termination was a reprisal for his participation in the grievance procedure. It conceded, however, that the employing [office], had undertaken a reorganization without obtaining the necessary prior approval.

The Board accepted jurisdiction over certain aspects of the case onjdtjf^i -. A hearing was held [dates] in order to consider the merits of the case. Transcripts were provided to the parties.

II. ISSUES

At the prehearing conference on [date], it was stipulated that [office] had reorganized elements of the [office] without prior approval of top management, in violation of 1 FAM 101. This stipulation left unresolved the following two issues in this grievance:

1. Did the officer's failure to comply promptly with the provision of 1 FAM 101 adversely affect the grievant's employment status?
2. Was the termination of the grievant's time-limited appointment in reprisal for his having filed grievance with the [Agency]?

III. BACKGROUND

[Grievant] entered on duty in the [Agency] on November 15, 19—. He was hired to become [title/office]. [Grievant] prior to entry into the Service was [a prominent academician] and a widely recognized authority on [international social issues].

[History of office staffing].

[Date] , about a month after [Grievant's] entry on duty, (Mr. M, to whom [Grievant] reported, issued a memorandum outlining the guidelines for the inter-relationship of [a related office? and [Grievant's] office. The (head of the related office/, [B] , was charged with developing and carrying out a government-wide approach to [subject matter of the two organizations]. The functions having to do strictly with [subject] were to be carried out through [Grievant's] office^ Support for [related office] was a major function of that office. The /head of the related office] was authorized to ask [Grievant] to exercise administrative supervision over the [head of the related office's] staff during his extended absences. But there was no direct reporting link between (the two men/- [Both reported directly to the same person]. It is germane to add that [Amb. B] outranked his titular superiors in the [office].

On September 5, 19-- , the new [title, Mr. C], informed [Grievant] that [D] wished to merge [grievant's] office with that of

(the related office). A few days later, in answer to inquiries from [Grievant] , the ^Agency element] designate, [Mr. D] , told him that in any reorganization his position and authority as /office directory would in no way be diminished.

On September --, 19--, [Amb• B] , then on vacation, asked [Grievant] by phone to assist him in searching for a senior official of ambassadorial stature to succeed him. [Amb- B] also asked [Grievant] to seek out the views of [title, House Committee] and leaders of key voluntary organizations in the field regarding the possible appointment of [Mr. E], a Foreign Service Officer, Class [], as the next (head of the related off ice]. He likewise asked [Grievant] to request the A J and others to relay their views directly to the /element head/designate [D] and to [Amb. B].

On September -, 19-, however^ [Amb- B] told [Grievant] that he and [Mr- D] had agreed upon [Mr. E] as his successor

On September 25, 19--, the [office] submitted to the Deputy Assistant Secretary for Equal Employment Opportunity its FY 19- Affirmative Action Plan. The report noted the hiring of anjminority memberjas office director in the [office].

At about this time [Grievant] expressed his view that *if* the [title, related office] post was not to be filled by a man of ambassadorial stature, he felt that he should be considered for the job. Among the factors in his favor, he felt, was the [officers] citation of himself in the EEO Plan.

A number of events followed which had a direct bearing on the evolution of this case-September --,19--

[D] announced the merger of the [Grievant^js] Office and the /related office]. This action was undertaken without obtaining prior approval of [management] as provided in [the regulation^.

On or about October -, 19-- - the [head of the agency and two other members of the top echelon] concurred in [Mr. E"^[appointment and in his having direct responsibility for [Grievant *s] {Office).

October -, 19- -Mr- E/ issued a memorandum proposing [Grievant] as Deputy mead of related office/. This action also lacked prior approval of /management]. October -, 19- - The/Agency' s senior officer for management/ issued a general memorandum calling attention to the continuing validity of Jthe regulations/ which requires all organizational changes affecting the responsibilities of office directors or above to receive the prior written approval of

December -, 19-- - [Grievant], by this time increasingly concerned with his status in fof f ic^l sought advice from [name], Equal Employment Opportunity Counselor, about the situation, particularly in light of the [office's] Affirmative Action Plan.

December -, 19- - [GrievanC] in a memorandum to the (Agency's senior office for management/, through [Mr.C], inquired about the status of his own office in the absence of final approval

by [management] of [Mr. D's] plan of September 27. No response to this inquiry was ever received.

December -, 19-- - [Mr. J and Mr. F], [another element head] co-authored a memorandum requesting the establishment of a new position in [F's office]; [Grievant], to deal with a special social question/. [Mr. G] /another official at the next higher level/, concurred in the request for this position, but it was eventually refused by [Mr. H, senior management official].

February --, 19-- - [Grievant] submitted a written EEO complaint stating his view that the ^Agency/ had failed to comply with EEO laws and regulations in filling [Amb. B's] T. March -, 19-- - [Grievant] withdrew the EEO complaint and on March -, 19-- submitted a consolidated grievance, alleging the |Agency'_s/ violation of the EEO Plan and ,the regulations about the clearing of reorganization/.

Early in March 19-- - The ^Agency^r conferred the personal rank, of Ambassador on (Mr.

March -, 19-- - The ^Agency/ concluded an agreement with the ^exclusive employee representative^ to "assure that Foreign Service personnel in EEO categories are afforded equitable consideration for all vacancies for which they are equally qualified, notably career-enhancing positions."

April -, 19-- - In a memorandum to [Mr. D], [management] indicated that it was "now prepared to render a decision" on [Mr. D's] reorganization plan-

June -, 19-- - Formal approval orT'reorganization.
[Grievant] also received termination notice, effective
September -, 19-•

June --, 19-- - [Mr. F] made a formal request for
[grievant *sj assignment to his [office] to fill a previously
authorized position.

July -, 19-- - The [Agency] denied [grievant*s] grievance
submitted on March -, 19-•

July -, 19- - The [Agency] inserted in the Congressional
Record a report indicating that it had on the staff of [the
related office], a Ph.D. with 20 years of academic experience.

August -, 19- - [a senior personnel office^] in
response to [F's] request for [grievant]^ said that /his
office]had not received a formal request from [F] for his
transfer, and indicated that the [Agency] must give priority
consideration to career Foreign Service personnel for
vacancies.

August -, 19- - [Grievant] submitted his grievance to
the Foreign Service Grievance Board.

September --, 19-- - [F] withdrew /hisj request for
[grievant *s] transfer in view of his "uncertain status-"

On January -, 19-, [Grievant] went off the employment
rolls of / >?-y/-Kfy j pending the resolution of
his grievance.

IV. POSITIONS OF THE PARTIES

A. Adverse Impact of [Regulatory] Violation

Grievant' s Position

The grievant alleges that the unauthorized implementation of numerous aspects of the [office] reorganization had a clearly injurious effect upon him. When he entered on duty, he raised questions about the duration of his limited appointment and had been informally assured that, because there was an increasing need for services in)hi_sj field, he need not be apprehensive about the long-term need for his own services.

He points out that when he first asked [Mr. D] about the reorganization in September, he received assurances that his own position would not be harmed. Yet within a. month his office was merged with that of the [related office]. Within less than three months he was stripped of all supervisory and policy-making responsibilities and, according to uncontroverted testimony, his orders were frequently countermanded and the last remnant of his authority virtually removed. At the same time, in the absence of an official confirmation of the reorganization by the [Agency's] top management, he could obtain no clarification of his status. Because of the ambiguity of his position, he was hampered in effectively seeking another assignment within [two other co-equal element? of the Agency] -

The grievant conceded that he would not be selected as [head of the newly merged office] if a candidate of ambassadorial rank were available—and he asserts that at least one was in fact available at the time of [Mr. E's] selection—because the post justified a high-ranking official. He maintains, however, that if no candidates of ambassadorial rank were available and the actual candidates had been narrowed to [E] and himself, he should have been selected because of his training and experience, had the [Agency] EEO plan been effected in accordance with [the Agency head's] directive.

Agency's Position

The agency denies that the delay in the implementation of all of the provisions of [the regulation] in connection with a reorganization of the [office] adversely affected [grievant's] employment status. It notes that as early as mid-October 19 78- the Acting [head of the Agency] had concurred with the appointment of [Mr. E] as Ambassador [Agency's] successor and with his having direct responsibility for the [newly merged office]. Eventually, [management] also concurred in this action. Thus all levels of management in the [Agency] supported these actions, and delays in the administrative documentation did not harm [grievant's] status. The agency also calls attention to the fact that on April --, 19-- [management] specifically approved the merger of the [office] with the [related office].

In sum, the agency contends that the consolidation of the two units resulted from a valid management decision to combine all [units concerned with the Grievant's subject specialty] in one office. The agency further claims that the scheduling of the changes regarding [this subject] was properly related to the timing of Ambassador [B's] retirement and hence had to be decided before all aspects of the [office] reorganization were fully resolved and implemented. The agency maintains that [grievant's] criticisms of management's decisions were merely personal opinions and did not invalidate those decisions.

B. Termination of Time Limited Appointment as Reprisal Grievant

The grievant contends that his participation in the grievance procedures led to a reprisal by the [Agency] in the form of a request for the termination of his services by the [head of the office], and that such action violated [the Agency's] regulations.

He notes that even after the formal abolition of his office directorship, his own termination was not a necessary sequel. At least one other FSR who lost his office directorship under the same reorganization had not been terminated. The [Agency], he asserts, could have assigned him to another long-standing vacancy in the [office] at his level, for which he was qualified, but instead chose to terminate him.

No other members of the [office] staff whose time-limited appointments would expire earlier than his had been given notice

of early release. At the time, the House Appropriations Committee's reduction of the [office] staff by one-half still waited final action by the full House, the Senate, and the House-Senate Conference Committee.

Pending his final separation, despite the [Agency's] reiterated emphasis on the urgency of (the grievant's/*and^{tf} his own acknowledged expertise in the subject, [grievant] complains that he was being temporarily transferred to the [another office], which is not expressly concerned with Jgrievant's specialty^ . Agency

The record, the agency declares, does not support a finding that the grievant's time-limited appointment was terminated as a reprisal for his having filed grievances and/or having made EEO complaints. The combination of the [specialty] functions in [office] into one office made it possible to abolish [grievant's] office director position. The agency is also convinced that [management] would never have approved establishment of a [deputy/ position, especially because [management] had earlier commented about "topheaviness" in [office?]. The agency refers to efforts by Ambassador [B] and [D] to find another position for [grievant] within the [Agency] and points out that a position was never actually established within [Mr. F's office] which was appropriate for an officer of his rank.

The agency notes that [grievant *s] time-limited appointment was not for the maximum five-year period authorized under Section 522

of the Foreign Service Act, and was terminated in accordance with established procedures.

The agency is of the opinion that speedier implementation of the provisions of [the regulation] would in no way have changed this action other than moving up the date of [grievant*s] termination and thus more plainly showing that the termination had not resulted from his grievance or EEO complaint.

IV. DISCUSSION AND FINDINGS

As the foregoing sequence of events shows, the two issues in this grievance are inextricably intertwined. The discussion which follows reflects this circumstance.

The record shows that [grievant] was brought into the [Agency] during a Presidential hiring freeze. An internationally respected scholar, he had been hired because of the new priority which the executive and legislative branches of the Federal government had recently assigned to [specialty] in U.S. foreign policy. Likewise, there is evidence that some among those who recruited [grievant] were mindful of the Administration's avowed interest in augmenting the representation of minorities at the [Agency's] policy-making levels -[Grievant], however, was not employed under the Affirmative Action Program.

The record shows that from the beginning, [grievant] contributed substantially to the formulation of basic policy papers for both Washington and overseas missions, and seems to have won the respect of both the ^ongressional Committee and its staff and private sector organizations. He also received

praise from his rating officers as well as Ambassador [B] for his supervisory, drafting, and interpersonal skills.

Reevaluation report] His first A noted that he "has entered upon the work with

a confidence and a feeling for the issues which is unusual for such a specialized position."

The arrival of a new [office head], [Mr. D], in mid-19- triggered a chain of developments which resulted in the shortening of [grievant's] time-limited appointment.

Among these developments was the amalgamation of the two [offices], along with the related appointment of [Mr. E] as the successor to Ambassador [B] in an expanded Office of [specialty].

There is no dispute that [D's] order of September - , 19- merging [the two agency elements] violated [a regulation]. That regulation does not authorize even partial implementation of a reorganization plan in the absence of a written approval by [management]* The issue, however, is not whether the [Agency] had the right to reorganize under certain procedures—it clearly did—but whether the way in which the reorganization was effected was unfair to the grievant. The Board concludes that it was.

The consequences of the [office's] accelerated installation of [Mr. E] as head of the combined [specialty] offices, in the Board's view, amply bear out this finding. When requested initially to report back to [office] about the acceptability of the foreign service officer sponsored by Ambassador [B] as the next [office head], [grievant] relayed word that the Committee Chairman and

private organization leaders opposed the appointment of a replacement without either ambassadorial credentials or specialized knowledge. The Board also notes that on September --, 19--, the [title] of the Congressional Committee wrote to the [Agency head] seeking a delay in the selection of a new [head of office] because of questions about [Mr. E]. The record indicates that [Mr- E], a graduate of the [Agency's] [training program] lacked significant experience in [specialty]- It is noteworthy that according to an interrogatory response by an [office] official,* staff members of the coordinator's office told the Ambassador that they considered [E] unqualified.

The record shows that [grievant] had made it clear to [Mr. D] that if an ambassador were not named to the post (at least one was available), he himself was entitled to consideration- He based this on his experience in the subject matter and the [Agency's] reaffirmed goal of opening up top positions to qualified minorities and women.

Although starting out on an over-complement basis, [Mr. E] was almost immediately vested with full authority by Ambassador [B], with the concurrence of the [element head], and proceeded to give direct orders to the [merged office] staff. [Grievant], meanwhile, was asking for clarification of his status through channels, with no response from [management]. Thus a conflict of authority existed without resolution for many months.

Testimony of a witness with an inside, third party perspective on that conflict* is that he was in a position

*A cable response to an interrogatory to an officer on duty in [the merged office] from April 19-- to February 19--.

to observe happenings in the reorganized office and maintained positive, amicable and candid relations with both [grievant] and [Kr. E] ♦ The agency made no attempt to rebut the version of events offered by the witness through any of the avenues open to it. The Board is persuaded that this officer's account must be given weight.

The Board also believes it reasonable to presume that if final approval of the reorganization by [management] had not been in doubt, the ambiguity described could have been instantly resolved. Even aside from the fact that regulations require prior approval before any reorganization is effected, the Board regards it as significant that [Mr. D] and [B] did not petition [management] for prompt published approval of the new [office] arrangements once they were set up by [D]; this, despite the fact that [grievant] had repeatedly drawn the irregularity of the reorganization to the attention of the two officials.

In sum, [management's] ultimate approval of the reorganization, in the Board's view, did not compensate for the damage which resulted from its premature imposition-

The record offers no evidence that the termination of the [grievant's] appointment in the Foreign Service Reserve was a logical consequence of the abolition of his position in [office]. For the action fitted none of the three criteria for termination specified in 3 FAM 713:

A Reserve officer may be separated on the DS-1032 (notification of personnel action) effecting his appointment or assignment when the program for which he was appointed expires; when the need no longer exists for his services; or when he fails to perform his duties satisfactorily...

On the first question of program continuance, the record contains abundant testimony that the [Agency] intends to intensify its attention to such topics as [the grievant's specialty], and in several reports to Congress (the last after his termination notice) referred to [grievant] (though not by name) to illustrate the high technical calibre of the [office] staff. On the need for [grievant *s] specific services, it can be recollected that [Mr. E] had proposed a Deputy position for the grievant in his reorganized office, in apparent recognition that his own lack of experience and knowledge in the field of [specialty] required strong reinforcement. In an internal memorandum on the reorganization the former [office] executive officer had stated that "the responsibilities of the [specialty office] would remain the same...it boils down to a mere relocation of staff from one office to another." And on the matter of performance, **had rated him as "excellent."** (evaluation reports) [grievant's] two fl

The Board finds it most revealing that [grievant] had L. valuation reportsj only two G .Us , each interim reports, for his entire [] months in [office]. The first written evaluation of his performance was a memorandum in lieu of an ^{Evaluation report]} 71 covering the ^{Mates)} period¹ [7¹] with [A] as rating officer and [name] as reviewing officer. Without a notation as to the reason, [grievant's] performance record has a hiatus between [dates]- revaluation report r datest

The next 7f covers the period [f] , but it was not prepared in 3 timely fashion. It was not prepared in fact until ten months after the last date of the interval being appraised. [C] and [D] were respectively rating and reviewing officers .

[Grievant's] performance from October 1, 19-- until his departure from the [Agency] 15 months later remains totally undocumented, a patent violation of 3 FAM 531.1. That regulation fixes in the [Personnel office] and the principal officer and executive officer of each H the responsibility for promptly submitting evaluation reports on employees* It is difficult to interpret this gap in the official record as other than evidence that [grievant] was not considered a bonafide member of [office] from the time of [D 's] assumption of his post/[title]. Until the approval was given for the [office] reorganization, however, [grievant] must be considered to have been a member of [office) and entitled to an evaluation.

The cumulative record before the Board indicates that [D] viewed [grievant] not merely as an outsider, but with personal antipathy. Before even announcing his reorganization, [D] had made no secret of his desire to remove [grievant] from his [office]. Early on, he seems to have held [grievant] responsible for Congressional criticism of [E*s] suitability as the new [head of the merged office]. In December [D] indicated to the EEO Counselor that [grievant's] presence was a disturbing influence in [office]- The essence of [grievant's] sustained challenge to the legitimacy of the reorganization plan was that [D], without final approval by [management] had usurped the authority reserved to the [head of the Agency] or his representative. After [grievant] filed his formal grievance, [D] made no further recorded efforts to find another place for [grievant], although a vacancy did exist in his own [office].

[B] and his replacement seemed to have shared [D's] antipathy to [grievant]. There is unrefuted testimony that [B] called [grievant] [ethnic nickname] over the latter's vocal objections, and in a conversation with a subordinate, [E] referred to [grievant] as "the [ethnic] gentleman next door." These ill-received ethnic quips worsened an already charged atmosphere in the workplace.

Despite the fact that [grievant] possessed unchallengeable expertise not only in [specialty] but in [other specialties] as well, he was denied an opportunity to continue in the Service. According to a witness from personnel, [grievant] was barred from consideration for what could have been routine reassignment either within the [Agency] or overseas on the ground that career Foreign Service officers should be placed first. The preferential assignment policy thus expressed is nowhere authorized by the evidence before the Board. The Board concludes that the delivery of [grievant's] termination notice on the same day as the promulgation of the [office] reorganization was not simply coincidental. On the evidence before it, the Board finds that the grievance is meritorious.

V. BOARD DETERMINATION

The Board directs as follows:

- 1- That [grievant's] termination be rescinded.
2. That [grievant] be reinstated as a Foreign Service Reserve Officer, Class [], with full pay and other benefits.

3. That his reappointraent extend for the remainder of his four-year terra, the balance to be recomputed after his service between [dates] is deducted.

4- That a good-faith effort be made to place [grievant] in an appropriate position either at home or abroad, which would afford an equitable opportunity for eventual conversion to a permanent appointment.

5. That if [grievant] decides that he does not wish to reenter the Service, the [Agency] pay him the difference, if any, between what he would have earned at the FSS-(grade] level and the salary he actually received from the date on which he left the rolls and the effective date of this order.