

EXCISION NO. 514

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant

and

[Agency]

Record of Proceedings

Wo. []

Date: March 12, 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

[The grievant], a Foreign Service Reserve Officer, Grade PSR-1, with the [Agency], filed a grievance with the Board on [date] . Be charged that he received both erroneous and insufficiently reliable information at the time of his appointment/ and that the [Agency] misapplied the laws and regulations governing the employment process in his case, which led to the alleged wrongful termination of his time-limited appointment. In addition, [grievant] claims his application for conversion to FSRU was improperly denied.

As relief, the grievant asks {in descending order of preference): conversion to FSRD and assignment to an appropriate position overseas, preferably as [job specialty]; conversion to FSRU and voluntary retirement; reinstatement to an appropriate position in [Agency X] or some other Federal agency.

The [Agency] contends that it violated none of its laws, regulations or published policy in the appointment of the grievant, in the handling of his conversion request, and in the decision to terminate his time-limited appointment.

In accordance with Part 905 of the Board's regulations, a prehearing conference was convened on [date]. A formal hearing was held [date] in the Board's offices.

II. BACKGROUND

Prior to his employment in [Agency X] and the [Agency], the grievant worked in [office] whence he was detailed to [office] [dates]. He later worked with [office] [dates], and also, in the private sector, was a [title, company, dates].

Immediately prior to joining the [Agency], the grievant held a tenured Civil Service position in [Agency X] where he was [title, office] and held a GS-16 supergrade.

In August, 19- the grievant visited [office] to explore job prospects in the [Agency's job specialty] program. No openings existed at that time. Nevertheless, he filed an application for a position in the program. Later that year [office] contacted [grievant] to discuss with him a vacant position in [office] as well as opportunities for employment in the [job specialty] program.

In early 19- the [Agency] offered [grievant] the position of [title, office]. In approving [grievant] for this position the [Agency] determined that there were no other qualified candidates in the agency who could meet the requirements of the position at that time.

The grievant accepted the domestic job offer. A letter of appointment dated May 4, 19- from the [personnel office] stated the following:

Your attention is called to the fact that this appointment is limited to five years or the need of the employee's services, whichever is less. You may apply for unlimited tenure before completion of this appointment after completion of three years of continuous and satisfactory service.

[Grievant's] appointment as FSR-1 (FAS Candidate) became effective [day of week] , May 9, IS -. His separation from [Agency X] took effect the previous day. May 8.

While serving as [title, office] , in the fall of 19-, the grievant was selected for the [specialty] job in [post]. He began [] language training at FSI on November 14, 19-. Six weeks later he was informed by the then [title, office] that the incumbent [job specialist] in [post] would not be transferred as planned. [Grievant] was withdrawn front language training, his overseas assignment was cancelled, and he returned to [office] as [title, relationship to official A],

There is an indication in the Record that [Agency official B] proposed [grievant] for another overseas position. There is no explanation as to why this proposal was not implemented. The grievant remained in [office] as [title, relationship to official A] from approximately January 1, 19- until [official A's] departure from the [Agency] in June 19-.

An individual eligible to apply for conversion to career status under provisions of Management Reform Bulletin No. 8 (MRB-8) and implementing documents (see the section "Special FAS Conversion Program" on page A-2 of the Appendix).

On July 12, 19- at the request of [Agency X] , after [office] came under the charge of a new [title] and [title] , [grievant] was detailed to that Agency because, the Record shows, he was "unusually well qualified" to help [Agency X] prepare for the 19- [conference].

In addition, after the new [title] came on the scene he effected a reorganization of [office] which included the abolishment of the position of [] .

Subsequent events and actions affecting the grievant's career include the following:

May 16, 19- - While the grievant was on detail to [Agency X] , he submitted an application to the new [title, office] , [official C], for conversion from FSR to FSRD.

May 30, 19- - The [personnel office official] notified the grievant, inter alia, that:

[official C] ,has eliminated your _
The reorganization of [office] and that office as a separate entity. Accordingly, it has been determined that your services are no longer required by the [Agency].

...your appointment as a Foreign Service Reserve Officer will be terminated effective close of business September 30, 19-.

June 5, 19- - [office] [official C], responding to the grievant's letter to him of May 16, 19-, wrote in part as follows:

...[office] has informed the central personnel management that the position you previously occupied has been abolished and that [office] is unable to certify to a continuing need for your services.

July 12, 19-- [grievant] filed a grievance as a result of the notification by the [Agency] that his time-limited appointment was to be terminated.

August 6, 19-- The grievant resubmitted his application for conversion, this time directly to [personnel unit].

August 21, 19-- The [personnel unit chief] replied to the grievant as follows:

On receipt of your application, we forwarded it to the [office] which originally requested your appointment and asked for a memorandum supporting your candidacy for conversion to FSRD. [office] has informed us that they cannot support your conversion.

Because your services are no longer required by the [Agency], your application for FSRU conversion cannot be approved.

September 19, 19-- The [Agency] denied the grievance.

September 20, 19-- [grievant] appealed the [Agency] decision to the Foreign Service Grievance Board and asked that his scheduled termination be suspended.

September 21, 19-- The Board accepted jurisdiction in the case. Under authority of Section 692(11) of the Foreign Service Act, as amended, it directed the Agency in a letter on this date to retain the grievant on the rolls during the processing of his grievance.

The Agency requested that the Board reconsider its stay of separation. A meeting of the parties on [date] resulted in Agency withdrawal of this request.

III. PERTINENT REGULATIONS

Included in an appendix to this decision are extracts from the following regulations and documents relating to conversion from FSR to FSRU.

A. Management Reform Bulletin No. 8 r February 16, 1971: "Toward a Unified Personnel System, The Foreign Affairs Specialist Corps."

B. [Type] Notice No. C-33, April 2, 1975: "Certification of Need."

C. [Type] Notice No. C-8, February 8, 1973: "PER Procedures for Processing Applications for Conversion to FSRU."

D. [Type] Notice No. C-31, June 3, 1974: "Revised Legal Interpretations on FSR Appointment Authorities."

S. An appendix to [Regulation] No. C-7, revised October 17, 1977: "Special Procedures for Processing Applicants for Conversions to FSRU."

IV. JURISDICTIONAL QUESTION

The [Agency] maintains that it had the right to offer the grievant a time-limited appointment and that it has the right to terminate same if and when his services are no longer needed. It asserts that termination of time-limited appointments is specifically excluded from grievance procedures pursuant to Section 692(1)(B) of the Foreign Service Act.

The grievant's position is that he is not grieving the termination of his appointment per se, but complains, rather,

that the manner in which it was determined that it should be terminated was contrary to law and regulations. As such, the complaint is within the Board's jurisdiction on the basis of that part of Section 692 {1) (B) which rules as grievable any "alleged violation, misinterpretation, or misapplication of applicable law, regulation, or published policy affecting the terms and conditions of the grievant's employment or career status." V. MERITS OF THE CASE

The two basic issues in this case concern the grievant's appointment and his request for conversion, and they will be treated separately.

A. Issue I: Was the employment process in the grievant's appointment defective?

1. Grievant's position. The grievant alleges that the employment process was defective due to erroneous information, insufficiently reliable information, and misapplication of governing laws and regulations. He maintains that the [Agency] letter, dated May 4, 19-, offering employment did not contain necessary and sufficient information (for example, on career/noncareer status) to make an informed decision on leaving a tenured senior Civil Service position in [Agency X] or provide adequate time for acquiring such information.

He claims he had no previous practical knowledge of the Foreign Service system. He understood his FSR appointment to

be equivalent to a career conditional appointment in the Civil Service; i.e., that three years continuous and satisfactory service was all that was required to gain tenure-He further claims that he is scheduled for involuntary separation contrary to commitments made to him when he joined the [Agency]. He accepted the appointment because he was told and believed it would lead to a [job specialty] assignment within 18-24 months and tenured status after three years of satisfactory service. Further, the [office administrative officer] told him that the [type] position was "a stepping stone...to an overseas assignment in the [job specialty] program."²

The grievant submits that the [administrative officer] and [title] of [office] shared and reinforced his understanding and expectation of an overseas assignment in the [job specialty] program in 18-24 months and conversion from FSR to FSRU after three years. Also, very shortly after joining [office], he met with [official D], then [title, office], who affirmed his understanding of these points.

With respect to his allegation concerning the misapplication of governing laws and regulations affecting his appointment, [grievant] refers to his appointment as a Foreign Service Reserve Officer under authority of Section 522(1) of

2

Transcript II, p. [].

the Foreign Service Act. He claims the [Agency] produced no evidence to controvert his allegation that its FSR appointment under this section of a tenured Civil Service officer in the employ of [Agency X] was defective unless it was the [Agency]'s intention that he be accepted as filling a career status appointment. If the [Agency] did not intend for him to have career status, he contends, it should have employed him under Section 522(2) and supported his reemployment rights with [Agency X].

2. Agency's position. The [Agency] denies the grievant was misled. It maintains it did not violate its rules, regulations or published policy in this regard. The [administrative officer] of [office] had initiated the necessary action to obtain approval to offer [grievant] employment and received that authorization in a memo dated March 3, 19—. The grievant's letter of appointment specifies a limit of five years or "need of the employee's services, whichever is less."

Given the grievant's considerable experience in government, it must be assumed that he was aware of the conditions of his employment, according to the [Agency]. As evidence of such awareness, the grievant's unsuccessful attempt to secure reemployment rights with [Agency X] before he left that agency was cited.

There was no question that the grievant had hopes of being assigned overseas as a [job specialist] , and that

[office] officials shared that expectation, as brought out in their testimony at the hearing- However, the [Agency] asserts "this inducement, as it might be called, really in fact involved benefits.-that the move from [Agency x] to [Agency] was not so much an inducement as it was a situation wherein benefits were to be derived."

3. Discussion and Findings. According to the Record, [grievant] believed prior to his appointment that his employment in the [Agency] would be as a career officer. This understanding stemmed from two main factors: (1) the personnel documents establishing his FSR appointment; and (2) the discussions he had with senior [office] officials.

Kith reference to (1) above, there is no credible foundation for his claim that his career tenure in [Agency X] was transferred when he was separated from [Agency X] to join the [Agency]; or that career status was conferred through his FSR appointment under Section 522(1) of the Foreign Service Act. The documents pertaining to his appointment as well as the applicable regulations examined by the Board clearly contradict this. The evidence shows instead that he entered as a non-career Foreign Service Reserve Officer with a limited five-year appointment; and that he could, as a designated FAS candidate, apply for conversion to permanent tenure after three years.

With respect to factor (2), however, all the evidence in the Record supports the grievant's complaint that he is scheduled for involuntary separation contrary to commitments made to him by top [office] officials.

The Board is persuaded that the grievant would not have left his tenured position in [Agency %] to enter the [Agency] had he not first received strong assurances from high-level [Agency] officers that he would have a career in the [job specialty] program of [office]. The facts in this case, which compel the Board to this conclusion, include the following:

- [grievant] declined a domestic position with [office] when he initiated inquiries with that [office] concerning openings in the [job specialty] program. [office] officers understood clearly that he would not accept employment in that [office] unless he were offered a career in the [job specialty] program.
- When [office] officials later initiated discussions with him concerning a vacancy in the [office] they sought to fill on an urgent basis, a career in the [job specialty] program was held out to him as an integral part of their job offer.
- The former [title] of [office] recalled in testimony at the hearing the conditions [grievant] set on employment with the [Agency] as follows: "We requested [grievant] to come to us regarding a domestic position, something he had before clearly declined. [grievant] was still very much interested in a foreign assignment. He stressed repeatedly that as soon as possible he would like to be sent overseas. I as well as others in [office] indicated if at all possible, in a period of 18-24 months, we would make every reasonable effort to assign him to such an overseas position."
- When this officer was questioned at the hearing whether he was anxious to persuade [grievant] to accept a domestic position with the understanding that [grievant] would later get what he wanted, to go overseas, he replied: "That's correct."

- After the grievant served in [office] for a period of about 18 months, he was selected to fill the position of [job specialist] in [post].

Further evidence that [grievant] was led to believe that he would have a career with [office] is found in the following testimony by the grievant's former supervisors:

The then [title] of [office] : "I was extraordinarily pleased with [grievant] 's performance....I tried to nurture, as much as I could, the already very considerable talents of [grievant] during the two years or so he was with me to prepare him for the most responsible positions in the Foreign Service, and I certainly could not have possibly imagined in those days...a situation where the [Agency] has decided that there would be no need for such an individual."

The then [title] of [office] and former [title] said [grievant] was "the very type of person we would want...to send overseas as a [job specialist]." He also stated he was under the assumption that the grievant was brought in for permanent status. "We talked about his future and I told him what I had in mind for him - which was sending him overseas." The witness also said he was "puzzled" by the [Agency] 's statement that they had no need of a person of [grievant]"s caliber.

B. issue II: Was the grievant's application for conversion improperly denied?

1. Grievant's position. [grievant] states that he was accepted as an FAS Candidate on Kay 9, 19- and that his application for FSRU conversion was subject to the procedures and policies established in MRB-8. He contends that he entered the [Agency] in an FSR appointment made by transfer

4 Transcript I, pp. [].

Transcript II, pp. [].

from a Civil Service career appointment and therefore, in terras of his request for conversion, he has career status under provisions of &!RB-8. The only requirements for conversion of career status officers under the MRB-8 regulations, he states, are three years of satisfactory service and a willingness to serve abroad. Because he met these requirements at the time he applied for conversion, he submits that the denial of his conversion to FSRU status is improper.

The grievant takes issue with the May 30, 19- "termination letter" which said, in part:

The reorganization of the [office] has eliminated your position as [title, office], and that office as a separate entity. Accordingly, it has been determined that your services are no longer required by the [Agency].

This is not credible, [grievant] contends, because he had not served as [title, office], since November 14, 19-.

The grievant also decries the absence of published criteria for making such an important determination as whether or not an employee's services are needed. He alleges that the [Agency] interpreted this clause narrowly to conclude that because he was serving with another agency on detail, there is no further need for his services. [grievant] asserts this is self-serving, not established in regulation, and inconsistent with the rank-in-person concept of the Foreign Service.

[Grievant] maintains that the [job specialty] program is continuing, and that the need for his expertise is ongoing. Pointing to his excellent evaluation reports, the grievant says he should not be dismissed arbitrarily and that the [Agency] cannot deny a need for his services without due process.

The grievant argues that the career status of his appointment is additionally substantiated by a general rule on tenure on transfer in the Federal Government, and the reciprocity principle on noncompetitive interchange between Foreign Service and Civil Service.

In sum, the grievant asserts the denial of his application for unlimited tenure was arbitrary and capricious and that, as relief, he should be accorded career status.

2. Agency's position. The Agency disagrees with the grievant's contention that his appointment letter makes no mention of conditions other than three years of continuous and satisfactory service. It submits that a close reading of that letter indicates that the grievant may apply for permanent tenure after completion of three years of continuous and satisfactory service. Such service is a preliminary condition for application to convert from FSR to FSRU and not, as the grievant maintains, the "only" and "sole" criterion. The letter of appointment makes clear that a need for [grievant]'s services would also have to be a determining factor.

The [Agency] also denies the grievant's allegation that the "need-for-services" procedures were carried out improperly. It explains that the reorganization of [office] was under active consideration prior to the fall of 19-- until its approval and full implementation in mid-19--. This reorganization resulted in the abolition of the position for which the grievant was hired and in which he had not served since November 19--. Its review of this process has not revealed that the denial of the grievant's conversion to FSRD was either arbitrary or capricious.

In sum, the issue is the extent of the [Agency]'s authority to interpret and determine its personnel needs and the extent of its discretion to make personnel decisions based on such determinations. The [Agency]'s position is that it has not abused its discretionary authority and that it did not violate, misapply or misrepresent any applicable law, regulation or published policy.

3. Discussion and Findings. The Board finds no grounds in the applicable regulations for the grievant's claim that the processing of his conversion request should have been predicated on a determination that he was a career officer. He was properly considered a non-career officer in terms of the conversion procedures and policies of MRB-8 and implementing documents, and therefore a supporting statement from his bureau was required.

The Record is not clear as to the basis for the denial of an endorsement for conversion of the grievant by the [title, office], who did not give testimony. The Agency states that this action was predicated on the reorganization in the [office] that led to the abolishment of the grievant's position, and consequently the grievant's services were no longer needed.

Factual information about and circumstances of the [office] reorganization, however, are absent from the Record. Lacking such information, the Board can not even speculate whether the [office] decision had a justifiable basis. For example, the Board notes that the position abolished by the reorganization, referred to as [grievantj's position, was [grievant]'s previous position in [office] but was not a position he was occupying at the time of the reorganization or had occupied for about a year prior to that time.

Further, there is no basis in the Record for a conclusion that careful consideration was given after the reorganization to placing [grievant] in another position in [office], either in Washington or in the [job specialty] program overseas. A [job specialty] assignment, if at all possible, was a commitment [office] made to [grievant] when he was recruited from his career supergrade position in [Agency X] . [Grievant] 's qualifications for such an assignment were recognized by [office] in its earlier decision to name him to the [job specialty] position in [post].

Surely the Agency has the right to determine its personnel needs. The breadth inherent in the administrative right to terminate a time-limited appointee is broad. However, it does not amount to the right to cancel such an appointment arbitrarily or for any reason wholly beyond the scope of the regulations.

Given that the Record contains no facts which would support a reasonable basis for the [office] decision; that the [job specialty] program is still ongoing, and that the grievant is a recognized expert in his field and received excellent evaluation reports, the Board is at a loss to understand the determination that his services were no longer needed. The Board may only conclude that the actions taken were impermissibly arbitrary.

Because the [Agency]'s decision to terminate the grievant ' s time-limited appointment was predicated on the arbitrary [office] decision, the Board finds the personnel action terminating the appointment to be defective and unwarranted.

VI. BOARD DETERMINATION

1} The Board directs that the [Agency]'s personnel action terminating [grievant]'s appointment be rescinded.

2} The Board recommends that in light of the commitments made to the grievant and his demonstrated excellent performance and expertise, he be assigned during the remaining period of his time-limited appointment to an appropriate position in the [Agency] or overseas and be provided with an equitable opportunity to gain conversion to career status.

APPENDIX

Extracts from Regulations and Documents Relating to Conversion from FSR to FSRU

Management Reform Bulletin No. 8, February 16, 1971.
"Toward a Unified Personnel System, The Foreign Affairs
Specialist Corps"

The Foreign Affairs Specialist (FAS) Corps, a new category of career Reserve officers, has been established. The Foreign Affairs Specialist Corps will parallel and complement the Foreign Service Officer Corps....Foreign Affairs Specialists will be appointed as Foreign Service Reserve officers with unlimited tenure (FSRU) under the authority of Public Law 90-494.

...With the exception of noncareer positions or those exempted by statute, all officer positions in the Department and abroad have been designated as either FSO or FSRU (FAS). Eligible officers may apply for conversion to FAS or FSO according to the designation of their position and other criteria. The Board of Examiners for the Foreign Service, which has over-all responsibility, has designated panels of Deputy Examiners to examine and select candidates for appointment as FAS or FSO....

C. Definitions

For purposes of the programs, policies, and procedures discussed herein, the following definitions are applicable:

1. FSR - Foreign Service Reserve officer with limited appointment tenure;
- 2* FSRU -Foreign Service Reserve officer with unlimited tenure, as authorized in Public Law 90-494;
3. FAS - Foreign Affairs Specialist--the administrative title identifying FSRU's as a career category and distinguishing them from FSR's;
4. Career Officer - An officer presently serving with the Department under one of the following types of appointment:
 - a. A Civil Service career or career conditional appointment without time limitation, excluding a Schedule C noncareer, or limited executive appointment;

- b. A Foreign Service Staff officer appointment without time limitation;
 - c. A Foreign Service Reserve appointment made by conversion or transfer from a career-type appointment described in paragraph a or b above, or made in lieu of such career-type appointment;...
5. Noncareer Officer - An officer of the Department presently serving under one of the following types of appointment:
- a. A Schedule C, noncareer, or limited executive appointment;
 - b. A non-Foreign Service appointment with time limitation;
 - c. A Foreign Service Staff officer appointment with time limitation; and
 - d. A Foreign Service Reserve officer appointment made in lieu of or by conversion from a type described in paragraph 2, b, or c, above....

III. Conversion and Appointment Policy

A. Special FAS Conversion Program

The Board of Examiners for the Foreign Service has overall responsibility for action on FAS applications. The Board has authorized panels composed of BEX Deputy Examiners to examine and select candidates for appointment under the special FAS conversion program. A panel, including wherever possible a representative from the bureau or office familiar with the applicant's specialty, will review his personnel file to determine whether he meets the criteria. If required standards are satisfied, the panel will certify the applicant as eligible for conversion and will at the time notify him of its action. Appeals from adverse decisions of the panels will be considered by the Board as a whole.

1. Eligibility Requirements and Selection Considerations

...the position staffing designations will provide a basis but will not be controlling in determining the eligibility of individual officers for consideration for FAS appointment. Exceptions will be made based on experience and qualifications, subject to the approval of the Director of Personnel or his designee...

a. Career Officers

FSR to FAS:

3 years of satisfactory service with the Department-

Civil Service to FAS:

...3 years of satisfactory service with the Department.

..

The only additional criteria to be applied in selecting career officers for conversion to FAS are (1) satisfactory performance, and (2) willingness to serve abroad on a limited basis after FAS appointment or to continue to serve on a worldwide basis as appropriate, unless exempted from service abroad....

Personnel files of career officers will be reviewed to verify that they meet the eligibility criteria and that their performance is satisfactory...

b. Noncareer Officers

FSR to FAS:

3 years of satisfactory service with the Department

...Certification of need for services as an FAS...

Subj: Certification of Need

1. A certification of need is a positive determination by PER/CA that a need exists, on a continuing basis or on a limited basis, for the skills of an employee or applicant proposed for conversion to another pay plan, extension of appointment under the same or a different pay plan, or initial appointment with the Department

2. In arriving at a determination of need, PER/CA will take the following factors into consideration:

a. The availability of officers with comparable skills at the relevant class level in the pertinent functional specialty in relation to the time frame of proposed action, i.e., limited appointment, extension of appointment, or conversion to a career appointment;

b. The relationship between requirements for such skills at the pertinent class level and specialty and the availability of such skills;

c- The assignability of the officer under the type of appointment proposed and the applicable conditions of service. With regard to candidates for conversion to FSR {FAS candidate) or FSRU, assignability may include continuing assignment in the U.S. and is not necessarily a question of worldwide assignment.

3. A certification of need will be requested in the following types of cases under the conditions indicated. If insufficient information has been supplied initially, PER/CA may ask the requesting office to supply or obtain clarification or additional documentation.

Conversion to FSR (FAS Candidate) or FSRU

a. A certification of need will be requested in the following types of cases:

(1) In all cases in which the applicant is determined to be a non-career employee under the provisions of MSB No. 8:

(2) The applicant is determined to have career status under the provisions of MRB NO. 8 but is serving in a non-FSRU-designated position;...

b. In cases of non-career applicants for conversion, a certification of need may be granted with a surplus of skills over requirements when the applicant offers some skills needed by the Department. Such skills must be described in the certification of need.

c. In cases of applicants with career status for conversion under MRB No. 8 serving in a non-FSRU-designated position, a certification of need may be granted with a surplus of skills over requirements when the employee is serving under a career or unlimited appointment (1) in a function or organizational unit designated for mixed FSO/FSRU staffing (2) in training or overcomplement status, (3) on detail or assignment to another agency, or (4) on approved LWOP for developmental purposes.

/Type,/ _____ Notice NO. C-8, February 8, 1973

Subj: PER Procedures for Processing Applications for Conversion to FSRU

Special Procedures for Processing Applications for Conversion to FSRU

I. Determining Career/Non-Career Status

1. Under the provisions of MRB No. 8, appointments which establish a clear case for career status with the required 3 years of continuous service include (1) FSSO (regular), (b) FSO, (c) GS (career or career-conditional), (d) ES or GG unlimited (unless the ES or GG appointment was based on special interest referral), and (e) FSR with reemployment rights in the Department to one of the above types of appointment.

A-5

2. Appointments which establish a clear case for non-career status include (a) Schedule C, (b) non-career or limited executive (supergrade) appointment, and (c) a limited appointment as GS, FSS, or ES or GG.

3. In all cases of FSR's not included under 1, (e) above, each case must be examined carefully to deter^