

EXCISION NO. 515

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant  
and [Agency]

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No. [  
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Date:  
July  
2,  
1980

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For the Foreign Service Grievance Board:

Presiding Member: Board Members;

Special Assistant  
to the Board:

Representative for the Grievant:

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Representative for the Agency: [

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In order to prevent an unwarranted invasion of  
privacy names of individuals and other identi-

fyng 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 withholoable under the Privacy Act-

I. GRIEVANCE

[Grievant], a Foreign Service Reserve Officer, Class [ ] , with [Agency] , filed a grievance with the Board on December -, 19-. He alleges that [Agency's] termination of his appointment as [specialty] misapplied law and regulations governing his original appointment and violated published policy and equity. He grieves the denial of conversion to tenure under the terms of his appointment, following three years of continuous and satisfactory service. Further, he maintains that [Agency's] determination as to the lack of need for his services is arbitrary and capricious, and contradicts Congressional intent with respect to the work force of the [office].

As relief, [grievant] requests the withdrawal of his termination letter, and an order from the Board that he be converted from FSR to FSRU or some other appropriate career status within the Foreign Service or Civil Service of [Agency].

On December -, 19-, [Agency] in its final review of [grievant's] original grievance dated August -, 19-, found that the termination of his time-limited appointment had been correctly based on a management determination that his services were no longer needed. It stipulated also that his performance in [Agency] was not an issue.

On January -, 19- the Board accepted jurisdiction in the case. In accordance with part 905 of the Board's

regulations, a pre-hearing was held on February – and a hearing on [dates], in the Board's offices. II. BACKGROUND

[Grievant's educational and employment background]. [Grievant] was hired by [another Federal Agency] as a [specialty]. In December IS– he was promoted to a tenured GS-[grade] position as [title, division, other agency]. His most recent duties at [other Agency] centered on the management, planning, initiation, and survey of [type] research in [specialty] and liaison with [four organizations] .

The record shows that the [Agency] took the initiative in seeking [grievant]' services, with the initial overture being made in the spring of [year].

October –, 19– – The [director] of [office] requested special permission from the [higher echelon's] office to employ [grievant] as a [specialty] in the [office] . The formal request read, in pertinent portion:

.-.The position deals with technical developments in [technological areas]. He will be responsible for handling policy issues in these areas and in preparing related technical evaluation and assessments as they affect U.S. policy concerning [areas].

March –, 19– – [Agency] informed [grievant] of the approval of his appointment as an FSR-[grade], under Section 522(1) of the Foreign Service Act of 1946, as amended. The letter contained the following paragraph:

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-April -, 19- - The date of his separation from [other Agency]; his pay level was GS-[grade, salary].

April -, 19- - He joined [Agency]. His certificate of appointment [form no.] classified him as FSR, Limited Appointment, and a Foreign Affairs Specialist (PAS) Candidate, and allocated tenure code 2 (career conditional) . His control card at [the Agency] read "transferring [other Agency]." Although he had signified his willingness to work overseas, [Agency] categorized him as DES-domestic only.

May -, 19---- [Agency] officially informed [grievant] that his appointment would be terminated, effective close of business September -, 19-.

August -, 19- - [grievant] filed a grievance with [Agency] requesting a stay in termination of his appointment to permit formal review of his case. He charged that [Agency] reneged on an alleged offer of a permanent career appointment.

October -, 19- - The [office of the higher echelon] cut orders transferring the grievant **from** [office] to the Office of [Former Agency], effective September -, 19-.

October -, 19- - The same office cancelled this action in its entirety.

December -, 19- - Grievant applied for conversion to a tenured position in the FAS.

Karch -, 19- - [grievant] was notified that [Agency] had denied his request for conversion.

[Grievant] continues to occupy his [office] position as [title]. III. Jurisdictional Questions

[Agency] asserts that [grievant] is grieving the termination of a temporary appointment, which is not grievable (Foreign Service Act of 1946, 692(1)(B)). The grievant counters that his complaint stems from the fact that there has been a violation, misinterpretation, and misapplication of applicable law, regulation, and published policy as well as equity affecting the terms and condition of his appointment, depriving him of right and benefit authorized by law and regulation. He maintains that his appointment is not temporary per se, but contained an offer of conversion and tenure after completion of three years. Likewise grievable were the termination and the improprieties in the recruiting process (also Foreign Service Act of 1946, 692(1)(B)).

The reinstatement rights at [other Agency] constitute an independent issue, and have been appealed to the Merit System Protection Board.

IV. POSITIONS OF THE PARTIES

This case presented the Board with three separate but interrelated issues: Did [Agency's] actions with respect to the (1) hiring, (2) requested conversion, and (3) termination of [grievant] violate law, regulation, or published policy? The following summary of the conflicting views of the parties on these issues is not all-inclusive. The major claims, however, are set forth and all the evidence in the Record of Proceedings has been taken into account. A. Hiring

1. Grievant's Position

[Grievant] claims that during recruitment there was an inequitable denial of information: he was persuaded to change from a tenured position in [other Agency] to "what is now interpreted" as a time-limited appointment without adequate explanation of the differences between the Civil Service and the Foreign Service systems. The two officers in [office] with whom he had principal interviews testified that they thought they were recruiting [the grievant] for a permanent position; the two personnel officers with whom he conversed before entry on duty never mentioned the possibly temporary character of the job offered.

[Grievant] asserts that the hiring authority given the [head of Agency] under the Foreign Service Act, Section 522, indicates that he should have been hired under Section

522(2). That subsection expressly authorizes hiring a person regularly employed in another government agency and normally involves obtaining reemployment rights for the employee with the losing agency so as to protect the employee's tenure, but does not bar the employee from a fully tenured FSRU appointment. On the other hand. Section 522 (1) covers the appointment as a Reserve Officer of a person "not in the employ of the Government." (Emphasis added) .

[Grievant] construed the second sentence of his letter of appointment to mean that he had a form of "career conditional" appointment. If, in reality, he had been giving up tenure, the Federal Personnel Manual, covering the Civil Service and normally the Foreign Service, requires that the employee be asked to sign a written statement to the effect that he or she is voluntarily leaving the competitive Civil Service to accept an appointment in the excepted service {FPM 296-31, S2-18, dated March 31, 1977). In any event, grievant contends, it would have been irrational knowingly to relinquish a tenured GS position for a temporary FSR position paying less than \$500 more a year.

2. Agency Position:

The Agency maintains that grievant had been hired pursuant to Section 552(1) of the Foreign Service Act, which is the general authority for the appointment of Reserve Offi-

cers, rather than Section 522-2, the hiring authority for reserve officers with re-employment rights at another government agency from which they had been assigned to [Agency]. The Agency believes that the [other Agency] Separation Form, [ ], should have told him that his appointment was of non-career status. The Agency supported his application for reinstatement at [the other Agency] September -, 19-, as required by regulation, but did not pursue the matter when the application was rejected by [other Agency].

[Grievant] had been hired for a specific position in a specific [office]- In accordance with Agency practice, a personnel specialist discussed the appointment with [grievant] before his entry on duty. [Agency] is convinced that the potential brevity of his service was in fact explained to him. Furthermore, a Memorandum from the [higher echelon] dated May -, 19-, admonished personnel officers to instruct new employees about limitations on certain appointments. The Agency notes that personnel officers carry a checklist which includes a session for orienting new employees on FS personnel systems. B. Requested Conversion

1. Grievant's Position:

The governing policy paper for the FAS program (MRB No. 8), in [grievant's] view, shows that he meets the definition of a career officer as an officer presently serving with [Agency] under

...A Foreign Service Reserve appointment made by conversion or transfer from a career type appointment... (Part II (C)(4)(c)).

He notes that Part III(A)(1)(a) of that policy paper states that the only applicable requirement a career FSR must meet is "3 years of satisfactory service with [Agency]-" [Grievant] claims that he meets this requirement.

Be further states if the Board should agree, however, with [Agency] that he is non-career, he could still qualify for a certification of need by the [personnel office] for service as an FSRU. (Foreign Affairs Manual Circular No. 788, 5, b (4). The standard for a certificate of need [Attachment 5 to MRB-8, page 45, paragraph 13) is explained thus:

"...the [title] of [Personnel]...will make the determination on the basis of the number, types, and levels of career officers in the system and the current and anticipated staffing needs...."

On the basis of information provided by [Agency] on [grievant's] skill code number [X]- [title], and number [XX] - [title] - at the class [grade] level, there is a surplus of staffing needs over and above the number of career officers currently employed. His [evaluation reports] are also highly complimentary and specify a high potential. Therefore, even as a non-career officer, [Agency] has no valid basis for denying his application for conversion to FSRU.

2. Agency Position:

The Agency counters that under established procedures, when a candidate for conversion is not a career employee - and in practice, persons brought in from outside [Agency] are non-career -- a memorandum from the employee' s [ ] office must certify the need for the employee. The [personnel office] followed this procedure with respect to [grievant's] candidacy: on receipt of his application, it was forwarded to the [office] which originally requested his appointment with a request for a memorandum supporting his candidacy for conversion to FSRU. [Office] has informed personnel that it could not support his conversion. The Agency observed that [grievant] had resigned from his previous agency and should have been cognizant of the attendant risks.

On behalf of the Agency, the FSRU Program Manager responsible for processing applications for conversion from FSRs testified that the grievant was not classified as world-wide available. He said that this was an [Agency] determination. He expressed the view that if [grievant] had entered as a [specialty title], he might have been accepted for conversion.

The Program Manager went on to say that the sole function of tenure code 2 is for reporting purposes to the Office of Personnel Management (successor to the Civil

Service Commission). The tenure designator has no bearing whatsoever, from a legal standpoint, on the status of a person appointed under the Foreign Service Act.

C. Termination

1. Grievant's Position:

The grievant asserts that [Agency's] separation letter of [date], inaccurately stated that as a result of a reorganization in [office] his position *had* been abolished. Actually, his position number as of his date of entry upon duty is retained in the most recent [Agency] staffing pattern for [office] with him still filling it. Moreover, inasmuch as Foreign Service personnel are appointed to a class rather than a position, [Agency] erred when it claimed it no longer needed [grievant] because his position had been abolished.

He takes particular exception to one sentence in his termination letter: "Your..-position will be redesignated at a lower level with broader general responsibilities rather than its present narrow specialization." He maintains that the characterization of his services as of a narrow specialized nature is refuted by his [performance evaluation] and [a special evaluation], his qualifications and his past and current duties in the [Agency]. [Grievant] declared that he has not been a specialist for 15 years. He notes that both his job description and his activities at

[office] have run a wide gamut: intergovernmental liaison; liaison with the U.S. business community; the multilateral development banks and international organizations; [specialty] in developing countries; and policy issues in regard to [specialty].

Grievant notes that the [office] reorganization should be studied in the context of other developments affecting the [office]. Title [no.], "[title]," of Public Law [ ] requires that [head of Agency] undertake new initiatives in [specialties]. The House of Representatives Committee on Appropriations has questioned whether [office] had the capacity to implement its Title [no.] responsibilities (Report No. [ ] ). As a response to that criticism, the [Agency] sent to Congress a special report, which recorded the [office's] success in hiring outstanding [occupation], citing inter alia "4 Ph.D's" and an "[other Agency]" background. This claim, the grievant says, can only be validated by including him as still on the payroll. Thus [office], he charges, is terminating him at the same time it is boasting to Congress about having recruited him.

In another report of January 19--, [Agency] informed Congress that in carrying out its responsibilities to coordinate and oversee [specialties] activities of the Government, both [occupation] and [occupation] professionals and career Foreign Service personnel with background in foreign

political and economic affairs would be required. In this connection, the grievant refers to nine [specialty] positions opening up in 1980 for which he would be qualified and which [Agency] reportedly is seeking to fill. 2. Agency Position:

The Agency responds that the decision to reorganize [office], which resulted in the planned elimination of his job, is a managerial prerogative. When the determination was made that his services were no longer needed, his deadline for termination was fixed for September --, 19--, in order to afford him the opportunity to find outside employment .

The new [office] structure, the Agency elaborates, reflected the incoming [office head's] desire for fewer higher level specialists like [grievant] and an increasing use of career personnel. Staffing requirements and levels are being altered, offices abolished, and others consolidated and established for the first time. V. DISCUSSION AND FINDINGS

This grievance spans events over an interval of four years in the [office] . The years between [date] - when the grievant was first sounded out about work in [office] - and [date] represented a formative period in which [Agency] sought to build strength in its [specialty] structure. From the beginning Congress was an assertive party in the [office's]

operations. The legislation, Title [no.] of Public Law [no.], reflected Congressional intent to inject [specialized] content into diplomacy and operations" and to monitor the professional standards in [office] for attaining that goal.

In its staffing [office] aimed at a mix of [specialists] and career diplomats. So as to develop a cadre of the former, [office] resorted frequently to time-limited appointments. It was under one of these appointments that the grievant came into [Agency]. The controversial aspect of the grievant's appointment relates to the hiring process and the circumstances of his proposed termination. Because conversion would be contingent on the resolution of the termination issue, the two are treated together in the following discussion.

A. Hiring Process

[Grievant] had no previous experience or practical knowledge of the Foreign Service personnel system. He came into [Agency] after about 14 years as [an other Agency] civilian. [Grievant] had originally been invited by the [Agency] to apply for a position. In various conversations with both [office] and personnel officers, he formed the impression that he was being offered a permanent career. Indeed, the Board heard testimony from witnesses who at the time of the case in question were responsible for recrui-

ting, interviewing and briefing candidates for positions in [office], among them the present grievant. Their clear testimony was that it was unquestionably the intent of [office] to use the device of temporary appointments, to be followed by later conversions under the FAS program, as a means of acquiring permanent staff with specialized [type] qualifications.

It is disputed whether his various interviews instilled erroneous impressions about the automaticity of his conversion after [a period] of actual work in [Agency]. It appears that he received the standard packet of materials. He acknowledges that he relied at the start on verbal assurances about terms of his prospective employment.

In recruiting the grievant, [Agency] had a number of alternatives from which to choose. The authority under which he was ultimately hired was Section 522(1) of the Foreign Service Act of 1946, as amended:

...the [head of Agency] may...

appoint as a Reserve Officer for non-consecutive periods of not more than five years each, a person not in the employ of the Government whom the Board of the Foreign Service shall deem to have outstanding qualifications.

In light of [grievant's] previous experience with [another Agency] , and the fact that there was no break in government service before entering [Agency] , the Board

believes that this particular option was not the most appropriate way to recruit him- It must also be recalled that [grievant] was abroad on official business for the [Agency] when crucial decisions were made about the nature of his appointment, foreclosing some of the last-minute consultation that might have averted future misunderstanding. Arguably, [Agency] should have observed FPM 296-31, 32-18 dated March 31, 1977, which would have obligated it to secure an affidavit attesting that the employee is aware of waiving his rights to return to his former agency. However, in the Board's view, [Agency] was not obligated to insure his retention of reinstatement rights in his former agency.

B. Termination/Requested Conversion

While generally upholding the agency in its conduct of the hiring phase, the Board finds fault with the final termination of the grievant's appointment.

[Grievant's letter of termination, dated [ ] stated:

Your appointment... is limited by its terms to a period of five years, or the need for your services, whichever is less. The reorganization of the [office] has resulted in restructuring the responsibilities within the new [office] . Consequently, your position as [ ] will be redesignated at a lower level with broader general responsibilities rather than its present narrow specialization. Accordingly your specialized technical background and services are no longer required by [Agency] in view of the aforementioned reorganization.

The Board does not challenge [Agency's] statutory prerogative of abbreviating time-limited appointments in certain

situations. The Program Coordinator for FSRD Conversions has also testified that other FSRs have come into [Agency] from tenured positions in the Civil Service and been terminated in less than five years when their services were determined to be unneeded.

Interpreted literally, however, the termination notice runs counter to the broad manpower policies of [office] as reaffirmed in prescribed periodical submissions to Congress. Perhaps the most authoritative evidence of the legislative branch's intentions in regard to [office's] personnel makeup is Public Law [no.] [title] . This basic statute makes clear previously described Congressional expectations of a steady and substantial admixture of trained [specialists] in the Service. More concretely a [date] report of [office] to the Congress -issued after the grievant had been told of his scheduled termination effective the following September - points to [grievant's] [specialty] credentials as partial evidence of [office's] ability to carry out its responsibilities and to justify restoration of its funds. (A House Committee earlier that summer had reduced the [office] budget by 50% partly because of dissatisfaction with the [office's] technical capacity.) In short, to accept at face value the explanation offered to [grievant] in the letter of termination would be to posit a sharp discrepancy between [office's] Congressional representations and the [office's] internal policy.

A more credible explanation for the termination decision came from a former executive officer of [office]. This officer testified that in his opinion the underlying reason for attempting to terminate [grievant] and others in his category in mid-19-- was a perceived need to make room for regular officers from overseas, rather than a clearly demonstrated lessening in the requirement for external expertise to reinforce the career service.

Another critical element in the decision to cut short the grievant's services was the desire of [management] to lower the grade structure of the [office]. [Office] evidently sought to respond to this pressure by reclassifying several positions and seeking lower-ranked officers as replacements for them. In the instant case, the job description for the replacement does not differ materially from that under which the grievant had served for three years. Substantively, the responsibilities of the job appear to have remained unchanged.

Beyond dispute, making room for Foreign Service Officers from abroad in [Agency] positions is a legitimate managerial objective. In the view of the Board, however, achieving this goal by severing an officer of [grievant's] qualifications and record, who had clearly been led by [Agency] to believe his temporary appointment would lead to conversion to permanent status, was not warranted.

The issue of conversion would be mooted by a finding that termination in this case was supportable. In this connection, it should be recalled that [grievant] was from the start classified as a candidate for conversion to FSRU under the Foreign Affairs Specialist Program. The root question then is whether the circumstances surrounding his denial of conversion indicate a defective handling of his candidacy by the agency.

From his initial processing in 19-, [grievant] had made clear his interest and availability for overseas service. He can possibly be faulted for negligence in not applying promptly for conversion as soon as he had completed three years, that is, in April 19-. But the fact that [Agency] had placed hire originally in the domestic service as an FSR should not have foreclosed his assignment to one of the several [specialty] positions becoming open in mid-19- and thereafter. The [office's] own skills inventory shows that there were [several] unfilled positions at [grievant]' level within [office] for which he would qualify. There is no doubt that [Agency] had the discretionary authority to assign an officer with [grievant's] skill codes to such positions.

[Agency's] rank-in-person concept should have afforded additional flexibility in matching the grievant with one of the available openings.

Briefly, then, [grievant's] experience before entering the service and performance within [office], as reflected in his [evaluation reports], provide no basis for doubting his suitability for assignments in the field as well as in [Agency]. On the basis of the facts presented by [Agency], the denial of conversion was also not warranted. VI. BOARD DETERMINATION

The weight of evidence establishes that the decision to terminate [grievant] was inadmissibly arbitrary. The Board, therefore, directs:

(1) that the termination of [grievant] be rescinded; and

(2) that he be reinstated and assigned during the remaining time of his time-limited appointment to an appropriate position either in [Agency] or overseas and be provided with an opportunity to gain conversion to career status.