

EXCISION NO. 519

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant  
and [Agency]

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For the Foreign Service Grievance Board:

Presiding Member: Board Members:

Special Assistant  
to the Board:

Representative for the Grievant:

Representative for the Agency:

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

On [date], [grievant], a [FS category] Officer, [grade] with the [Agency] filed a grievance with this Board in which he complained of several allegedly illegal practices by the Agency. Those complaints are: (1) that the Agency was not correct in its original hiring of him at the [FS category] , [grade] level; (2) that the Agency did not have the authority to detail him to the [Agency B] for 3 period longer than the original assignment of six months; (3) that the Agency violated the Merit Promotion process in not selecting him for the position of [title] ; and, (4) that when [Agency] merged with a unit of Agency B, [Agency] failed to assign him to a position commensurate with his grade.

As relief [grievant] requests that: (1) he be granted back pay at the level of [grade] , from the time of his original appointment; (2) the selection of [name] as [title] be invalidated with [grievant] to be given the position as of the effective date of [name's] appointment to that position; and, (3) all pay, allowances, and the removal of records/files that might flow from the Board's decision. After the hearing in this case, [grievant] cropped his second request concerning the removal of [name] as [title].

In its final decision of [date]<sub>r</sub> the Agency asserted that, in its judgment, the question of whether the Agency is

required to place the grievant in a General Schedule (GS) position equivalent in grade to his present Foreign Service (FS) class is not grievable. Because [Agency] contested the extent of the Board's jurisdiction, if any, over the grievance, it was decided to hold a hearing in accordance with Parts 904.2 and 905 of the Board's regulations. A prehearing conference was convened [date] and the hearing was held [dates]. Depositions on behalf of the Agency were taken from [name] and [name] and from the grievant on his own behalf on [date]. The final briefs from the Agency and the grievant were received [date], at which time the Record was closed.

## II. BACKGROUND

[Grievant] has been associated with the [field/industry] since his military service [date to date], when he served as [title] supervising and directing the [job specialty]. He received a Master's Degree from the [university] in [year] in [subject].

Before entering Government service, [grievant] held many positions, such as [titles] in the [industry].

During his career he has won many prestigious awards in the United States and [abroad]. He was the [title of position] , [name] , for which he won an [award] in [year] .

In [year] he became a [specialist] for the [Agency C]. By [year] he was [title], at [Agency C], and held the [grade]. This position required him to supervise [employees] .

In [date], [official], a political appointee who had been named an [title] at [Agency], called [grievant] to offer him a position as [title]. According to [grievant], he and [official] became acquainted in the [date] through their membership in an organization called the [name]. As a result of [official's] call, [grievant] applied for the position. Because of a hiring freeze within the Agency, [official] formally requested an exception so that he could hire [grievant] for this position. In his [date] memo of request, [official] described the position as being classified at the [grade] level and stated: "I have no objection to the classification of the position at the [grade] level, and I am certain that [grievant] would consider a Foreign Service appointment." A pen and ink note dated [ ], at the bottom of this memo indicates that [official's] request was reviewed by the [Head and Deputy Bead] of the Agency with [official] present, and it was agreed to proceed to hire [grievant] at the [grade] level.

On [date] [grievant] was appointed a [FS category] officer to fill the position of [title, office, grade]. This appointment was to be valid for a period of three years or the need for his services, whichever was less - He remained in the position of [title] until [date] when it was abolished, and he was assigned by [official] to a special project. This was a special [project] for the Bicentennial and involved

[grievant's] traveling to [two posts]. When this project was completed, he became the [title, office] and during this period he resumed his studies receiving a degree on [date].

[Grievant's] [FS category] appointment was extended and ultimately converted to [FS category] on [date].

On [date], he was detailed to the [Agency B] for a period of 90 days. He remained there until [date]; on that date, the [unit in Agency B] was moved to [Agency] , which became then the [Agency], "Grievant 's] particular office became the [office] within the Agency. As of [date] he was officially reassigned to the position of [title] in the [division] where he remained until he retired on [date],

### III. GRIEVANT'S POSITION

[Grievant] claims that his appointment to the Agency in [date] as a [grade], was an improper classification- He contends that when [name, title], recruited him for the position of [title], it was classified as a [grade] position and, therefore, the rank at which [grievant] originally accepted the job. However, the grievant claims that after he had accepted the position and given notice to his previous employer, [the official] called to inform him that, because of a "technicality," [grievant] would have to begin his employment with the Agency as an [grade] , a Foreign Service rank equivalent to [grade] . According to [grievant], [official] assured him that this would be corrected by a promotion to

[grade] within a year. [Grievant] contends that the Agency did not counsel him as to the implications of the Foreign Service classification.

[Grievant] claims that this was the first of several instances in which he relied in good faith on officials of the Agency. He argues that because of this trust, he finds himself in a similar position as that of the subject grievant of Foreign Service Grievance Board-supplied Excision 514. In that case the Board provided that grievant relief, as it found that he "would not have left his tenured position in [agency X] 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] ." According to [grievant], he might not have given up his Civil Service status had he not been assured of a promotion by [the official].

Concerning his tenure as [title], [grievant] claims that his performance was outstanding in the quality of [type] work achieved, but that his deputy [name], willfully contrived to undermine him in the management of his section. According to [grievant], [the official] initially advised him to place implicit trust in [deputy] for the administrative functions of the section. However, [grievant] claims he found that [deputy] repeatedly sought to destroy him, and finally proved so successful in his efforts that the Agency abolished the

position of [title] as a means of getting rid of [grievant]. This, the grievant contends, was the sole purpose of the Agency's [year] reorganization of [division]. He argues that this action violated Agency regulations in several ways. First the criteria for reorganization, as specified in [Agency regulations] does not include the "elimination of undesirable employees." He next points out that [Agency regulations] specifies that the "number of management and supervisory positions should be maintained at the minimum level," but that the [date] reorganization elevated three other management positions, while eliminating only one, [grievant\*s].

After the reorganization [grievant] asserts that he was left as an "errand boy" to the [official]. This, he argues violates [Agency regulations] of the objectives for reorganization which include "adequate opportunities for employee development and progression," and "sufficient job interest to attract, retain, and motivate employees."

This continued until [the official] left the Agency after the [year] presidential election. When [the official] left the Agency, [grievant] bid on [the official's] position, but was not successful. He claims that the [title, name] advised him to find another position. This led, in [date] , to [grievant's] arranging a detail, not to exceed six months, to the [Agency B. He was left on this detail until [date]. He claims that this violates [Agency regulations], which states

that a "detail is the temporary assignment of an employee to a different position for a specified period with the employee returning to his or her regular duties at the end of the detail." [Grievant] notes that although these regulations took effect on [date], he has no reason to believe that the predecessor regulations did not vary substantially, and that these are the regulations the Agency gave him in connection with this grievance. [Grievant] claims that he had no "regular duties" to which he could return, as his position description was marked, "Incumbent only." The grievant argues that the Agency had no "specified period" in mind when it initiated the detail, and although the order stated "six months," he was left on the detail for 18 months. [Grievant] contends that had [Agency] kept him apprised of more attractive positions that became available within the Agency, he would have been in a better position when [Agency] and [unit in Agency B] merged to find a suitable position within the Agency, He maintains that this constitutes another link in the pattern of illegal personnel practices he has been exposed to by the Agency.

The next issue is "[grievant's] claim that the Agency ignored the Merit Promotion process when it failed to choose him to fill the position of [title] when it was reestablished in [date]. He contends that in every aspect of the work, including the fact that he had previously held

the position for [number] years, he was more qualified than [name], the candidate the Agency chose.

The fact that the Agency appointed [name] [title] before making its final decision on a permanent incumbent for the reestablished position, indicated to [grievant] that [name] had been preselected for the position. [Grievant] claims that by any objective criteria he was more qualified than [name]. He had completed his doctorate; he had over [number] years of actual [specialty] experience in [field], [number] of which had been as [title] for the Agency; and, he had won awards in almost every major domestic and international [field] competition. [Grievant] contends that in choosing [name], the Agency violated its regulations for the Merit Promotion Protection of Domestic Specialists, as provided in [Agency regulation], effective [date], because it had not chosen the best qualified candidate.

[Grievant] argues that [name], the selecting official, was not well informed on either [grievant's] or [name's] knowledge of creative and technical standards for [specialty], and he ignored other factors such as education and awards. In these areas [grievant] claims superiority.

Concerning the administrative ability the Agency sought in the incumbent, [grievant] contends that the only problem in his record was his "conflict with a single

unscrupulous deputy." The grievant also faults [name] for not indicating to him the special interest the Agency had in [specialty] experience thus preventing him from providing [name] with more detailed information concerning his experience in this area.

Further, [grievant] claims that the Agency violated its regulations contained in [Agency] regulations which set forth the system for the evaluation of all Foreign Service officers. The grievant notes that the [Agency] regulations were promulgated on [date], but states that "The previous evaluation system did not vary substantially." He argues that: "The machinations of the agency to exclude [grievant] from the [title] position makes a mockery of the personnel evaluation system. [Grievant's] evaluations [of his performance] do not support the allegations of mismanagement. Indeed, the only reference to any supervisory problem in [grievant's] evaluations is one to the ubiquitous [name]." According to the grievant, this failure of the Agency to utilize the personnel evaluation system acted to deprive him of the procedural rights conferred by the regulations. He maintains he was the victim of "harassment," "scapegoating," "retaliation," and "unsubstantiated allegations and extreme overreaction to ordinary bureaucratic differences." He claims his career was further damaged through the ineptitude of the Agency in dealing with the incidents involving [name].

[Grievant 's] final charge is that when the [Agency and **unit** in Agency B merged], [Agency] failed to assign him to a position commensurate with his grade. He contends that, although his office was moved from the [Agency B] where he was still on the six month detail, to [Agency] in [date], he was not assigned a permanent position until [date, a year later]. When this action was finally taken by the Agency, the position he was placed in had been classified at the [grade] level.

[Grievant] argues that, even though his rank was not downgraded by this action, he was left at a severe disadvantage were he to apply for conversion to the General Schedule when he reached mandatory retirement under the Foreign Service system. The grievant confirms that the Agency was not required to offer Foreign Service officers conversion to the General Schedule, but he maintains it is a reasonable likelihood that he might have applied to do so and, in fact, admits he was offered a position at the [grade] level.

The grievant cites the Agency's [year] regulations governing the discipline of employees, [regulations], to argue that the Agency's failure to take any action against him, which could be technically labeled "discipline," deprived him of the right to appeal under these regulations. His brief argues that, "Instead, the agency eliminated his position from under him, detailed him, relegated him to menial duties, ignored his application for promotion, and denied his request

for reassignment. The agency let him sit until he reached mandatory retirement age with full knowledge that he would not accept conversion at the [grade] level. It is ironic for an employee to grieve the failure of the agency to take disciplinary action. The lack of official discipline, though, has left [grievant] wronged without a remedy."

[Grievant] claims that all the issues in his grievance account for actions taken in violation of Agency regulation and in contravention of the Agency's legitimate employee evaluation and discipline procedures. Further, he contends that the Agency's claim that these actions were legitimate or good management are not a defense of improper personnel action.

The grievant has noted several ways in which the Agency demonstrated bad faith in the handling of his grievance. First he mentions the Agency's inability to produce anyone who was authorized to discuss a settlement of the case. He mentions the difficulties he encountered in obtaining documentation from the Agency, either through management sources or through Freedom of Information channels. He notes that the Agency failed to respond to his Request for Admission of Facts, although they were presented at the Prehearing Conference. He also complains of problems with the Agency in the taking of the depositions and the receipt of the transcripts.

During the course of this grievance case, [grievant] altered the relief he seeks. In his final brief he asks that: (1) he be given a retroactive promotion to [grade] as of [date] , the date he was appointed to the Agency; or, in the alternative, (2) a retroactive promotion to [grade] as of [date], the date [name] was appointed [title]; (3) attendant back pay, benefits, adjustment of retirement annuities, etc.; (4) correction of all personnel records; and (5) reasonable attorney's fees and costs of pursuing his grievance. This removes the grievant's original request that the selection of [name] as [title] be invalidated, and [grievant] be given the position as of the effective date of [name's] appointment to that position. However, it still includes the alternative action of his being given a retroactive promotion as of [date] and requests reasonable attorney's fees and costs. IV.

AGENCY'S POSITION

The Agency argues that under Section 692(3) of the Foreign Service Act of 1946, as amended, the grievant's complaint concerning the circumstances surrounding his hiring in [date] must be dismissed by this Board. This, because [grievant's] claim was presented more than three years after the occurrence giving rise to it and more than two years after the effective date of the Board's regulations, i.e. [date].

The jurisdictional question aside, the Agency contends that, by statute, the Foreign Service personnel system

establishes the concept of rank-in-the person, regardless of the grade or class of the position occupied. Therefore, the officer holding a position higher or lower than his personal rank is not subject to promotion or demotion as is the case in the Civil Service personnel system, where the grade of the incumbent is determined by the position. The Agency declares that its policy in establishing the personal rank of an officer at the time of appointment is, in general, to match the earnings to the applicant's experience, or by reference to the base of the corresponding civil service grade level for which the officer qualifies. Therefore, [grievant's] entrance level was placed at [grade], because his highest grade in the Civil Service had been [grade]. This, the Agency points out, resulted in [grievant's] leaving the [Agency C] at [grade], at an annual salary of [amount] and immediately being appointed to the Agency as an [grade], at a salary of [amount] [ per annum.

The Agency also claims that in accordance with regulations and procedures promulgated in [regulations, date], the Agency was not making any appointments of officers under the Civil Service General Schedule (GS) at the [grade] level and above at the time [grievant] was hired. All such appointments then were made under the Foreign Affairs Specialist (FAS) program.

Regarding [official's] alleged promise of promotion a year after [grievant's] appointment, the Agency states it has "...no moral or legal obligation to honor such informal contracts or arrangements." The Agency further points out that there was no way that [the official] could have accomplished this outside the Selection Board process.

Finally, on this issue, the Agency contends that [grievant] was aware of these circumstance surrounding his hiring and accepted them. The Agency further notes, that the grievant has the burden of proof on this issue, as well as all the others in this grievance, and that when asked to support his claim of having been hired at the wrong level, he was unable to cite any law, regulation or policy that had been violated.

The Agency notes that the grievant has abandoned his original demand that [name's] appointment as [title] be set aside and that [grievant] be given the position, but that [grievant] still contends that the selection of [name] was wrongful. The Agency further states that it appears the grievant wants a retroactive promotion to an equivalent grade and salary, effective [date].

The Agency contends that on this issue [grievant] is asking the Board to substitute its judgment for that of [name] and [name, head of division], in selecting the best qualified candidate for the position of [title]. The Agency argues

that, "Nothing in the Grievance System Regulations gives this Board jurisdiction to review the actions of a duly appointed Selection Officer in selecting or not selecting a Foreign Service officer who is a Domestic Specialist, as was [grievant], for a particular position. On the contrary, 'judgments of Selection Boards...or of equivalent bodies, in ranking Foreign Service Officers for promotion' are expressly excluded from matters which are grievable (Grievance System Regulations, Sec. 662d.2)." The Agency submits that this Board should apply this section of its Regulations by analogy to the situation under discussion and decline jurisdiction of this issue.

[Regulations], which the Agency claims applies to [FS category], such as the grievant, states in pertinent part:

"While the procedures used by the Agency to identify and rank qualified candidates are properly subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance." {underscoring by Agency)

The Agency argues that the grievant has made no attempt to prove that [name] and the other two candidates against whom he competed were not qualified for the position, but that [grievant] merely contends that he was the best qualified.

Finally the Agency points out that the grievant has not alleged that the selection of [name] for the [title, name's] position was "arbitrary, capricious, or contrary to law or regulations." The absence of such allegations and proof thereof, the Agency argues, excludes the grievant from entitlement to relief from the Board under Section 666.6b(2) of its regulations.

According to the Agency, the question of whether it is required to place [grievant] in a General Schedule position equivalent in grade to his Foreign Service rank is not grievable. The Agency cites Section 662d.(!) of the Foreign Service Grievance Regulations, which states that complaints against individual assignment or transfer of Foreign Service Officers or employees are not grievable acts or conditions. The Agency argues that Section 523 of the Foreign Service Act of 1946, as amended, expressly authorizes the Secretary to assign Foreign Service Reserve Officers "as the interest of the Service may require." The [Head of Agency] has the same powers with regard to [FS category] in that Agency as the [Head of Agency B]. Therefore, the Agency had the authority to extend the length of [grievant's] detail to the [Agency B] past the original six months.

The Agency makes the same reference to the Foreign Service Act to justify its position that when the Agency merged it was not required to assign [grievant] a position

commensurate with his abilities and experience. Again, the Agency points out that the grievant was unable to cite any law or regulations which would require the Agency to assign him to any particular position.

The Agency addresses [grievant's] claim to a retroactive promotion effective [date], the date [Agency] was created by noting that: "A retroactive promotion of a Foreign Service Domestic Specialist such as [grievant] to a position for which he has never applied or competed would be a direct violation of the Agency's Merit Promotion Regulations."

Further, there is no evidence in the Record to show that [grievant] applied for any positions except for the [title] job, and twice for the job of [title], which the Agency states is shown by the evidence to be reserved in these instances for an [FS category]. In fact, the Agency continues, after [Agency] was created "[grievant] was asked to return from his 'informal detail' to the [section] - his assigned organization - in a [grade] position. He elected instead to remain in [division] and, at s risk which he fully understood and accepted, find a suitable position to which he might be permanently assigned. He was eventually assigned to a position classified and allocated at the [grade] level on [date]."

In conclusion the Agency contends that [grievant] "...has totally failed to demonstrate that he has been harmed in any

tangible way as a result of violation by the Agency of any applicable law or regulation." V. DISCUSSION AND FINDINGS

The Board chooses not to address the jurisdictional questions raised by the Agency over some aspects of the case. The Board has, after a careful review of the Record of Proceedings, concluded there is no merit in the grievance and therefore does not feel obliged to reach the jurisdictional issue.

The Board concludes there is no merit in the grievant's claim that he should have been hired at the [FS category grade/GS grade] level. [Grievant] contends that because the position he was recruited for was classified at the [grade] level, the Agency was required to hire him at that level. He cites no laws or regulations to support this. However, the Agency has shown that there were regulations in effect at the time which required it to make new appointments, such as the one offered [grievant] in the Foreign Service, under the Foreign Affairs Specialist (FAS) program- This system is based on the concept of rank-in-person, not in the position, as in the Civil Service. Therefore, when setting the level at which new appointments were made under the FAS program, the Agency was properly guided by the applicant's qualifications and abilities, not the classification of the position. The Board finds that the Agency's decision to hire [grievant] at

the next higher equivalent grade than he held [grade] was a correct application of Foreign Service personnel regulations.

There is no proof of [grievant 's] allegation that [the official] promised him a promotion during his first year with the Agency- Moreover, under the Selection Board process, the system by which Foreign Service personnel are considered for promotion, there was no possible procedure available to [the official] to keep such a promise.

The Record confirms that, in its letter of [date], the Agency offered [grievant] an appointment as an [grade] under the FAS program. In that letter he was informed that the FAS program would be explained to him upon his arrival in Washington. That letter also included information concerning the Foreign Service, the possibility that he might be required to serve abroad, and that he would compete for promotion with other officers in his class and specialty. The Record does not shew whether or not the FAS program was explained to him. However, the [date] letter confirms that the Agency intended to do so as well as to bring the FAS program to [grievant's] attention. Had not the Agency explained the FAS program to him at that time, [grievant] could have requested that the Agency do so.

In his next issue, [grievant] states that he arranged the detail to [Agency B] in [date], and in a memo to [name], dated [ ] , he referred to it as "a challenging and worthwhile

position." The Record confirms that [grievant's] performance in this position was superior. The completion of this six-month detail corresponded to the [merger of Agency and unit in Agency B]. At that time he was assigned as a [title] in the [division] in the Agency, where he retained his rank as a Foreign Service employee and continued to perform in an exemplary manner.

The Record shows that during this period, whether it was soon after the reorganization in [date] as the Agency claims, or in the fall of [year] [ as [grievant] claims, the Agency offered him the position of [title] in [section], the office from which he had been detailed to [Agency B] . He refused this assignment because it was a "very lowly position." Thus, the Agency fulfilled its obligation to return him to his original office, and by his refusal of the [section] position, [grievant] remained on the [Agency B] detail of his own volition. Therefore, the Board cannot sustain the grievant's claim that the Agency lacked authority to detail him to [Agency B] for a period longer than the original assignment of six months.

The Board denies the grievant's claim that the Agency violated the Merit Promotion process in not selecting him for the position of [title]. [Grievant] argues he was the "best qualified" candidate and, therefore, under [Agency regulations], should have been chosen.

As required by these regulations, the Agency posted a vacancy announcement of the position and the four "best qualified" candidates, of which [grievant] was one, were considered. The Record confirms that [grievant] was superior in many of the qualifications that the position required. There is no question that he was both imaginative and innovative as exemplified by the [project] he produced for the Bicentennial. However, convincing testimony was adduced at the hearing which demonstrated his lack of managerial ability, a quality the Agency was especially looking for in a [title].

Despite [grievant's] sharp allegation that [name] had been preselected for the [title] position, the grievant has brought no evidence forward to prove such a charge.

[Grievant] notes other factors which, he argues, bear on his grievance, such as problems encountered with his deputy during his tenure as [title] as well as another alleged infraction of regulations on the part of the Agency in abolishing the position of [title] in [date] and its reestablishment in [date, four years later] . The Board can find no violation of Agency regulations in the abolishment and reestablishment of the [title] position.

There well may have been duplicity on the part of [grievant's] deputy, but if so, no link between that individual's actions and the abolishment of the [title] position has been established.

Nor does the Board find credence in the argument that Egrievant's] career suffered because the Agency violated regulations governing personnel evaluations and discipline of employees by not informing him in a timely manner of its true appraisal of his performance or initiating any formal disciplinary action against him.

The final issue is whether or not the Agency failed to assign [grievant] to a position commensurate with his grade when [Agency merged with unit in Agency B] in [date] . The Board finds nothing in the Record to support the grievant's position on this issue.

As has been pointed out previously in this decision, under the Foreign Service personnel system, the rank is in the person not in the position. Therefore, as a Foreign Service employee, no matter what position the Agency offered [grievant], he would have retained his grade. While [Agency] had no obligation to offer him a particular position, he did have the option to apply for available positions for which he was qualified. He exercised this right by applying for the position of [title]. He was determined to be one of the "best qualified" candidates, and the Board finds he was properly considered for the position. By not selecting him for the position, [Agency] violated none of the regulations of the Merit Promotion Program nor any of [grievant's] other rights.

The Board must take note of the Agency's unconscionable delays in responding to the grievant's requests for materials. The Board cannot condone such delays, which have clearly created difficulties for the grievant. However, we do not find that such delays have changed the substance of the arguments.

After careful review of the Record before it, the Board finds no merit in any of the issues. Hence, the grievance is denied.