

EXCISION NO. 520

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant
and [Agency]

Record
of
Proce
innings

No. [
]

Date:
May
23,
1980

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 Pr ivacy Act.

Grievance
and
Agency

Opinion of the Board

I. SPECIAL FACTORS BEARING ON THE GRIEVANCE

It has probably always been true that the Foreign Service agencies have considered carefully and compassionately employees' wishes about future assignments to foreign posts before making such assignments.

There have always been family, health or personal reasons to be considered in making an assignment besides the needs or mission of the Agency.

There are no certain ways to compare the personal requirements of today with times past because every such need must be weighed against the advantages or opportunities of the times.

This is especially true for Foreign Service officers. Developments in our domestic economy affect the economic wellbeing of our Foreign Service officers - sometimes synergistically as, for example, the strength of the dollar against foreign currencies. The prestige of the United States, internationally, has a more pronounced and immediate effect on Foreign Service officers, for good or for bad, than on working people in our domestic economy. Although such effect is an intangible part of the job, it could have a substantial effect on the employee's perspective of job content, challenge and contribution.

Rapidly changing social patterns (interacting with economic changes) in the United States, such as working women and children with one resident parent in the family, have required substantial adjustments in life style, care and shifting of family responsibilities, affecting health, education and other such requirements. The problem is compounded for Foreign Service officers. They are affected by these social changes within our own country but they must then *take* the consequence of such changes and attempt to live with them in foreign places which, for the most part, have not experienced such changes - at least in nearly the same degree as in the United States.

There is no substantial record to support the thought, but a certain restiveness seems apparent in the ranks of Foreign Service officers. There is increasing concern about job satisfaction and career opportunities. An intrinsic

part of this concern is the place to which a foreign service officer is assigned to duty- There is a growing insistence that their wishes about their jobs not only be considered but that they be counted by top management in deciding when, where and how work is to be done.

And yet, foreign service work is public work- It is very important public work. The work of the Foreign Service must be done, sometimes despite the preferences of its employees as to job assignments. Employees of Foreign Service agencies thus accept it as a "condition of employment" that they will serve wherever assigned.

Thus, the needs of the service on occasion clash with the personal requirements of its officials - as here.

In this dispute, the grievant, a highly regarded junior officer, refused an assignment in [Post A], because it was not likely his spouse could be employed in [Post A] during his tour of duty. The employer, [Agency] knew of the grievant's strong preference not to be assigned to [Post A] when so assigning him to that post, but considered the needs of the Agency to balance out the employee's personal preferences.

The dispute here is whether the Agency duly regarded contractual commitments (later incorporated in Agency regulations) to give the grievant an opportunity to express his preferences for assignment before he was assigned to duty in [Post A].

On the record there is little question but that the Agency satisfied the spirit and all but some technical parts of the letter of the contractual agreement it had with the [Union], which requires the Agency to consider the employee* s preferences before assignment. Therefore, the grievance should be denied.

But more than passing reference to contractual and regulatory requirements and relevant facts is required because: the grievant may be discharged for his actions (in a parallel proceeding) while several other Foreign Service officers were not disciplined for virtually the same actions raising a question of basic fairness; the jurisdiction of the Foreign Service Grievance Board (Board) to act on the grievance has been strongly and repeatedly challenged by the Agency and there were some technical deficiencies in the Agency's compliance with its own regulations on an "Open Assignments" policy and procedure. Most importantly, some amplifying comment is required because this is the first grievance to be considered by the Board under a new collective bargaining agreement on assignments; the case for each party was argued by experienced and competent attorneys raising substantial policy questions; and the award, although favorable to the Agency, should not be construed as blessing the extensive arguments it advanced in support of its case concerning the Agency's obligation - or absence thereof -under the collective bargaining agreement, to consider the employee's

preference for assignment before making any assignment.

The decision here is limited to a determination that the grievant did not show that the Agency violated the agreement of the parties under the facts.

II. FACTS

A. Grievant Refuses Assignment

By all accounts, [the grievant] was a good Foreign Service officer with excellent potential for long and distinguished service. He was proficient in the language [of Post A] and had received step increases for this proficiency, as provided in the regulations.

In the Spring of [date] while based at [Post B] , [the grievant] anticipated his next duty assignment in [date]. He was at the time accompanied by his spouse who had obtained [] work in [Post B] after joining him when he was assigned to that duty station. As authorized, [the grievant] corresponded with his career counselor [], in Washington, about a new assignment indicating, in [date] interest in [Post C] , [Post D], (Post E] , [Post F] , [Post G] and [Post H]. He made clear he was concerned about his spouse's employment at his next duty station.

On [date] , [his career counselor] replied that it was too early to predict what might be available in the cities which [the grievant] preferred "because of the language training involved". The counselor indicated that announcements for assignments for

those places would be made probably in [date] and that any language training to fill those jobs would begin in the summer of [date] for assignment in January or the summer of [date].*

In this letter, however, the counselor may have confirmed [the grievant's] worst fears because he advised the grievant that the assignment group was then in the process of considering officers for jobs in [Post A] and that there were four junior slots turning over in the summer of [date], one of which might turn out to be his next assignment because "it was always likely that the Agency would call on your [language] skills at some point".

In response, [the grievant] asked to be considered for an assignment in [Post I] or as a [specialty] in [Post C] with an opening in [date].

By telegram on [date], the Agency assigned the grievant to [Post A] for duty between the summer of [date] and the summer of [date]. Anticipating the grievant's disappointment, the Agency included in its cable assigning him to [Post A] advice that the appointment was made "after pursuing all alternatives" and emphasizing that the Agency needed his experience in language skills, because of the shortage of officers

* A critical factor in assignments is language proficiency. Some languages, like [language], are considered "hard". Training for hard languages might take more than a year. A conflict would arise between the policy to give employees an opportunity to indicate a preference for a new assignment based on listed vacancies, where the information about opportunities for such vacancies is not made available to the employee until a year before the assignment. Such conflict would not arise if the employee were already qualified in the language for the post which becomes available within the year of assignment or where language training would take less than a year.

available and qualified to be compatible with hard language training for the [date] cycle.

Following an appeal to the [Executive Committee], the [head of personnel] for [the Agency] denied his request to change his [Post A] assignment because:

There is a clear case of Agency need. We need you in [Post A] more than we need you in any other position opening in the summer of [date].

Thereafter, there were petitions or appeals by or on behalf of [the grievant] concerning other assignments or an extension of the tour in [Post B]; further consideration by the exceptions committee; and a series of requests under the Open Assignments Policy to assignment to places in virtually all parts of the world, except [Post A].

After more than a year of exchanges with the Agency concerning his next assignment, [the grievant] wrote his new career counselor [date] and stated in part:

"I am unable to accept the assignment as [specialty] in [Post A] beginning in [date]."

This led to further exchanges between [the grievant] and the Agency concerning the implication of his decision, followed by the agency proposing to separate him for cause as a result of his alleged insubordination.

Associated with this impasse over the [Post A] assignment was a request to the [Board] by [grievant] on [date] to be transferred to [another foreign affairs Agency]. [Agency] approved this request on [date]. The [other Foreign Affairs Agency]

certified need for his services on [date]. However, the matter of "assignment discipline" within [the Agency] then became a factor concerning exchange of officers, considering that three [Agency] officers had recently transferred to [the other Foreign Affairs Agency], under conditions similar to [the grievant]. [The Agency] brought this to the attention of the [other Foreign Affairs Agency] on [date]. On [date], [the Agency] informed the [other Foreign Affairs Agency] that [the grievant] was in Washington "pending final action on his involuntary separation for cause from the [title]." On [date] [the Agency] proposed to the Board of the Foreign Service that [the grievant] be separated for cause.*

B. Grievance

On [date] (the same day the Agency proposed to separate the grievant), [the grievant] submitted his grievance to the Foreign Service Grievance Board.** He charges that the Agency violated its own regulations by denying him the opportunity to participate in the open assignment process before assigning him

*At the time of the decision of this Board, initial proceedings had been completed by the Board of the Foreign Service with a recommendation that [the grievant] be discharged for insubordination.

**In this proceeding the agency continues to press its argument that this Board does not have jurisdiction because (1) [the Agency] had already started action for separation for cause, which lies within the exclusive jurisdiction of the Board of the Foreign Service and (2) that complaints against individual assignments are not grievable. This Board considered this question in a separate proceeding and decided on [date] that "the existence of the other proceedings does not require the finding against this Board's jurisdiction" This Board with a different Presiding Member adopts the opinion and finding of the previous Board on jurisdiction.

to [Post A]. As a result, he contends he was denied the opportunity to make his preferences for assignment known to the Agency and that this denial will seriously affect his career development*

C. Positions of the Parties

Grievant's case before the Board was contained in a pre-hearing and post hearing brief and in some cross examination of witnesses called by the Agency at the hearing on the grievance held on [date].

The Agency presented witnesses who testified as to the making and effect of the Open Assignments Agreement and the facts concerning the consideration and appointment of [the grievant] to his [Post A] assignment. It also presented a post hearing brief.

1. Agency

The Agency argues that the grievant has not sustained his burden of proving that [it] violated any applicable law or regulation selecting him for assignment to [Pose A]. Supporting that conclusion, the Agency argues that [the grievant] does not dispute that lists of vacancies were published continuously under the Open Assignments Policy beginning in [date] and that those lists were received in [Post 3] where he had access to them. He applied for vacancies in [Post G] and [Post J] before he was selected for [Post A]. He was listed and considered for several others. He continued to submit applications and was listed and considered for at least 13 more vacancies

before his assignment became final and he was ordered to [Post A]. Further, during this time his two appeals to the [Exceptions Committee] were being considered and acted upon.

The Agency also argues, affirmatively, that [the grievant] was selected for assignment to [Post A] because of a compelling and urgent need for an [officer] with his abilities, experience and training, particularly his language skill, for which he had received premium pay. All of his expressions of preference for assignment to places other than [Post A] had to yield to the compelling need of the Agency for his services there.

The Agency argues with special emphasis that:

- no Agency rule, regulation or policy prohibits an officer from applying for vacancies more than twelve months in advance of his or her availability date.
- no Agency rule, regulation or policy prohibits the Agency from selecting the officer for an assignment more than twelve months in advance of his or her availability date.
- no Agency rule, regulation or policy prohibits the Agency from selecting an officer for an assignment before such officer has submitted any preference statements.

And, finally, the Agency argues that the Open Assignments Policy and regulations incorporating that policy, have as their first and dominating consideration, the right of the Agency to select the Foreign Service officer that will satisfy the needs of the Agency – which in this case was to have [the grievant] report for duty in [Post A].

2. GRIEVANT

The grievant presented a spirited and coherent argument that the Agency violated the policy on assignments to his prejudice for which he should be awarded the remedies included in his grievance.

One of the policies, which is incorporated in Agency regulations*, requires the Agency in exercising its right to assign employees to "consider all the assignment preferences the employee has requested", [regulations]

The Agency's regulations on Open Assignment Policies and Procedures contemplate a three stage procedure.

First, the Agency is to issue a list of assignments one year in advance of transfer. Second, employees who would be available for those assignments may express their preferences for assignments and their reasons for those preferences on a reply form provided by the Agency. These reply forms must be sent directly to the employee's career counselor within two months after the assignment for which the employee wishes to be considered appears on the list. Third, the Agency considers all the assignment preferences an employee has formally requested, as well as others for which the Agency may consider the employee qualified, and then makes the assignment.

* [basis for the regulations]

To the grievant, the procedure followed by the Agency prior to assigning him to [Post A] did not satisfy the requirements. [The grievant's] assignment to [Post A] was made on [date]. Grievant argues, therefore, that as of that date, not one stage of the three step process had been completed, or even begun. The grievant's assignment to [Post A] was made one month before the lists of the assignments for which he could have stated his preferences began to be issued- Also, since the Agency did not fulfill its duty of providing him with a list of vacancies projected one year in advance of his assignment, it prevented him from exercising his right at the second stage of the procedures to submit his assignment preferences in a timely fashion from among the vacancies that would have been listed.

Moreover, the grievant argues that the violation by the Agency of its own regulations about assignments harms him because he was forced into a position of having to choose between the Agency's assignment or refusing it, thus, risking a decision to separate him for cause- And, the Agency's determination to discipline [grievant] for refusing his assignment to [Post A] led it to "sabotage" his chance for transfer to the [other Foreign Affairs Agency].

The remedy requested is for the Board to: order the Agency to rescind the assignment made on [date] and to start a new cycle under the assignment procedure; recommend to the Agency that it reimburse [the grievant] for the attorney's fees and expenses he has incurred in order to pursue this grievance; and order any further appropriate relief.

III. DISCUSSION

A. Grievant Did Not Sustain Burden That Agency Violated Assignments Policy

[The grievant] has not sustained his burden that the Agency violated the collective bargaining agreement or applicable regulations on assignments.

The agreement between the Agency and the union is with respect to a policy.

The policy is to encourage employees to participate in the assignment process. The policy is stated in [section] of the agreement. It is stated in five major categories. The first two insure equal opportunity and that there will be no discrimination in assignments.

The third category is immediately involved in this dispute. As a predicate to specific factors that the Agency is to consider in the assignment and transfer of individual employees, the agreement provides that:

Consistent with applicable law, Agency assignment needs, and the principle of world wide availability, [Agency] will give consideration to the following factors in the assignment and transfer of individual employees.

There are then listed seven factors to be considered by the Agency in making such assignments. They are: effective use of the employee's abilities, experience and training; career development and preference as to the type of functional assignment; family considerations, such as educational needs of

children and availability of suitable housing; health limitations; personal concerns of a compassionate nature; prior service, particularly at hardship posts; and opportunity to serve in more than one geographic area.

The fourth category in this policy on open assignments concerns married employees whose spouses are Agency employees. This category does not apply in this dispute.

The final statement of policy commits the Agency to "consider" the employee's assignment preferences "as well as others for which the Agency may consider the employee qualified" in exercising the Agency's right to assign employees. The Agency could not have been in doubt at any point pertinent in this dispute about [the grievant's] preferences. He did not want to go to [Post A]. He said so in writing, telephone conversations and meetings with officials responsible for determining his assignments. The Agency therefore did not violate any agreement to "consider" [the grievant* s] preferences for assignment.

The grievant speaks in terms of adverse effect on long range career development, but the basis for this argument, developed only after the issue was joined by the parties whether or not he would report to [Post A], as assigned. The grievant made no argument with respect to the Agency failing to make effective use of his ability or experience or training; nor did he maintain there was any health problem or failure to have an opportunity to serve in taore than one geographic area. He did not complain that [Post A] was a hardship post in the usual

sense of the term (except by indirection in the fact that employment opportunities were limited for his spouse)-It might be argued that the grievant had a personal problem that required compassionate consideration by the Agency, but no direct argument was based on this factor.

The essence of the grievant's complaint on policy considerations was that the Agency did not sufficiently weigh, in his favor, the family problem of his spouse not having a good opportunity to use [spouse's] training in a job in [Post A], as against the Agency's determination that he was needed at that post, at his rank, and because of his proficiency in the [] language, which was a hard language and for which there were not other qualified officers - or the time within which to make them language qualified to meet assignment cycle requirements.

Since the agreement of the parties on policy requires only that the Agency consider the factors listed before making an assignment, there can be no finding here that the Agency violated the agreement. The employer made a very substantial case that it did consider the employee's personal circumstances before making the assignment. It considered those circumstances before and after the assignment (on the chance that circumstances might change, such as the unexpected closing of another mission thus freeing a language qualified officer to take the [Post A] assignment within time limits) including correspondence, cables, meetings, a supporting recommendation by the Ambassador to [Post B], and consideration, twice, by the [Exceptions Committee].

There is therefore no basis to sustain the grievance on the grounds that the Agency violated the policy of the agreement concerning assignments.

B. Grievant Did Not Sustain Burden That Agency Violated Assignments Procedure

The grievant is on somewhat raore firm ground in his complaint against the Agency with respect to ["Assignment Procedures"] of the agreement on Open Assignments.

In the section concerning Agency responsibilities, there is a requirement for listing of designated vacancies "projected one year in advance". Also, there is a commitment by the Agency to provide appropriate forms for employees to submit their preferences for assignments.

It is not correct, as the grievant argues, that these procedures effectively prohibit the Agency from making an officer's next assignment more than one year in advance of the officer's availability for reassignment; or that the procedures prohibit the Agency from making an officer's next assignment before the officer has had the opportunity to submit any assignment preferences; or that the regulations prevent an officer from submitting more than a year in advance of the officer's availability for reassignment any assignment preferences that the Agency will consider equally with the preferences of other officers, except a preference for an assignment for which an officer is language qualified.

It should first be said that the grievant makes a thoughtful argument to support these conclusions. [The grievant] did not have a full opportunity to express his preferences for assignment other than [Post A] , based on designated vacancies which were announced between the time of his assignment in [Post A] in [date] and a year before he was due to be reassigned. [Career Counselor] testified things could have changed after [the grievant] was assigned to [Post A] which would have permitted a change in assignments, but it is always more difficult to undo something already announced officially than to make the initial decision. Since [the grievant] was already language qualified for the [Post A] assignment, there was no prejudice to the Agency's requirements to wait until the autumn of [date] to make a decision on [the grievant's] assignment, rather than fix the assignment several months earlier, in [date]. Also, there were four junior officer slots to be filled in [Post A]. Normally, multiple assignments would provide flexibility not otherwise available in a single assignment.

There was therefore a technical violation of the procedures in the premature assignment to [Post A].

But form cannot prevail over substance. Rules of procedure are subordinate to the policies which they serve-

The question is whether the Agency considered the grievant's preferences before making the assignment. It did. The policy was thus fulfilled. Also, the Agency satisfied the essence of the procedures by which it was to make its substantive decision. The Agency was protected, in any event, against the technical

irregularities which occurred. [Section] on assignment procedures provides that:

It should be noted that these lists represent a good faith projection of anticipated Agency needs but in no way constitute a commitment to retain or fill a position, replace the incumbent, or abide by the time table indicated.

The evidence is overwhelming that the Agency acted in good faith and the Agency is not bound (by agreement of the parties) to the "time table" on announcements.

There is therefore no basis to sustain the grievance for failure by the Agency to observe agreed procedures in the Open Assignments Policy.*

C. Agency Made A Commitment It Is Obligated To Observe

The attention given to the arguments by the grievant is warranted not so much by the merit of those arguments under the facts but because such arguments must be considered if the policy on assignments is to be given effect as a collective bargaining agreement of the parties.

This was a new agreement at the time the dispute arose- The Foreign Service Grievance Board has not previously considered issues under this agreement. In defending against this grievance the Agency argued strenuously that it did not violate the agreement.

*The actions of the Agency in deciding to discipline the grievant after first approving his transfer to the [other Foreign Affairs Agency] and after other foreign service officers were effectively excused for the same conduct are matters within the Agency's responsibilities

In so arguing, it left the impression with the Board that the Agency regards the Open Assignments Agreement as little more than a gesture to its employees.

The Agency presented a line of witnesses, each of whom effectively testified there is no restriction on the Agency in assigning an employee where and when needed. This is not so. The Agency has committed itself, among other things, to consider Foreign Service officers, equally, for overseas assignments and that it will apply U.S. law and not the policies of a foreign country regarding race, color, religion, national origin, sex or age- On these factors alone, if the facts were sufficient to support the charge, the Agency might be found to have violated the agreement so as to require the Agency to start a new cycle on assignments in accordance with its agreement.

In addition, the Agency has committed itself to consider personal matters in making assignments.

The word "consider" is a weak contractual term. But the word does appear as a term with meaning in the context of the collective bargaining agreement- The Agency should not be surprised if, in the future it were found in a proper case that personal factors do outweigh the Agency's declaration of need and a finding is made that the Agency has not duly considered the employee's preferences for assignment.

The parties agreed that employees will participate in the

assignment process and that personal considerations will be counted in the balance. The Agency cannot now write out such commitment.

IV. FINDINGS

For this dispute, the Board finds that there was a valid agreement; the Agency is required to consider designated preferences by employees as to overseas assignments; the Agency did consider the grievant's preferences in accordance with the spirit of the agreement and in accordance with the letter of the agreement, with the exception of certain de minimus technical deficiencies with respect to applicable procedures under the Open Assignment Policy; and, therefore, that the grievance should be denied.

V. DECISION

The grievance is denied.