

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████ § ██████████  
Grievant

and

The Agency for  
International Development

Record of Proceedings  
No. G-90-004-AID-02

Date: March 18, 1992

ATTORNEY FEES

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

James M. Harkless

Board Members:

James S. Landberg  
Marilyn Johnson

Special Assistant  
to the Board:

Irene Barbeau

Representative for the Grievant:

Self

Representative for the Agency for  
International Development:

William D. Jones  
Chief, Labor Relations Staff

Exclusive Representative:

American Foreign Service Association

## I. INTRODUCTION

Following the Board's decision in this grievance, issued on April 24, 1991, the grievant, [REDACTED], moved for an award of legal fees and expenses. Section 1107(5) of the Foreign Service Act of 1980 authorizes the Board to direct the payment of "reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code." Pursuant to this provision, the agency may be required to pay the attorney fees incurred by an employee, if the employee is found to be the "prevailing party" and the MSPB determines that payment is "warranted in the interest of justice."

## II. BACKGROUND

[REDACTED] original grievance with his agency, filed on July 27, 1989, alleged that an Employee Evaluation Report (EER) covering his assignment to [REDACTED] from August to December 1988 contained falsely prejudicial information and procedural violations. He asked the agency to expunge the EER from his records and to do so expeditiously so that it would not be seen by the 1989 promotion selection board (PSB). The agency determined that the subject EER was procedurally flawed and withdrew it from grievant's personnel file. However, this was not before it was seen by the 1989 PSB, which failed to promote him.

Grievant appealed to this Board on January 25, 1990, alleging that the flawed EER was responsible for his failure to be promoted and to obtain appropriate assignments. As remedy,

he requested retroactive promotion or consideration by a reconvened 1989 promotion board, a two-year extension of his "Time in Class" limitation (TIC), and his choice of assignment.

The Board determined that grievant's submission raised new issues which the agency had not previously addressed and remanded it to the agency for a decision on these issues. After efforts by grievant and the agency to negotiate a settlement failed, the agency issued a final decision on October 11, 1990 denying all of grievant's requested remedies. In the meantime, grievant was recommended for promotion by the 1990 promotion selection board.

In its April 24 decision, this Board found that grievant had not established that the faulty [REDACTED] EER was a factor in his non-promotion in 1989, and therefore denied his requests for retroactive promotion or consideration by a reconvened 1989 promotion board. However, the Board found partial merit in grievant's request for a two-year extension of his time in class limit, noting that:

...while we agree that grievant suffered an injustice as a result of the [REDACTED] experience, we believe a one-year extension of his time in class is adequate compensation for the career disruption caused by the four month assignment to [REDACTED] and subsequent temporary duty assignments.

Consequently, the Board directed the agency to extend grievant's time in class by one year.

### III. DISCUSSION AND FINDINGS

#### A. Whether grievant was the prevailing party

Grievant contends that he is the prevailing party because he

gained a significant portion of the relief he sought, specifically, a one-year extension of his TIC. He points out that this will result in a salary benefit which he estimates at \$90,000. He contrasts this with the smaller amount he would have received had he obtained promotion as of 1989.

The agency argues to the contrary that the one-year TIC extension is not significant in the overall context of the case. It points out that it granted the original remedy sought by grievant; removal of the contested EER from his file. Secondly, the agency says grievant did not attach great significance to a TIC extension when it was offered by the agency in the course of settlement negotiations.

The standard which the Board applies in determining if a party has prevailed for the purpose of attorney fees is whether the grievant succeeded on any significant issue which achieves some of the benefits sought in grieving (see G-88-072-USIA-03, page 9). This standard is consistent with the Supreme Court's decision in Texas Teachers v. Garland School District, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). There, the Court reaffirmed that "If the plaintiff has succeeded on 'any significant issue in litigation which achieved[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind."

In this case, grievant obtained an additional year of time in class as the result of the Board's decision. This was meant to repair the disruption to his career caused by the faulty [REDACTED] EER, curtailment of the [REDACTED] assignment, and his having

to accept a series of temporary short-term assignments as a result. An additional year of employment is substantial, in our view.

The agency's argument that it granted the principal remedy when it removed the contested EER is beside the point. That was not the issue before the Board. The issue was whether grievant should receive additional relief (i.e., beyond expungement) for the effects of the [REDACTED] EER. The Board determined that a one-year TIC extension would adequately compensate grievant for the career disruption caused by an EER that clearly was defective both procedurally and in substance.

The agency's argument that grievant did not consider its offer to extend his TIC to be significant is not an appropriate defense, in our opinion. The agency's offer and grievant's rejection of it occurred in the course of efforts to negotiate an overall settlement. Grievant cannot be penalized for his negotiating position in such discussions. In effect, the agency withdrew the offer when it issued its final decision denying all of grievant's requests for relief.

We find, therefore, that grievant was the prevailing party on a significant issue which achieved some of the benefits he sought. The question remaining is whether his case meets the interest of justice qualification for payment of attorney fees.

B. The interests of justice

Implicit in the Board's decision in this grievance was its view that the agency committed an error or errors which injured the grievant. A finding of error and injury is not enough,

however, to require an award of attorney fees. The standard for such payment is found in the decisions of the MSPB and the courts. Particularly noteworthy is the decision in Allen v. United States Postal Service, 2 M.S.P.R. 420 (1980), an administrative decision cited with approval by the courts. In Allen, the MSPB developed five criteria for determining whether an award of attorney fees is warranted in the interest of justice. The first of these, whether an agency was guilty of a prohibited personnel practice, is not applicable in this case. We will consider whether grievant's situation meets any of the four remaining criteria.

Allen Category 2:

Where the agency action was "clearly without merit," or "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency.

Grievant argues that the agency's action was clearly without merit or wholly unfounded because its initial inquiry into the facts surrounding the contested EER was inadequate and defective and it failed to recognize that the EER contained falsely prejudicial statements.

The agency contends that it attempted to meet grievant's concerns and in effect did so within regulatory time limits, despite the geographical dispersion of those involved in the EER dispute. It points out that grievant did not file his grievance until July 19, 1989 (revised on July 27), over two months after the contested EER was issued and only a month before the

promotion board convened. Moreover, the agency notes, it repeatedly offered a TIC extension as part of a settlement of the grievance.

In the Board's view, the injury which grievant suffered was an approximately one-year disruption of his career caused by curtailment of his Zaire assignment and the defective [REDACTED] EER. This forced the agency to arrange, and grievant to accept, several temporary short term assignments. It appears that the curtailment was arranged by mutual consent while grievant was in Washington. Curtailment was a reasonable action by the agency in light of grievant's difficulties in [REDACTED], and it is not uncommon in such circumstances that an employee must take short term fill-in assignments until an appropriate assignment is found. Thus, while grievant was not immediately given a "main-stream assignment", neither was he left in limbo by his agency. Instead, he was given several substantive interim assignments for which, to his credit, he received highly favorable short-term performance appraisals. That he was promoted the following year is strong evidence, in our view, that he was not severely handicapped by the short-term assignments or the gap left by the withdrawn Zaire EER.

Secondly, although the agency failed to withdraw the [REDACTED] EER in time to prevent it from being seen by the 1989 promotion panel, this Board determined that grievant did not establish that he was injured by this agency action. As we noted in our decision "...we are unable to determine that absent the [REDACTED] EER, or even with an outstanding performance rating in its

place, grievant might have been among the very small number of persons promoted in 1989." (page 9). Whether or not the agency could or should have acted more expeditiously to prevent the Zaire EER from being seen by the 1989 promotion board, the Board determined that this did not injure grievant.

We conclude that there is no basis for a finding that the agency's actions were without merit or wholly unfounded.

Allen Category 3.

Where the agency took action against the employee in "bad faith."

Grievant contends that bad faith characterized the agency's actions throughout. The agency's basis for expunging the Zaire EER, lateness and lack of examples, could have been determined earlier and before the EER was seen by the promotion board. The agency also denied that the promotion board criticized the rater and reviewer for the defective nature of the EER and failed to place the letters of criticism in their files.

The thrust of the agency's argument is that it withdrew the contested EER and that it repeatedly offered an extension of grievant's TIC in settlement of the grievance. It says it attempted to meet grievant's concerns, but that although he was aware of the EER's procedural defects in February 1989 and it was submitted in May, 1989, he did not file his grievance until July, only a month before the promotion board convened. In the agency's view, it was the grievant, therefore, who was responsible for the delay.

Although there were substantial differences between agency and grievant over the contested EER, we do not find the agency guilty of bad faith in its actions toward grievant. Although the agency experienced difficulty in finding grievant a "mainstream" assignment, it did place him in substantive positions in which his performance was highly praised by the receiving offices. We have little doubt that this was a factor in his 1990 promotion.

Nor has grievant submitted any evidence that the timing of the agency's withdrawal of the [REDACTED] EER was made in bad faith. Grievant filed with the agency on July 19, 1989. The agency was entitled to investigate the circumstances before reaching a decision. It offered settlement on October 19, 1989, which included withdrawal of the EER. When grievant declined to accept the settlement offer, the agency voluntarily withdrew the EER and issued a final decision on November 29, 1989. Withdrawal of the EER indicates that the agency's offer was not made in bad faith. Bad faith, in our view, would have been a deliberate agency action to delay removal of the defective EER so that it would be seen by the promotion board. There is no evidence of this.

Grievant's complaints about the agency's alleged denial that the promotion board issued letters of criticism to the [REDACTED] rating and reviewing officers is not persuasive evidence of bad faith. The criticisms could not, of course, have affected the agency's failure to withdraw the EER earlier. Notice of the criticisms was signed by the promotion board on October 5, 1989

(see attachment to grievant's letter to the Board of May 17, 1991). Two weeks later, on October 19, the agency offered to withdraw the EER in settlement of the grievance. Thus, regardless of how the agency treated the "criticisms" issue, there is nothing to indicate that this adversely affected its actions with regard to expungement of the EER or the rest of its final decision of November 29, 1989.

Allen Category 4.

Where the agency committed "gross procedural error" which prolonged the proceeding or severely prejudiced the employee.

Grievant's arguments on this issue are directed at the procedural flaws in the [REDACTED] EER. The agency acknowledged such flaws and withdrew the EER because of them. These are not issues which came before the Board, and, therefore, are not relevant to a decision on attorney fees.

Grievant has presented no evidence that the agency committed procedural errors in processing his grievance which prolonged the proceeding or severely prejudiced his career. Given the date of grievant's original submission, we cannot fault the agency for failing to withdraw the [REDACTED] EER prior to convening the promotion board about one month later. We determined, in any event, that the EER did not severely injure grievant in 1989. The agency's final decision, following this Board's remand of the grievance, was delayed by efforts to negotiate a settlement. Since the remedy granted by the Board, a one-year extension of TIC, affects the distant future of

grievant's career, the timeliness of the agency's final decision was not prejudicial to the grievant.

Thus, there is no basis for a ruling that the agency committed gross procedural error which prolonged the proceedings or prejudiced grievant's interests.

Allen Category 5.

Where the agency knew or should have known it would not prevail on the merits when it brought the proceeding.

Grievant argues that the agency offered a settlement only after he obtained an attorney. We see no relationship between this argument and the subject Allen category. It seems to pertain more to the question of timeliness, which we addressed under Allen category 4.

Grievant also argues that the agency was negligent in its investigation of the grievance. It ignored documentary evidence, he charges, and "knew all along" about the letters of criticism from the promotion board.

As indicated above, however, the letters of criticism did not emerge until October, 1989, and the agency offered settlement shortly thereafter. Moreover, contrary to grievant's claims, there is no evidence that the agency's investigation of the facts was deliberately prejudiced against grievant or otherwise undertaken in bad faith.

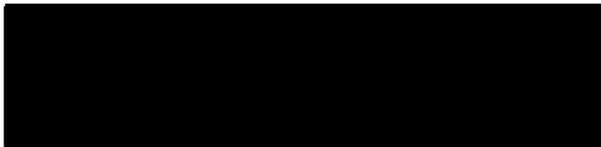
Finally, the issue which this Board considered and decided was whether grievant should receive remedies in addition to expungement of the [REDACTED] EER to compensate him for the

disruption of his career. The agency's final decision on this issue denied further relief on the basis that the agency had withdrawn the defective EER, and that the defects were not a substantial factor in grievant's failure to be promoted. This was the principal issue which the parties argued before the Board, an issue on which the agency prevailed. Grievant's request for a two-year extension of his TIC was a subsidiary issue, to which neither party devoted great attention. This Board concluded, after a thorough review of the record, that the defective [REDACTED] EER had disrupted grievant's career sufficiently to warrant a one-year extension of his TIC, but not the two-year extension that he requested. The circumstances of the case, including the fact that the subject EER covered only four months, that grievant received several substantive interim assignments, and particularly that he was promoted in 1990, demonstrated that he was not irremediably harmed by the Zaire EER. Consequently, we cannot fault the agency for failing to grant grievant's requests for additional remedies. We do not find, therefore, that the agency should have known that grievant would partially prevail on the issue of an extension of his TIC.

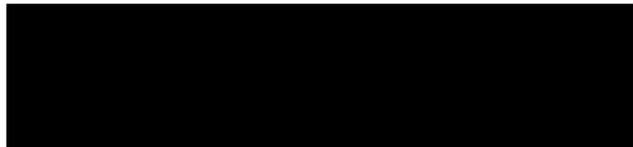
#### IV. DECISION

Grievant's motion for attorney fees is denied.

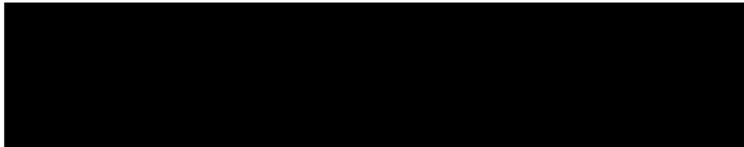
For the Foreign Service Grievance Board.



James M. Harkless  
Presiding Member



James S. Landberg  
Member



Marilyn Johnson  
Member