

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Name],
Grievant

Record of Proceedings
No.

and

Date: September 27, 1991

The Department of State

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

John J. McCarthy

Board Members:

Calvin C. Berlin
Paul A. Modic

Special Assistant to the Board:

Judith A. Schmidt

Representative for the Grievant:

[Name],
Attorney

Representative for the Department:

Joanne M. Lishman,
Acting Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

I. GRIEVANCE

[Grievant], a [grade] Foreign Service officer with the Department of State, filed a grievance with his agency on December 13, [year]. He complained that the Department had mishandled its investigation of his alleged misuse of government property, unjustly removed him temporarily from the [year] promotion list and subsequently refused to promote him. He also contested the Department's March 9, [year] proposal to suspend him for ten days without pay as a disciplinary action. [Grievant] asked for retroactive promotion, back pay, expunction of agency records, attorney fees and all other relevant relief. The Department, in its final review dated April 27, [year], denying any relief concluded that: (1) questions of misconduct justified the temporary removal of grievant's name from the promotion list; (2) proper investigative procedures had been followed; and (3) no disposition could be reached with respect to promotion since that matter was still before the Director General.

On July 16, [year] [grievant] appealed to this Board. In addition to the relief he requested of the Department, he asks us to order the Department to reinstate him with back pay, to retroactively tenure him, and to provide him with copies of all investigative reports concerning him.

II. BACKGROUND

[Grievant] entered the Foreign Service as a career candidate on February 29, [year] under the mid-level appointment program. He was assigned to [post] as [title] with responsibilities which included serving as the [title] officer.

In [year] the Inspector General's Office (OIG) initiated an investigation of allegations that grievant [misused] government furniture for his personal gain. On October 30, [year], the Acting Director General

informed grievant that his name would be removed temporarily from the promotion list pending resolution of the matters being investigated. The investigation was closed on February 13, [year]; the Department notified grievant on March 9, [year] that it proposed to suspend him for a period of 10 days because of misconduct disclosed in the investigation. He was charged with [misuse of government furniture]. On March 14, [year], grievant submitted an application for retirement, to be effective August 3, [year]. Through counsel on March 15, [year], he requested that the Department furnish him certain documents relating to the proposed suspension, and that it extend the time for his reply to that proposal. He advised the Department on May 25, [year] that, even though he had applied for retirement, he planned to contest the removal of his name from the promotion list. On June 5, [year], the Department informed grievant that it had closed the file on the proposal to suspend him.

III. POSITIONS OF THE PARTIES.

The Grievant

[Grievant] alleges that the Department mishandled its investigation of his alleged misconduct, and failed to notify him of the inquiry and the allegations against him in violation of 3 FAM 763.2(c).

Grievant further contends that his lack of access to relevant documents containing false and erroneous information unjustly resulted in the removal of his name from the [year] promotion list, his failure to be promoted or tenured, the proposal to suspend him, and finally his "unsought" early retirement. He charges that the Department violated 3 FAM 763.2(d), which requires that employees be provided copies of all records collected in the course of an investigation, as well as copies of all reports and/or recommendations completed at each stage of the investigation. As a result,

he says, potential witnesses are no longer available to him and he was deprived of his right to make a timely and complete response to the allegations against him.

Grievant concludes that, had the Department handled the matter properly, the investigation would have disclosed that the embassy failed to provide written policy regarding [certain transactions] and that it did not properly manage such [transactions]. The investigation would have further disclosed, in [grievant's] view, that the embassy was not harmed by his action but, rather, it benefited. He adds that there is no evidence that he acted improperly.

The Agency

The Department denies any mishandling of the investigation. It claims that grievant was given proper notification that an inquiry had been opened and that at the time of the first OIG interview on October 6, [year], he was not the focus of the investigation, but only one of many employees being interviewed about allegations of malfeasance and "misuse" of government property at [post]. While grievant was not accused of wrongdoing during that interview, the agency says he was informed that allegations of improprieties had been made against him by his former foreign national [FSN] subordinates in [post]. The record shows that grievant signed a consent for a search of a shipment of his household effects, based on allegations that it contained items he had acquired illegally.

[Grievant] was again questioned on November 20 [year], in [country] to address evidence which the agency alleges was uncovered in [post] after the first interview. The Department points out that at that time grievant orally waived his rights to remain silent and to have legal counsel, and agreed to discuss the allegations against him. At the conclusion of the

interview, the Department states, grievant drafted and signed a handwritten statement outlining his activities, which included violations of Foreign Service regulations.

The Department states that [grievant] was provided "appropriate notice" at each stage of the investigation. At the first interview he was informed of allegations made by the Foreign Service nationals and apprised of his rights. In the second interview, when he was questioned about matters for which he might be criminally prosecuted, he was properly informed of his rights. The Department maintains further that in his second interview grievant was given time to prepare his statement; he did not request any additional time for that purpose.

The Department states that it followed proper procedures in temporarily removing grievant's name from the promotion list. It points out that 3 FAM 558 provides that promotion lists be sent to the OIG, the Bureau of Diplomatic Security (DS) and other appropriate officers, to determine whether there are reasons why any promotion would be inconsistent with the national interest or the efficiency of the Service. In grievant's case, the OIG responded that [grievant] was under investigation for malfeasance. The available documentary evidence was forwarded to the Acting Director General who then informed grievant that his name was being temporarily removed from the promotion list. The Department states that this action was justified by the evidence and had been implemented in accordance with applicable procedures.

The Department finds no merit in [grievant's] allegations that his lack of access to records denied him the opportunity to demonstrate the appropriateness of his conduct at [post]. It alleges that he never directly contacted the FOIA/Privacy Act Office concerning any missing documents. It

states that he failed to inform the Department's grievance staff (PER/G) that he had been given access to over 300 agency documents under the FOIA/Privacy Act, that he failed to provide its grievance staff with copies of documents he submitted to this Board, and that he failed to respond to its offers to assist him in obtaining documents he still lacked.

It is the Department's position that, since [grievant] did not raise any issue concerning tenuring in his agency-level grievance, he cannot now do so before the Board. It rejects grievant's claim that his retirement was "unsought" or that he was in any way compelled to retire. In view of the voluntary nature of his retirement, the Department argues, grievant's reinstatement in the Foreign Service is not a proper form of relief.

IV. DISCUSSION AND FINDINGS

Grievant alleges that the agency's investigation which led to the denial of his promotion and to the proposal to suspend him was conducted improperly and produced false and inaccurate information. He also contends that he was denied access to investigative documents and was not given an opportunity to refute the allegations against him.

A letter from grievant's attorney to the Board, dated February 25, [year], identified three issues in this grievance:

1. The agency's improper removal of grievant's name from the [year] promotion list;
2. The agency's refusal to allow him "to defend himself against the allegations of misconduct which resulted in his not receiving tenure and in his name being removed from the promotion list;"
3. The agency's proposal to suspend him for ten days. We now consider the issues as identified by grievant.

Removal of Grievant's Name from the Promotion List

The Director General notified [grievant] on October 30, [year], that his name was being temporarily removed from the [year] promotion list because certain allegations against him were being investigated by the OIG. Grievant asserts that this action was improper because: (1) the Department did not disclose to him the "written documentation" of the reasons for removing his name from the promotion list, as 3 FAM 558(a) provides, (2) the Department acted on the basis of inaccurate, erroneous and false information, (3) he was not advised of the substance of the allegations against him, and (4) he was denied an opportunity to respond to the allegations. (See grievant's letter to the Department, dated December 13, [year], pages 2 and 3).

Grievant's first argument is based on 3 FAM 558(a) which governs the temporary removal of a name from a promotion list. He states that he did not receive "written documentation" of the reasons his name was removed. However, we find that his argument is based on a misreading of section 558(a), which provides, in part:

[T]he Director General may order the temporary exclusion from...[the promotion] list of any member, if the Director General determines on the basis of notification by an appropriate office that reason exists to believe such promotion would be consistent with the national interest or the efficiency of the Service. Such reasons must be based upon written documentation of ...

[1) Issues of loyalty, security, misconduct, suitability, or malfeasance...

These provisions, to be carried out by the Director General, do not require that a copy of the "written documentation" supporting the Director General's action be served on the employee, as grievant contends. We find that the

regulatory requirements were fully met when the Director General, on the basis of written documentation from the Inspector General's office, removed grievant's name temporarily from the promotion list. We conclude that [grievant] has failed to show that the Director General acted without authority or in violation of the applicable regulations in removing his name from the promotion list.

We now consider grievant's allegations that the Department improperly conducted its investigation.

We find no merit in grievant's allegation that erroneous information obtained the course of the agency's investigation invalidated the Director General's action in removing his name from the [year] promotion list. 3 FAM 558(a), reasonably interpreted, gives the Director General broad discretion to act on the basis of written documentation that gives reason to believe the promotion would be inconsistent with the national interest or the efficiency of the Service. At that stage, there is no regulatory requirement that the allegations against the employee be verified by evidence that meets a certain standard of proof - as would be required for a decision to take disciplinary action. Indeed, the regulation contemplates a continuation of the investigation, if necessary, and it directs that appropriate administrative proceedings be pursued to resolve or dispose of the matter. In grievant's case, the Director General subsequently did propose disciplinary action -- a ten-day suspension -- as the appropriate administrative proceedings to resolve the issues involved.

The investigative process when a disciplinary action is proposed is governed by 3 FAM 763. The procedures under 3 FAM 760 afford an employee the opportunity to present evidence and to respond to allegations of wrongdoing. The fact that information received in the courts of the

investigation may prove to be false or inaccurate does not invalidate the temporary removal of a name from the promotion list, an action which is taken at an early stage of a case on the basis of the written documentation required by section 558(a).

Grievant also argues that he was not advised that he was being investigated and was not informed of the substance of the allegations against him, and that he was not given the opportunity to respond to those allegations -- as required by 3 FAM 763 which sets out investigatory procedures for disciplinary action. While, as we have noted, non-compliance with the provisions of 3 FAM 760 does not necessarily affect the validity of the Director General's earlier removal of grievant's name from the promotion list under section 558, a violation of section 760 may be pertinent in judging the validity of the final "disposition or resolution of the issue."

When we examine the record in light of grievant's arguments, we find that he has not established that he was denied his rights in violation of the regulations governing disciplinary actions (3 FAM 760) or removal of his name from the promotion list (3 FAM 558). Section 763.2(c) provides that an investigation "should, as a general rule, include appropriate notice to the employee that an inquiry has been opened, unless such notice would compromise the investigation." Section 763.2(d) provides that the employee shall be given "an opportunity to respond to the allegations and, if the employee desires, a reasonable amount of official time to prepare the response." Similarly, section 558 (b) states in part: The member will be given an opportunity to submit whatever information or b the member believes are pertinent to the case."

The Department states that when grievant was interviewed by investigators, on October 6, [year] and November 20, {year}, his rights were

accorded him. It submits that at the time of the first interview he was not the subject of an investigation and was advised that allegations of malfeasance and misuse of government property in [post] were being investigated. When he was told that allegations of improprieties on his part had been made by his former subordinate foreign service nationals (FSNs) in [post], including claims that the shipment of his household goods to [post] contained items that might have been illegally acquired, he signed a consent form to allow the shipment to be searched.

When the Department after further investigation decided to conduct a second interview, on November 20, [year]. grievant was informed of his rights before the interrogation began. He was given a printed copy of the warnings, which included advice that he did not have to answer questions, that he had a right to counsel and that anything he said or wrote could be used against him in court or other proceedings. Grievant responded by waiving his right to remain silent and by writing and signing a statement concerning his actions in the sale of property from the GSA warehouse.

We have reviewed grievant's signed statement dated November 20, [year], and his affidavit dated April 19, [year]. In the first document, he describes in some detail the [transactions] in question while at [post]. He acknowledges his familiarity with regulations applicable to such transactions. He also states that although he had packed four [items] with his household effects he removed them before shipment and returned them to the supplier. In the more recent statement, furnished in support of his grievance, [grievant] gives his account of the November 20, [year] interview with the Department's investigators. He points out, *inter alia*, that the investigators did not tell him his purchase of [item] was viewed by the agency as illegal, that one of the investigators questioned him in an

accusatory manner, and that he considered the pre-interview warning to be more appropriate for a witness than a suspect. He again states that he was not told he was the subject of an investigation.

We find unconvincing grievant's claim that he was not told he was being investigated and that he was neither advised of the substance of the allegations nor given a chance to refute them. His characterization of the warnings as suitable for a witness but not for a suspect obscures the essential message contained in the warnings: grievant was to be questioned about a transaction in his area of official responsibility, a matter in which he was directly involved, and concerning which his statement could be used against him in judicial or administrative proceedings. His signed statement of November 20, [year] recites that he was advised of these rights, including the right to confer with an attorney before he made any statement. In that handwritten statement he also explained the reasons why he used the [one] method rather than another, why he acted without the required approvals and in violation of regulations in buying such property. He ended the statement with a refusal to discuss certain other matters without his attorney present. A detailed justification for his purchase of the property in question was given in his signed statement, essentially a defense of his practices in general and his [misuse] of government furniture in particular.

We find that grievant was given adequate notice that his own conduct was being investigated, that he was apprised of the allegations against him, and that in his sworn statement of November 20, [year]. he had the opportunity to respond to those allegations. Moreover, he had a further opportunity to contest the same allegations when he was advised by letter of March 9, [year], of the proposal to suspend him, based on charges related to his [misuse] of government furniture. He was informed of his right to

respond orally and in writing and to have his answer considered before a decision was made. Whatever technical shortcomings may have occurred in the investigation -- we have found no substantial deficiencies -- they did not result in a denial of due process by preventing grievant from disputing the charges that grew out of the investigation. [Grievant's] own statement of November 20, [year], is itself adequate evidence that he was informed of the allegations against him and was given the opportunity to furnish relevant information. We find that grievant has failed to meet his burden of establishing that there were defects in the investigation that warrant remedial action with respect to his promotion.

The Proposal to Suspend Grievant

About three months after [grievant] filed his grievance with the Department, but before its decision was issued, the agency on March 9, [year], notified him that it proposed to suspend him for ten days for improprieties (detailed above). Before responding to the proposal, however, grievant on March 14 submitted his application for retirement. Nevertheless, on March 16 he requested certain documents related to the charges, and an extension of time for reply. On May 25 he advised the Department that even though he was retiring, "I plan to pursue the issue which cause [sic] my name to be removed from the promotion list." Grievant did not file a response to the Department's proposal to suspend him, a procedure available to him under 3 FAM 763.2d. After his retirement application was accepted, the Department by letter from an employee relations officer advised him:

I have closed your file without any further action being taken regarding our proposal of March 9, [year], to suspend you for ten workdays.

[grievant's] retirement was effective August 3, [year].

The closing of the suspension case and grievant's retirement from the Service mooted the suspension proceeding. This means that grievant is precluded from contesting the merits of the suspension proposal before this Board.

Other Allegations and Requested Remedies.

(a) Request for Reinstatement with Back Pay.

An application for retirement filed by an employee is a request to terminate the employment on the date specified. Once the application has been approved and the employee has retired, he or she does not have the right to be reinstated unless it can be shown that the retirement should be set aside as without legal effect.

Though grievant characterizes his retirement as "unsought," he offers no evidence to show that it was not a knowing and voluntary choice on his part, and he does not ask the Board to find that his retirement was without effect. The fact that, when he decided to retire, charges of malfeasance on his part were pending does not make the filing of his retirement application an involuntary act. Certainly he was also aware when he chose to retire that his grievance raised a number of questions concerning the investigation and the denial of promotion. However, even if those questions were resolved in his favor, they are irrelevant in determining whether his retirement should be nullified. We must therefore treat his retirement as legally binding. Accordingly, grievant is not entitled to reinstatement.

(b) Tenure

Grievant's request that he be granted tenure is denied. His request is not properly before the Board.

The grievance system established by the Foreign Service Act of 1980 (the Act) provides for the filing of a grievance first with the Department or agency. Only if a grievance is not satisfactorily resolved under agency procedures (within the prescribed time period) is the grievant entitled to present the grievance to the Board. Section 1104(b) of the Act; 22 U.S.C. 4134 (b). We must decline to consider [grievant's] allegations that he was unlawfully denied tenure in [year] and [year]. The record shows that grievant failed to present this issue for the Department's consideration before raising it with the Board.

Grievant's counsel states that [grievant] was unaware - until he received certain documents from the Department on July 13, [year] -- that his name had been removed from the [year] tenure list. Nevertheless, it was not until February 25, [year] that he alleged for the first time, in a letter from this counsel to the Board (page 3), that the Department had removed his name from the [year] list of officers recommended for tenure, and that he was not considered for tenure in [year] because of the pending investigations. While a delay in discovering grounds for filing a grievance may extend the time limit for filing the grievance [sec. 1104(a) of the Act], the delay does not excuse the failure to submit that grievance to the Department before applying to the Board for relief. The grievance involving the tenure issue is therefore dismissed.

Production of Reports concerning Grievant from the Diplomatic
Security
Service (DSS) and OIG.

In his December 13, [year] grievance submission to the Department addressed to the Director General and PER/G, grievant through counsel requested that all agency documentation concerning him be immediately

made available to him for review, including records of OIG, DSS and PER which he said he had never seen but which he presumed contained false and erroneous information. Grievant's attorney submitted a similar request to the Director General on the same day under the privacy Act and the Freedom of Information Act, but with an expanded, detailed list of the documents requested.

In the grievance filed with the Board on July 16, [year], grievant's attorney stated she had not received the information sought which allegedly supported the proposal to suspend [grievant]. It also appears from subsequent letters to the Board that grievant's counsel had received some (at least 331) of the documents requested, but not all. Submissions from PER/G indicated that the staff director had offered to help grievant obtain documents still needed.

Significantly, at no time during the proceedings before the Board had grievant asked us to order the Department to produce any documents or other information he deems relevant to the grievance. He specifically requested the production of documents only in his request for ultimate relief, asking the Board in its final decision on the merits to order the Department to give him a copy of all DSS and OIG reports concerning him.

Board procedures provide that where information or documents are withheld, upon application by the requesting party and a showing that the information is relevant and material the Board may order production of the information. This procedure was not invoked by grievant. The question, then, is whether providing grievant copies of DSS and OIG reports concerning him is a proper subject for final relief.

The record shows that grievant received over 300 documents under the Freedom of Information Act, but he never responded to PER/G's offer to

assist him in obtaining any missing documents. The ROP in this case has been closed with no indication of what records grievant received or what records may be lacking. Grievant never took advantage of section 903.9(1) of our regulations by requesting us to provide him with access to "any agency record which he requests to substantiate his grievance" upon a determination by the Board that "such record may be relevant and material to the case."

There is no contention that the investigative reports were fabricated or based on falsehood, but only that "given the results" -- as grievant's attorney phrased it - the documents "contain falsely prejudicial, inaccurate and/or erroneous information about [grievant]. There is no substantiation for this allegation, nor any showing that grievant was not provided with all available documents, nor any evidence that documents, if missing, are material and relevant to this case. Under these circumstances, we must deny grievant's request for copies of DSS & OIG reports.

We do not overlook the fact that, under the regulations that apply to investigations related to possible disciplinary action, an employee is to be given access to records obtained in the investigation:

The employee will have the right to review and receive copies of all records collected in the course of the investigation and shall be given copies of all reports and/or recommendations completed at each stage of the investigation. The employee shall be granted reasonable opportunity to review official and unofficial records and to obtain copies of such records. 3 FAM 763.2(d)

Any denial of access to the record in violation of section 763.2(d) might very well have been relevant if grievant had not retired and had contested the proposed disciplinary actions. By retiring, he has waived his right to challenge the suspension proposal that was, in fact, withdrawn when the Department received notice that [grievant] would retire. Under the

circumstances the possible violation of the regulation by failing to disclose records is a moot question.

Expunction of derogatory information

Grievant has not established a basis for the Board to order expunction of derogatory information from the Department's records. The Board has authority, if it finds a grievance meritorious, to direct an agency to correct "any official personnel record" found to be inaccurate or erroneous or to contain falsely prejudicial information. Section 1107 (b) (1) of the Act. Even assuming that the investigative documents in this case are personnel records, we have not found the grievance meritorious. In light of the investigative report and grievant's own admissions in his statement of November 20, [year], the Department has a reasonable basis for proposing disciplinary action. The charges essentially stated facts and conclusions drawn from the investigation. Grievant then had an opportunity to contest the action, to refute the charges, to challenge the accuracy of the allegations and to offer evidence and reasons why the proposed action should not be taken. Grievant waived his right to do so, and he cannot revive that right before the Board - - we have declined to consider the merits of the proposed suspension.

Moreover, grievant has not shown that false or erroneous information obtained in the investigation has resulted in a denial of his rights or is likely to cause him harm in the future. He has not provided any justification for expunction of allegedly derogatory information.

Attorney Fees

Grievant's request for an order directing the Department to reimburse him the amount of attorney fees he incurred in connection with this

grievance is hereby denied because he has not met the basic requirement that he be the prevailing party.

V. DECISION

The grievance is denied.