

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between:

██████████,
Grievant

Record of Proceedings
No. G-91-081-State-69

and

DATE: August 24, 1992

The Department of State

INTERIM DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Leroy S. Merrifield

Board Members:

Calvin C. Berlin
Geraldine Sheehan

Special Assistant
to the Board:

Irene M. Barbeau

Representative for the Grievant:

Self

Representative for the Department of State:

Joanne M. Lishman
Director, Grievance Staff

I. THE GRIEVANCE

[REDACTED], a class 02 administrative officer with the Department of State, filed a grievance March 5, 1991, to protest the denial of an away-from-post education allowance for his son. The Department denied the grievance September 24, 1991, and [REDACTED] presented his case to this Board November 16, 1991.

II. BACKGROUND.

Grievant was assigned to [REDACTED] in July 1989 when he first applied for an allowance to cover the expenses of a U.S. private school for his son. Grievant's wife had had surgery for breast cancer in 1987, then joined her husband overseas for a five-week period at the end of the year, but returned to the United States in February 1988 when she developed skin cancer.

Based on an informal conversation with a doctor in M/MED, [REDACTED] enrolled his son in a private U.S. school for the 1989-1990 school year, then applied for the allowance, enclosing a letter from Dr. Christine D. Berg of the Georgetown University School of Medicine, who had treated his wife. His application was based on section 276.3 of the Standardized Regulations, which states:.

An education allowance shall not be paid for a child in the United States: (1) who has a natural or adoptive parent or step-parent residing in the U. S. (except where the employee establishes that the parent residing in the U. S. is divested of legal custody of the child or is mentally or physically unfit to care for the child

On July 26, 1989, M/MED advised the allowances staff of the Department that it could find no reason why [REDACTED] should not be

able to adequately care for the son, who, it said, had no physical or mental handicap requiring special care. The Department's grievance staff upheld the allowance denial on October 31, 1989; that decision was not appealed to this Board.

A recurrence of breast cancer brought additional surgery in December 1989 and a course of chemotherapy in the first half of 1990. The [REDACTED]'s son was then 16 years of age. Grievant reapplied to the allowances staff in January 1990, and when he was again turned down, he sought to reopen the original grievance with PER/G in March 1991. He was informed that any evidence dated subsequent to October 31, 1989, would be considered as a new grievance. He presented letters from two additional attending physicians, Dr. Chittoor and the surgeon, Dr. DeRosa, the former attesting to his belief that the patient was physically and emotionally unfit for parenting responsibilities, the other stating that "full devotion to parenting her child is totally impossible." PER/G consulted with M/MED and then denied the grievance.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant protests that the term "mentally or physically unfit," as it appears in the regulation, is undefined, and urges that the regulation be revised so as to spare other employees the difficulties he has experienced.

He objects to the allowances staff's reliance on a determination by M/MED when no physician in that office examined his wife during the 1989-1990 school year. He argues that his wife's attending physicians were in a better position to judge her ability to care for their son, and that their opinions should have been the controlling evidence required for granting the allowance.

Grievant states that M/MED never spoke with Dr. Honig, the chief oncologist, who was the only physician to treat his wife regularly during the seven-month course of chemotherapy treatment. Rather, he says, M/MED based its judgment of her condition on information received in a conversation with Dr. Curti, who provided only "transitory care" under the general supervision of Dr. Honig. Dr. Curti advised M/MED that [REDACTED] was 70 percent of her normal self on May 31, 1990; grievant argues that her health on May 31 is not the issue. His wife, he states, spent a significant portion of every third week in bed while receiving chemotherapy.

Grievant quotes Dr. [REDACTED] of the M/MED staff as telling him that he was not going to recommend approval of the allowance because he thought [REDACTED] should be at home with his wife rather than overseas.

[REDACTED] notes that had he sent his son to an overseas private school, an allowance would have been paid; or had his wife decided to live with her family in [REDACTED] while she underwent chemotherapy, the allowance for a U.S. private school would have been paid; or had wife and son chosen to live in another [REDACTED] country while the son attended a [REDACTED] private school, an allowance would have been paid. He states that he chose the most sensible and least expensive course and has been penalized for it.

The Department

The Department states that it has no authority to overturn a determination of the allowances staff absent a showing that a staff ruling was contrary to law or regulation, and that grievant has neither proved nor alleged that law or regulation was violated by the actions of either M/MED or the allowances staff. Those two offices, it says, concluded that "All of the letters from [REDACTED] physicians mention possibilities, but did not spell out a current disability."

The Department submits a memorandum from Dr. [REDACTED], who advised that it was [REDACTED] himself who had given him the names of Dr. Curti and Dr. Flam as treating physicians for his wife. Dr. [REDACTED] noted that in a letter to the allowances staff, [REDACTED] referred to Dr. Curti as ordering chemotherapy for his wife. Nowhere in MED's files, he said, is Dr. Honig's name mentioned. (Grievant subsequently clarified this point: Dr. Flam married and took the name Honig.) Dr. [REDACTED] stated that neither Dr. Curti nor Dr. DeRosa mentioned significant problems when speaking to him of [REDACTED]'s condition, and in a May 31, 1990 consultation with Dr. Curti, only fatigue was mentioned as a problem. His telephone consultations with her physicians, he said, did not substantiate any incapacity. He added that MED is aware of many other women who have received a similar course of therapy; none was unable to parent.

The Department states that [REDACTED] was not entitled to receive the education allowance unless his wife was found to be mentally or physically unfit to care for the son. The Department asserts that its decision that she did not meet that standard was based on an objective and careful review by M/MED of all available evidence regarding the parental medical disability claim.

IV. DISCUSSION AND FINDINGS

The denial of the allowance was based on a judgment about [REDACTED] [REDACTED]'s physical condition during the months she was receiving chemotherapy, which commenced in January 1990, following her second breast cancer surgery in December 1989. That judgment was reached without benefit of the opinion of Dr. Honig, who, according to the record, was the chief oncologist and the only physician to treat the patient regularly during her seven months of chemotherapy, and in the face of a written

statement of one of the treating physicians, Dr. Chittoor, on January 18, 1990: "It is my professional opinion that [REDACTED] is presently physically and emotionally unfit for the responsibilities of parenting a teen-age son."

We find that the decision to deny the allowance was insufficiently based and was not, as the Department claims, based "on all available evidence." The reason we make this finding is that the Department was in error in failing to obtain information from Dr. Honig, the principal treating physician, as to [REDACTED]'s actual condition from January through May, 1990. Grievant thus has met his initial burden of proof; he has shown error that may have been a substantial factor in his failure to get the allowance. In accordance with section 905.1(c) of the Board's regulations, the burden now shifts to the Department to show that it would have taken the same action even if the error had not occurred. We note that the error can be corrected, even now, by having M/MED reassess its original guidance to the allowances staff after reviewing information from Dr. Honig.

V. INTERIM DECISION

The Department erred in failing to obtain information from Dr. Honig. The Department shall submit evidence within 30 days of its receipt of this decision on whether, had Dr. Honig's views been taken into consideration, grievant would have been denied an education allowance.

We, the undersigned members of the Foreign Service Grievance Board, hereby submit for action to the Deputy Assistant Secretary for Personnel our findings and directives in the grievance case of [REDACTED], an employee of the Department of State.

This remedial order to the Department is made under the authority granted to the Foreign Service Grievance Board by the Foreign Service Act of 1980, and by the regulations established thereunder.

[REDACTED]

Leroy S. Merrifield
Presiding Member

[REDACTED]

Calvin C. Berlin
Member

[REDACTED]

Geraldine Sheehan
Member