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BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████, ██████████,
Grievant

and

The Department of State

Record of Proceedings
No. G-91-082-STATE-70

Date: June 12, 1992

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Rolf Valtin

Board Members:

Geraldine Sheehan
Calvin C. Berlin

Special Assistant
to the Board:

Michael J. Gould

Representative for the Grievant:

Self

Representative for the Department:

Joanne Lishman
Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

DECISION

I. THE GRIEVANCE

██████████, a Class 03 officer with the Department of State, filed a grievance with the Department August 6, 1991 and another the following day. The first alleged that personnel officials refused to add to his assignment bid list an advertised opening of a position in Caracas or to allow him to compete for it, in contravention of the open assignments system. The second grievance alleged that his appeal rights regarding his subsequent involuntary assignment to ██████████, ██████████, were violated and that, contrary to regulation, no one had ever told him prior to that assignment that he would be proposed for ██████████. The Department denied both grievances, the first on November 5 and the second on November 6, 1991.

██████████ filed the two grievances with this Board November 22. He requests as relief that his appeal of the ██████████ assignment be presented to an assignment panel untainted by previous knowledge of his case and that he be given a directed assignment to any available position of his choice for which the receiving bureau supports his candidacy.

An earlier grievance involving a charge of improper discipline was pending before the Board when the two new cases were filed here, and grievant indicated that he had no objection to a consolidation of the cases for administrative ease. The Board ruled that consideration of the initial grievance would go forward independently but that the two new submissions would be consolidated.

II. BACKGROUND

██████████ entered the Foreign Service in 1985 with a bachelor's degree and a law degree. He served his first tour in ██████████, ██████████, and his second in ██████████. He was then assigned to the Department's nine-month economics course and was pursuing those studies when the events giving rise to this grievance occurred.

In August 1990, bidding began for onward assignments to start in summer 1991, and grievant submitted his initial bid list that month. He remained unassigned as of March 1, 1991, and that circumstance left him subject, under Department policy, to the possibility of an involuntary assignment to meet a "service need." On March 29 he was named by the assignment panel for a service-need assignment to an economic position in ██████████, an opening on which he had not bid and one to which he subsequently formally objected because of concerns about a medical condition and about the opportunity to practice his religion.

When ██████████ did not report to post by July 31, 1991, he was charged by the Department with being absent without official leave and he has remained in AWOL status. The Department has since moved to separate him for cause.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant states that both the ██████████ desk and the Embassy in ██████████ indicated they would be delighted to have him fill an O4 economic position -- one grade lower than his

personal rank -- that would be opening at a date that would allow him to acquire [REDACTED] language training after his economics training. The desk and the Embassy indicated to him that the responsibilities of the position merited an upgrade and were appropriate for an officer of his grade and background. He tried to bid on it in early March, he states, but the personnel bureau refused to put it on his bid list or allow him to compete for it, in contravention of 3 FAM 140.

Grievant's career development officer (CDO or counselor) never told him that he needed to submit anything in writing, but simply stated that he, the CDO, would not accept the bid, according to [REDACTED]. Subsequently the CDO accepted and proposed to the assignment panel a bid on another position without requiring that it be in writing. Grievant finds it significant that his counselor also proposed to the panel that he be assigned to a [REDACTED] job, one of his original bids, but did not inform him he was doing so, and that the counselor withdrew his bid on that [REDACTED] job, at [REDACTED]'s request, without requiring the withdrawal request to be in writing. Grievant asserts that the Department's position cannot be justified on grounds of bidding policy when bidding practices are different.

He disputes the Department's contention that he was overqualified for the job, and argues that Department policy permits such bids and that 04 positions have been filled with tenured as well as untenured officers. He himself is aware of two instances. He adds that the additional six-month language

training ought not to have been a concern; half his classmates in the economics course, he says, either received language training or did not take an onward economic assignment.

In short, grievant asserts that the Department's claim that he never submitted a valid bid circumvents the issue since it was the Department that dissuaded him from bidding and refused to accept the bid. The Department, he says, subverted the process.

On his charges of a violation of his right to appeal the subsequent assignment to [REDACTED] and the alleged failure to notify him in advance of that involuntary posting, grievant gives his account of conversations concerning [REDACTED] and an alternative assignment in the economic bureau ([REDACTED]). He states: "Though I had submitted a valid bid on an 03 ECON position in [REDACTED] and may have been the only bidder, my CDO mentioned that both [REDACTED] a [REDACTED] and [REDACTED] were interested in me. I had assurances from the EB assignments office that no [REDACTED] office would propose me for any position that had not been discussed with me first. I was never contacted by any [REDACTED] office. A month earlier, my discussions with [REDACTED] regarding [REDACTED] resulted in the Director of AF/PER wishing me well in my other bids. There was no indication that I was under consideration for [REDACTED] and no one in [REDACTED] ever told me that I would be proposed for [REDACTED]"

Once assigned to [REDACTED], he was erroneously advised, he says, that the Director General was the only one who had the authority to affect the assignment decision. He contends the

Director General should have forwarded his appeal to the assignment panel to meet the requirements of regulations.

The regulation he relies on was in place, he says, since 1983 and was consolidated under the new regulations that went into effect March 14, 1991. The latter were not transmitted to bureaus and posts until April 30, 1991, and it is unreasonable to expect him to have been aware in March of the change. In any case, he asserts, the two are compatible. The new regulations state that PER/FCA may establish procedures for assignment panels to consider appeals, and they suggest that panel action is not final until these procedures are exhausted; only then would an appeal to the Director General be in order.

Grievant contends that he was never notified by his CDO or anyone else that he was about to be paneled to [REDACTED] or the [REDACTED] bureau, so his counselor could not have presented his views on such assignments to the assignment panel. He asserts that he remained unassigned as of March 29 because the Department refused to accept his earlier bid on the [REDACTED] position and it put his bid on [REDACTED], [REDACTED], before the panel only on March 29, eight days after he had submitted it.

He states that all his bids complied with regulations. He adds that many of his classmates in the economics training course preferred to compete for jobs in the regular cycle rather than take early placement during the months when trainees were due to get priority assignment attention. All officers, he explains, are counseled to "work the system" and to lobby for jobs.

In several of his entries in the record, grievant accuses a deputy assistant secretary for personnel of intransigence, insensitivity and hostility towards him and his religious practices.

The Department

The Department points out that new regulations effective March 14, 1991 refer officers to the annual Open Assignments Message for instructions on submitting bids. Both that message, disseminated June 29, 1990, and the old regulations provide that all bids be submitted in writing and meet certain criteria.

Concerning the [REDACTED]'s opening, the Department states that the limited number of 04 economic jobs normally are reserved as training positions for untenured officers. A bid by an 03 officer on an 04 position would be considered only when there is no available candidate among untenured officers or tenured 04s. The opening in question already had a substantial number of untenured and language-qualified 04 bidders. Grievant, the Department notes, would have required six months of language training on top of his nine months of economic training.

The Department submitted a declaration by [REDACTED] [REDACTED] career development officer in the assignments and counseling office, who states that grievant did not submit a written bid on the position as required. The Department asserts that since grievant did not submit a written bid, he was not deprived of any entitlement to be considered for the

position. It says [REDACTED] had the authority and good reason to advise grievant that such a bid would be unreasonable. [REDACTED] states in his declaration that since [REDACTED] did not pursue the matter further, he assumed that the advice had convinced him to look for a more appropriate assignment. Had grievant submitted a written bid on the job, Taylor adds, he would have entered it into the computer system.

Concerning the issue of advance notification of the [REDACTED] assignment, the Department notes that the assignment was made on the basis of "service need," and that the June 29, 1990 Open Assignments Message warned, with the underlining in the original: "At any time during the assignment cycle urgent Service need may require that Foreign Service employees be assigned to positions not bid, and employees left unassigned as of March 1, 1991, will be placed by central personnel in accordance with Service need. . . . All officers who remain unassigned as of March 1, 1991 will be considered for assignment on this basis."

The Department states that grievant did not have any appeal rights prior to the panel decision of March 29, 1991 that assigned him to [REDACTED], but had the right to appeal to the Director General, a right he exercised, following the panel decision.

The panel, though it was informed that grievant opposed the [REDACTED] assignment, was not advised of his medical and religious reasons for opposition because, according to the Department, grievant did not make those reasons known until after the panel had acted.

Career development officer [REDACTED] in his declaration affirms that he informed grievant in a telephone conversation on March 21, 1991 that the [REDACTED] bureau had proposed that grievant be assigned to [REDACTED] under the service-need procedure.

IV. DISCUSSION AND FINDINGS

The three questions before us are these:

- (1) Did grievant's career development officer violate regulations and the open assignments system by refusing to allow grievant to bid on an opening in [REDACTED]?
- (2) Were grievant's appeal rights violated in the way the Department handled his challenge to the [REDACTED] assignment?
- (3) Was he notified in advance of the proposal to assign him to [REDACTED]?

(1) The [REDACTED] Opening

Documents in the record sketch out the circumstances leading to the discussion between grievant and his CDO that is the basis for the charge of agency error on the [REDACTED] bid.

In 1990-91 [REDACTED] was a student in the Department's nine-month economics course. To assure that course graduates would secure job placements that made immediate use of the training, the Department decreed that they were to get "priority assignment" attention. Their bids on openings were to be acted on early in the assignment cycle that begins in the autumn each year, before the bids of others were considered.

Grievant, for example, was advised in August by his CDO that he would get a priority 1991 assignment before mid-October 1990.

His original bid list, submitted in summer 1990, identified 10 openings of interest to him. Three of them were jobs at his grade and in his functional field -- a requisite for action in the priority season. One of the three was a 1990 vacancy -- too early to be suitable for Friedman; a second went to another "priority" bidder. The priority season bidding process was still under way in November 1990 when grievant's CDO informed him by telephone that he had proposed to the assignment panel that [REDACTED] be named to the remaining opening at his grade on his bid list, a job in [REDACTED]. When [REDACTED] learned that, he asked his CDO to withdraw the [REDACTED] bid, explaining he wanted to pursue another position on his list, one that he would not be allowed to press for until the end of the priority season in December. He had his eye on an opening in [REDACTED], which, because it was one grade above his personal rank, was not available to him under priority-assignment rules. He informed his counselor he would waive his right to a priority assignment and take his chances in the regular cycle. His request to withdraw his [REDACTED] bid was granted. Eventually the [REDACTED] job went to another officer whose rank equaled the grade of that position.

By early March 1991, six months of the bidding cycle had elapsed. Unassigned officers were now at risk of being placed by central personnel in accordance with service need.

When the assignment panel met on March 8, it had before it a proposal from [REDACTED] that [REDACTED] be designated to fill a service-need [REDACTED] vacancy, a position on which he had not bid. His CDO states -- and grievant denies -- that he telephoned [REDACTED] to inform him of this on March 6 or 7.

Sometime in early March -- the date is not recorded -- grievant, a class 03 officer, spoke to his CDO about a newly listed class 04 economic opening in [REDACTED]. He had had experience in the economics field during a previous tour and was approaching the end of the economics course. Both the [REDACTED] desk and the Embassy in [REDACTED] favored his assignment there.

The ensuing discussion with his CDO is the heart of this issue, since grievant contends that what his counselor said to him then amounts to a denial of his right to bid on the [REDACTED] opening. Yet, critical as was the discussion, the record before us contains few details about it. It is unclear whether one conversation was involved, or more than one. The discussion appears to have been by telephone.^{1/}

^{1/}A telephone discussion is suggested by the following: An April 23, 1991, memo to the Director General, drafted by grievant's CDO, closes with the statement, "In fact, his CDO has never met him face-to-face." Grievant, taking issue with that statement, asserts in a letter October 30, 1991 to the Director General, "My CDO and I did meet face to face in the Fall 1990." Presumably if the two had also met in early March 1991 to discuss the [REDACTED] assignment, one or the other would have noted it in his communications to the Director General.

The following brief excerpts from the record contain the substance of grievant's account of what transpired in the pivotal exchange with his counselor:

I tried to bid on this 04 Econ job, but PER refused to put it on my bid list or allow me to compete for this position. (August 20, 1991 letter to [REDACTED])

In early March, after getting the nod from the [REDACTED] Desk and the Embassy, I requested, through my CDO, to bid on the 04 Econ job in [REDACTED]. He refused my request. (Letter to Director General October 30, 1991)

I was unassigned as of March 29 because the Department refused to accept my earlier bid on an 04 Econ position in [REDACTED]. . . . (Submission to record November 29, 1991)

When I attempted to bid on the 04 Econ position in [REDACTED], my CDO never said that I needed to submit anything in writing. He simply stated that he would not accept my bid. (Should I have submitted my bid in writing after being told it would not be accepted?) (Submission to record November 19, 1991)

. . . [I]t was the Department that dissuaded me from, and refused to accept, the bid. (Submission to record November 19, 1991)

The declaration of grievant's CDO, [REDACTED] [REDACTED] indicates that there may have been more than one conversation on the subject. He gives his recollection of the matter as follows:

As I recall my discussions with [REDACTED] about his interest in the FS-04 Economic position in [REDACTED], I advised him that this was an inappropriate assignment for him because it was a junior officer training position. I told him that such positions were limited in number and needed to be preserved to provide opportunities for unconded junior officers to demonstrate a proficiency for economic work. Since Mr. [REDACTED] did not pursue the matter further, I assumed that my argument had convinced him to look for a more appropriate assignment. Had he submitted a written bid on the job, I would have entered it into the computer system.

The question before us, of course, is not whether grievant should have been given the assignment or even whether [REDACTED] was correct about the need to hold the job for a junior officer. The issue is simply whether the CDO's verbal response constituted a denial of grievant's right to bid on the opening.

Regulations governing bidding were revised effective March 14, 1991. Since no precise date has been given for the alleged violation, it is impossible to say whether the old or the new regulations apply. However, in relevant particulars concerning the submission of bids, the two versions are similar enough to permit conclusions applicable under either set of regulations.

The old regulations, at 3 FAM 141.7-6, provide for bidding as follows:

* * * *

g. An employee's bid list must be submitted in the standard format by cable or in writing, to the employee's Career Development Officer (CDO) in the Office of Foreign Service Career Development and Assignments (PER/FCA). Telephone bids are not accepted. Bids not in the proper format will not be recorded.

h. Supplemental bids on "new" vacancies are welcomed and will be given full consideration. Late bids on "old" vacancies may be submitted after November 1 if the employee has not already been assigned.

* * * *

The new regulations, at 3 FAM 142.1-3 a., identify an annual Open Assignments Message as the source of bidding instructions. Though circulation of the new regulations was delayed and grievant could not be expected to have known of them at the time, the 22-page Open Assignments Message covering the 1991 assignment cycle had been issued eight months before his

attempted bid on [REDACTED], and he should have been aware of it. The message is identical to the old regulations in its requirement that bids be submitted in writing. It states:

All officers eligible for transfer from June 1 through September 30, 1991 [as grievant was] . . . may bid on any of the advertised 1991, 1992 world language, or 1993 hard or non-world language positions.

* * * *

Your bid list must be submitted to your CDO in PER/FCA in the format shown starting on page 20, by cable or in writing. Telephone bids are not accepted; bids not in the proper format will not be recorded.

* * * *

Supplemental bids are welcome at all stages of the cycle and will be given full consideration, if you have not already been assigned

* * * *

The 1991 bid format allows computerized registration of your bids. It requires your closest attention: only the prescribed format can be used or your bids will not be recorded.

The basic format is the same whether bids are submitted from the field or the Department.

* * * *

Follow-up bid cables should follow the same formatting rules, but have as the subject line, "Supplemental bid list for onward assignment...."

In an August 20, 1991 letter to a deputy assistant secretary for personnel, grievant refers to the Open Assignments Message quoted immediately above as one of three Department notices he never received because he departed his former post that summer. The Open Assignments Message was issued June 29, 1990. The record shows that [REDACTED] remained in [REDACTED] at least until August 1, the date on which he sent a first-person cable transmitting his initial bid list, using the precise computer format prescribed, with examples, in six pages of the Open Assignments Message. That message was the

guiding policy on assignments throughout the following year. Presumably grievant, who like all his colleagues in the economics course was actively engaged in seeking an onward assignment from August 1990 forward, found access to the message even if he did not receive it when it was issued. In any case, it was his responsibility to acquaint himself with its instructions, which did not differ from the old regulations on the sole point at issue here. Under either the Open Assignments Message or the old regulations, grievant was faced with the same basic requirement for the manner in which bids were to be submitted -- that is, in writing. It is evident that a written bid was required on the [REDACTED] job and that grievant knew or should have known it. There is no disagreement over the fact that he never submitted his bid in writing (and there is no suggestion that he was under a mistaken impression that his counselor himself intended to prepare the bid for the computer system).

Grievant states his CDO never told him he needed to submit it in writing. He argues also, "[T]he Department's bidding practices diverge from its purported policy." He is referring to his own experience with his counselor in regard to two other bids: His subsequent bid (on a position in [REDACTED] was accepted over the telephone by his counselor and entered in the computer; his CDO acknowledges that this is true. In his declaration [REDACTED] states, "This was my mistake. I had had such a difficult time over the previous five months getting him to bid on any appropriate position that I broke the rules and

added the bid without getting it in writing." And grievant points out that, notwithstanding regulations to the contrary, his CDO allowed him to withdraw his bid for the [REDACTED] opening without submitting the request in writing.

Apart from these two admitted missteps, the record contains no evidence that acceptance of telephoned bids was customary practice. In our opinion, neither the fact that his CDO was silent about the written-bid rule nor the fact that the CDO himself twice ignored regulations relieved grievant of the requirement to submit his bid on [REDACTED] in writing.

Grievant turns aside the Department's reliance on the regulatory requirement for written bids. This "circumvents the issue," he contends, since it was the Department that "dissuaded" him from trying for the [REDACTED] job and "refused to accept" his bid. He protests, "[T]he only reason I did not submit a bid in writing was that [REDACTED] [REDACTED] said I could not bid on the position." He asks, "Should I have submitted my bid in writing after being told it would not be accepted?" It seems clear that the proper answer to grievant's question is "Yes." He knew or should have known that the governing policy, set out in the Open Assignments Message, declared, "All officers eligible for transfer from June 1 through September 30, 1991 . . . may bid on any of the advertised 1991 . . . positions." Nothing his CDO said could abridge that right. Grievant's position is that if his CDO said he would not accept the bid, it was not reasonable for him, grievant, to submit it in writing anyway and take his chances with the assignment

panel. In the face of the published policy, that position cannot be sustained.

Grievant states that his CDO "dissuaded" him from trying. But that would appear to be an appropriate function of a career counselor who had reason to believe the bid had no prospect of succeeding with the assignment panel and who, meanwhile, needed to get realistic bids from [REDACTED] if he was to be placed in a suitable job while appropriate openings still existed.

Had grievant submitted the bid in the proper format and had it been withheld by his CDO from the computer system and the assignment panel, the charge that he had not been allowed to bid on the position would have merit. The fact is that no properly presented bid was made or withheld. Consequently we find no merit in the charge.

(2) Appeal Rights

Grievant appealed a subsequent involuntary assignment to [REDACTED] and was turned down. At issue here is whether the appeal procedures provided for by regulation were followed by the Department.

Grievant states that after being informed of his assignment to [REDACTED], he was told by two sources -- the director of personnel for the [REDACTED] bureau and the office of the Director General -- that only the Director General had the authority to affect the assignment decision. Accordingly, he wrote the Director General immediately, outlining reasons why the assignment should be canceled. He claims now that the

information given him by the two sources was a material error and asserts that the office of the Director General should have forwarded his appeal to the assignment panel, as provided by 3 FAM 141.7-8. Instead, the Director General himself acted on the appeal, reaffirming the assignment panel's decision to assign him to [REDACTED].

Because of a statement reportedly made by the [REDACTED] bureau assignment officer to an EEO counselor -- that the panel would have accommodated him had it known of his concerns -- grievant believes he would have succeeded in voiding the proposed assignment had the panel rather than the Director General considered his objections.

Statements by grievant and his CDO indicate the following chronology of events in early 1991:

March 19 -- [REDACTED] informed the CDO that the bureau would propose [REDACTED] for a service-need assignment to [REDACTED]. A similar proposal from the economic bureau was already before the panel. A decision was to be made at the March 22 meeting.

March 21 -- In the afternoon, too late to affect the agenda for the next day's meeting, [REDACTED] and his CDO spoke on the telephone. [REDACTED] advised the CDO that he wanted to bid on a position on [REDACTED], an assignment that would require him to take two years of [REDACTED] language training immediately following the economics training. In the same conversation his CDO raised with him the [REDACTED] bureau's interest in him for an assignment on that continent. (Grievant and the Department are in dispute as to whether the proposal of a [REDACTED] assignment was specifically mentioned.)

March 22 -- At the panel meeting a hold was placed on both the [REDACTED] and the [REDACTED] proposals until the following week so that [REDACTED]'s bid on [REDACTED] could be considered at the same time.

March 29 -- When the assignment panel met, it had before it the AF proposal of [REDACTED] for [REDACTED] and [REDACTED]'s own bid on a position on [REDACTED]. ([REDACTED] had withdrawn its proposal.) The CDO told the panel that [REDACTED] was opposed to [REDACTED] and wanted [REDACTED]. Nevertheless, the panel voted eleven to one in favor of [REDACTED].

April 1 -- The CDO told [REDACTED] of the panel's decision, and [REDACTED] informed him that he was medically unqualified to serve there. The CDO states, "This was the first time he informed me of any possible limitations on his assignability to [REDACTED]." He advised grievant to update his medical clearance, adding that if the medical division would not clear him to go to [REDACTED], the assignment would be broken.

April 2 -- Grievant spoke with the [REDACTED] personnel director, who two months earlier had first discussed with him the possibility of an assignment to [REDACTED]. Grievant had told him in that initial talk that he could not serve in [REDACTED], and "was not even sure I was medically cleared to do so." On April 2 they discussed grievant's two objections -- his medical and his religious concerns. The personnel director advised him to turn to the office of the Director General if he wished to have the assignment changed.

April 3 -- Grievant wrote the Director General, raising both objections. (This memo was not submitted to the record.)

April 11 -- The Director General responded by memo. He advised that he was deferring a decision until information from grievant's new medical examination was available. (The medical division subsequently cleared [REDACTED] for service in [REDACTED].) The Director General added that grievant's request to break the assignment because of a lack of religious facilities at post could not be honored "at this late date." At that point grievant sought a face-to-face meeting with the Director General to discuss the situation.

April 24 -- In a 10-minute meeting with the Director General, grievant asked, to no avail, that the [REDACTED] assignment be canceled.

The regulations in effect at the time of grievant's assignment provide for appeals as follows:

142.1-6 Appeals

PER/FCA may establish procedures for the panels to consider appeals concerning assignment decisions. Once panel action is final, an assignment decision may be appealed to the Director General by the employee concerned or by the bureau with jurisdiction over the position. The employee or bureau making an appeal to the Director General must do so within ten working days of receiving notification of the assignment decision.

The regulations were new and had been in effect for scarcely two weeks. Grievant did not know of the change, and could not be expected to have known. (The notice transmitting the new text to bureaus and posts was dated April 30.) Yet, as a result of the advice given him, he followed the course dictated by the new regulations in submitting his appeal to the Director General.

In his grievance at the agency level, [REDACTED] cites 3 FAM 141.7-8 -- the old regulations -- in charging that his appeal rights had been violated, that he had not been notified before final action was taken, and that the panel never had the opportunity to fully consider his appeal. The old regulations provided that appeals were to be addressed to the CDO and considered by the assignment panel. Grievant states that 3 FAM 141.7-8 was "consolidated" under 3 FAM 142 -- the new regulations. A comparison of the two versions does not bear out his contention. Rather, it makes clear that the old section 141.7-8, "Appeal Rights," ceased to exist once the new regulations, including section 142.1-6 "Appeals," took effect.

Concerning 3 FAM 142, grievant argues, "Even if I am presumed to know these unavailable regulations, 3 FAM 142.1-6 is compatible with the previous section on appeals, 141.7-8, as it provides for the "panels to consider appeals concerning assignment decisions." Here he is quoting from the first sentence of 142.1-6, which reads, "PER/FCA may establish procedures for the panels to consider appeals concerning assignment decisions." In a submission to the Board he asks, "What are the procedures? Presumably, the procedures are at least consistent with the prior regulations, which as explained above should be controlling in this instance."

In response to a query from the Board, the Department advised that PER/FCA never exercised the option allowed by 142.1-6 of establishing procedures by which assignment panels would consider appeals from employees. Thus, the only appeal

route authorized by regulation on April 1, 1991 was the one grievant followed -- a memorandum to the Director General.

The fact that grievant did not know and could not have known that new regulations required him to do exactly what he did do does not mean that the Department was wrong in not applying the former regulations to his appeal and in not sending it back to the panel for reconsideration of the assignment. Had grievant diligently followed the old regulations and then found his appeal denied for failure to meet new requirements that had not yet been promulgated, we would readily find merit in his complaint. But neither of those conditions existed: he did not address his appeal to his CDO, as called for by the old regulations, and his appeal was not denied on grounds that it did not conform to regulatory procedures. Unwittingly, he followed the procedures of the new regulations that were in effect. He apparently ignored the procedures of the old regulations. Yet he insists now that though he acted pursuant to the new regulations and though this turns out to have been correct, he is entitled because of his ignorance of the change to have the old regulations applied to his appeal. He would have us find against the Department because it did not -- any more than he himself -- pursue the procedures called for in the outdated regulations. That we cannot do. We find that grievant's charge that his appeal rights were violated is without merit.

(3) Advance Notification of Involuntary Assignment

The Open Assignments Message offered assurances on two points relating to involuntary assignments -- advance notification and panel consideration of any relevant personal circumstances of the officer. It advised employees:

Identifications: You will be notified if the Department's need for timely staffing is likely to result in your being considered for assignment to a specific advertised vacancy on which you have not bid. The panel, in deciding whether to make such an assignment, will take into account such factors as Service need, career development, viable alternative bids, and any relevant personal circumstances of the officer concerned. (This procedure will also apply to "Service need" assignments made after March 1, 1991, in instances in which officers have not bid the positions for which they are being considered.)

Grievant protests, "There was no indication that I would be under consideration for [REDACTED], and no one ever told me that I was being proposed for [REDACTED]. . . . Statements to the contrary are false." 1/

His CDO in a declaration signed under penalty of perjury gives a contrary account. (Curiously, grievant in his final submission refers to that declaration as "a statement which does not contradict my claims.")

1/Grievant similarly disputes that his counselor ever advised him that [REDACTED] had proposed him for a service-need [REDACTED] assignment. He states, "I was never notified by [REDACTED] or anyone else that I was being proposed for a position in the EB bureau" However, CDO [REDACTED] in his declaration, recounting the events leading up to grievant's bid on the [REDACTED] position, states: "I telephoned [REDACTED] and told him that he had been proposed for a 'service need' assignment to [REDACTED]. As I recall, I made this call on March 6 or 7. [REDACTED] told me that he was not interested in the [REDACTED] job and would try to find a more desirable assignment. I told him that I could put a hold on the assignment proposal on his behalf for up to two weeks." The record shows that [REDACTED] put a hold on the [REDACTED] proposal on March 8.

What is at issue is precisely what was said by CDO [redacted] in their March 21 telephone conversation, when grievant advised his counselor that he wished to bid on the [redacted] position.

Grievant states that, even though he had submitted a valid bid on an 03 ECON position on [redacted], Taylor mentioned that both the [redacted] and economic bureaus were interested in him.

In his declaration Taylor indicates that he gave grievant specific information of the [redacted] bureau's proposal:

The agenda for the March 22 [panel] meeting was distributed about mid-day on March 21. On the afternoon of March 21, after the March 22 [panel] agenda had been distributed, [redacted] informed me by telephone of his wish to bid on the [redacted] position. In this same telephone conversation, I informed him of the [redacted] proposal that he be assigned to [redacted] under the "service need" procedure.

No documentary evidence exists in the record to corroborate or disprove either grievant's or his CDO's account of the specificity of the notification.

After carefully weighing all that is before us, including grievant's repeated categorical assertions to the contrary, we have concluded that the CDO's statement that he informed grievant of the [redacted] town proposal on March 21 is to be accepted. [redacted] had learned of the proposal just two days earlier, and the agenda for the March 22 meeting, which included the [redacted] proposal, reached his desk at midday March 21. There seems little likelihood that it had slipped his mind, and we can conceive of no reason why he should purposely suppress the information -- or should gloss over the

proposal with a vague and unspecific mention of [REDACTED] interest in [REDACTED] -- when grievant was on the phone in the afternoon of the same day with his bid on the [REDACTED] opening. After all, the CDO would be required in any case to notify [REDACTED] immediately after the panel acted.

[REDACTED] states that at the March 29 panel meeting, during the debate over the two competing proposals -- [REDACTED] and [REDACTED] -- he told the panel that [REDACTED] wanted the [REDACTED] position and was opposed to the [REDACTED] assignment proposal. That statement persuades us that [REDACTED] had been advised by [REDACTED] of his opposition to [REDACTED] -- from which it obviously follows that [REDACTED] was aware of the proposal. We find it unlikely that [REDACTED] in an affidavit would falsify his account of what he told the panel since he was aware that that account could be checked by any challenger with the other panel members who had been present.

In making grievant's assignment, the panel apparently did not take into account his concerns about his health and about the opportunity to practice his religion -- both "relevant personal circumstances." It appears that neither his counselor nor the panel was alert to these two concerns (although [REDACTED]'s original bid submission in August 1990 noted that he had a restricted medical clearance). In the March 21 telephone conversation in which, by our finding, the CDO informed grievant of the [REDACTED] assignment proposal, grievant did not take the opportunity to alert his counselor at that point, prior to the panel meeting, to his concerns, and

was thus himself responsible for the panel's failure to take them into account. Even by his own account, grievant had been informed at least that the [REDACTED] bureau was "interested" in him, but there is no indication that he tried then to point out to the CDO why many or most assignments in [REDACTED] would entail problems for him.

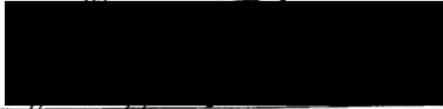
Why would grievant not express his concerns at the time his counselor first informed him that [REDACTED] had proposed him for [REDACTED]? We can only speculate that he was confident of prevailing on his bid for the [REDACTED] position, which was at his own grade level and which he had just succeeded in getting his CDO to enter in the computer system on his behalf. In a letter to an employee relations officer on June 12, 1991 he wrote: "I was [REDACTED]'s top (perhaps only) candidate. Personnel did not offer any objection to my [REDACTED] bid. I had every expectation that I would be assigned to [REDACTED]"

Grievant has not shown that error was committed when the panel acted without considering his relevant personal circumstances or that he was not notified in advance of the assignment proposal.

V. DECISION

The grievance is denied.

For the Foreign Service Grievance Board.



Rolf Valtin
Presiding Member



Geraldine Sheehan
Member



Calvin C. Berlin
Member