BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant

and

The Agency for
International Development

Record of Proceedings
No. G-91-084:-AID-03

Date: June 23, 1992

PRESCRIPTIVE RELIEF
- EXCISION

For the Foreign Service Grievance Board:

Presiding Member: Howard W. Solomon

Board Members: James S. Landberg

John H. Rouse

Special Assistant
to the Board: Irene M. Barbeau

Representative for the Grievant:

David R. Shopfner, Esq.

Representative for the Agency for
International Development:

William D. Jones, Chief Labor
and Employee Relations
Division

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I. REOUEST FOR PRESCRIPTIVE RELIEF FROM SEPARATION

[Grievant], a class FS-01 Foreign Service officer with the Agency for International Development (AID), requests that the Board suspend, during the pendancy of this grievance his scheduled mandatory retirement on June 30, 1992 for expiration of his time-in-class (TIC). The Board has discretionary authority to grant such relief under section 1106(8) of the Foreign Service Act of 1980 (the Act).

II. BACKGROUND

{Grievant] filed a grievance with his agency on July 9, 1991 alleging that it violated regulations when it denied him consideration for promotion into the Senior Foreign Service (SFS) in 1990 and 1991. In 1987, grievant had chosen to withdraw from being considered a seventh time for promotion into the SFS. Under AID regulations prevailing at the time, if grievant had been considered a seventh time but failed to be promoted, he would have been subject to immediate mandatory retirement. By withdrawing from the promotion competition, he became subject only to mandatory retirement based on his time-in-class limitation. The agency had notified him that this limitation would expire on August 7, 1991, 20 years from the date of his entry into class 01.

AID later temporarily extended grievant's career appointment until June 30, 1992, in accordance with section 607(d) (2) of the Act, allowing him to remain in his present position as AID representative in [Post] until that date.

In 1990, AID changed its regulations to provide FS-01s an eighth opportunity to be considered for SFS promotion prior to mandatory retirement. Grievant argued that this change should be retroactively applied to persons such as himself, who had foregone a seventh SFS promotion review. After AID notified him that it would be unable to extend the benefits of the regulatory ,change to him, [Grievant] filed the instant grievance. On December 5, [year], prior to the agency's final decision denying his grievance, [Grievant] submitted his grievance to this Board.

In pursuing his case before the Board, grievant noted, in a submission of March 6, [year] that he had discovered an error in the agency's calculation of his TIC expiration date. He alleged that under applicable regulations, a one-year period of agency-sponsored training he had taken in [Blank] should not be counted in his TIC. Therefore, he argued, his proper TIC expiration date should be August 7, [year] Although this issue was not previously raised at the agency level, AID has not objected to its consideration_by the Board.

In a later submission, dated April 14, 1992, AID advised the Board that it had reviewed grievant's records and discovered that he was entitled under applicable law and regulation only to 18 years in class 01. Therefore, it contended, his TIC expiration date should have been set at August 7, [year] AID averred that even if grievant were entitled to an additional year of service because of his

training (which it did not concede), grievant would have been entitled to remain in the service only until August 7, 1990. Therefore, AID argued, there was no basis for changing grievant's proposed retirement on June 30, 1992.

Pursuant to grievant's request for a hearing before the Board under section 1106(1) (A) of the Act, a pre-hearing conference was held on June _10, 1992, attended by grievant's counsel and agency representatives. The agency representatives indicated that grievant's assignment to {Post] is scheduled to end on June 30, 1992, and that because grievant will reach the mandatory retirement age of 65 on July 6, 1993, they did not contemplate his further assignment to regular duties should he be granted prescriptive relief.[1]

III. DISCUSSION AND FINDINGS

Section 1106(8) of the Foreign Service Act gives the Board discretionary authority to suspend involuntary separations from the service. That section states:

> If the Board determines that the Department is considering the involuntary separation of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the Board has ruled upon the grievance.

The Board decides in each grievance whether interim relief from separation is warranted based on the particular

1 Grievant remains in {Post] at this time. Agency representatives indicate there is a slight possibility that he will receive a short extension of his appointment until his replacement arrives.

circumstances and considerations of that case (see G-92002-ST-01). We have noted (see G-89-026-ST-19) that the underlying purposes of the prescriptive relief authority which Congress granted to the Board were based on two related ccnsiderations:

1) To avoid disruption of a Foreign Service career while a grievance is pending; and,

2) To take into account the difficulty of repairing the damage to a career subsequent to a significant hiatus in service as the result of separation followed by reinstatement.

Having carefully reviewed the record before us, we find that the circumstances of this particular grievance do not warrant exercise of our authority to suspend grievant's proposed June 30, 1992 separation.

AID has notified the Board that a replacement for grievant already has been assigned to [Post] and will arrive in July. If grievant is granted prescriptive relief, the agency states, grievant will be recalled to Washington. The agency also makes plain that because grievant will reach mandatory retirement age in July, 1993, even were he to remain in the service until that date, it does not anticipate that it could give him a regular new assignment for such a brief period.

Two principal substantive issues are involved in this grievance. The first arises from grievant's claim that he is entitled to a seventh review for promotion into the SFS.

However, even if he prevailed on the merits and, consequently, gained promotion into the SFS, he could remain in the service only until he reaches mandatory retirement age in July 1993. The second issue involves [Grievant]'s claim that the correct date of his TIC expiration is August 7, 1992. If he were to prevail solely on that issue, he normally would remain on the rolls only until that date, just a few weeks beyond the June 30 retirement date.[2]

Thus, it is clear that grievant's separation would have, at best, a minimal disruptive effect on his career while his grievance is being processed. Moreover, because of his relatively short period of career tenure remaining, longer term career harm, under any circumstances, is not a significant consideration.

In view of [Grievant]'s current situation -- the relatively short career span remaining and the limited possibilities for meaningful interim assignments -- the Board believes that, should he prevail, the relief the Board can provide will adequately remedy any harm he may have suffered. The Board has authority to provide for restoration of any back pay, allowances and other perquisites of employment to which he would be entitled, and, as appropriate, to reinstate grievant into the Service.

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2 This issue will not be decided in any event until after August 7, 1992, since the hearing grievant has requested is scheduled to occur August 13, 1992.

IV. DECISION

1. Grievant's request for prescriptive relief from separation is denied.

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