

2001-043 – EXCISED - DECISION

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]
Grievant

Record of Proceedings
Case No. 2001-043

and

Date: October 7, 2002

Department of State

DECISION

Excised: 10/2002

For the Foreign Service Grievance Board:

Presiding Member:

Paul G. Streb

Board Members:

John H. Rouse

Richard H. Williams

Senior Advisor:

Barnett Chessin

Representative for the Grievant:

George N. Elfter, Esq.

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service
Association

OVERVIEW

Grievant was a Family Member Appointee who worked as a Consular Associate at the U.S. Embassy in [post]. The Agency required her to vacate that position for three reasons – her failure to return from home leave during the 2001 consular rush season until 17 days after her leave had expired, her action of taking extensive leave during the 2000 rush season, and certain actions she took related to her job performance.

Grievant contended the Agency's action constituted a termination for misconduct, but the Board sustained the Agency's position that Grievant had instead been placed into an Intermittent-No-Work-Scheduled (INWS) status. The Agency also contended that the Board lacked jurisdiction, but the Board held otherwise.

The Board found that Grievant's absence on approved leave in 2000 and her alleged performance problems did not support the agency's adverse action, but that her unexcused absence during a period of peak workload was a valid reason for placing Grievant in INWS status. Since Grievant had not shown that she had been terminated or that her reassignment was contrary to law or regulation, the Board denied the grievance.

DECISION

I. THE GRIEVANCE

[Grievant] (Grievant) filed a grievance, by counsel, contesting the decision of the U.S. Department of State (Department, Agency) to require her to vacate her position as a Consular Associate at the U.S. Embassy in [post], [country]. She asks the Board to reverse the decision, reinstate her, expunge the records pertaining to her termination, and award her back pay and benefits.

II. BACKGROUND

Grievant, whose husband is a Foreign Service Officer with USAID, was appointed as an American Family Member (AFM) Appointee in June 1999 under 22 U.S.C. 3951 and 3 FAM 8200. She was assigned to the position of Consular Associate at the [post] Embassy.

On August 5, 2001, the Embassy sent a cable to the Department of State requesting that a personnel action be taken to terminate Grievant's appointment effective August 11. Apparently, the Embassy informed Grievant only after sending the cable that her appointment would be terminated. On August 10, Grievant filed a grievance with the Department contesting her termination. On August 16, the Embassy sent two telegrams to the Department. One telegram canceled the request to terminate Grievant's appointment; the other reflected her placement in Intermittent-No-Work-Scheduled (INWS) status effective August 11.

On August 19, the Embassy's Human Resources Officer (HRO) wrote Grievant informing her of the reasons for the decision "to terminate without prejudice [her] appointment . . ." The HRO's memo set forth three reasons for the action -- Grievant's failure to return from home leave in the U.S. as scheduled during the "Consular rush season" in August 2001, her action of taking extensive leave during that season in 2000, and certain actions she took related to her job performance. The memo concluded by stating that after deciding to effect the termination, "[w]e subsequently learned that we could better preserve your opportunities for further employment by placing you in [INWS status] rather than a straight termination."

On September 21, the Department issued a decision denying the grievance. On November 15, Grievant appealed that decision to the Board. Following receipt of Grievant's supplemental submission and a response from the Agency, on April 11, 2002, the Board requested further views of the parties as to the nature of the Agency action -- i.e., whether it should be considered a transfer of assignment, a termination of appointment, or separation for misconduct -- and the effect of that determination on Board jurisdiction. Grievant responded on June 25 and the Department on June 23 and July 8. On August 12 the Record of Proceedings (ROP) was closed.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant contends that her placement in INWS status was not permitted by 3 FAM 8217, that the Agency improperly placed her in that status in an attempt to circumvent her grievance rights, that the Agency, in

essence, terminated her for alleged misconduct (dishonesty and insubordination regarding leave) pursuant to section 610(a) of the Foreign Service Act, and that she was entitled to a pre-termination hearing.

Regarding the merits, Grievant argues that her delayed return to [post] after her leave expired was justified for medical reasons, that her taking approved leave is not a valid reason for the Agency's action, and that her job performance was not unsatisfactory.

The Agency

The Agency contends that it did not terminate Grievant for misconduct, that it properly placed her in INWS status, and that the Board lacks jurisdiction over that assignment action.

IV. DISCUSSION AND FINDINGS

A. Nature of the Action

The Board finds that the Department did not terminate Grievant's appointment, but rather placed her in INWS status. As stated above, the [post] Embassy initially requested the Department on August 5, 2001, to take a personnel action to terminate Grievant's appointment effective August 11. However, the evidence shows that the requested termination was not effected. On August 16 the embassy cancelled the request and stated that Grievant had been placed in INWS status effective August 11. This action was confirmed by the HRO's memo informing Grievant that she had been placed in INWS status instead of being terminated. It is true that the

Department's decision denying the grievance refers to the action as a termination of Grievant's appointment, not as a placement in INWS status. However, we do not view that fact to be significant. As stated above, the grievance contested a termination. When the grievance was filed on August 10, it appeared that the action would be a termination because the embassy's August 6 request for a personnel action effecting such action had not yet been canceled, and Grievant's placement in INWS status (on August 11) had not yet occurred. There is no evidence that the official who decided the grievance was informed that the request to effect Grievant's termination had been cancelled.

Grievant argues that her placement in INWS status was not permitted by Department regulations, that she did not consent to it, and that her placement in that status did not alter the fact that she has, in essence, been terminated. We find no merit to these arguments. Placement in INWS status is authorized, inter alia, when an "[i]ndividual under a Family Member Appointment vacates a Qualifying Position at a post abroad." 3 FAM 8217.2a(1). Grievant argues she did not vacate her position but rather was involuntarily removed from it. However, section 8217.2 does not specifically require that the individual voluntarily leave her position before the Agency may invoke its provisions. Nor can such a requirement be inferred from the language of that section. Section 8217.2a provides that the "work schedule" of a family member appointed to a position "is changed" to

INWS status and the individual is assigned to an agency inactive complement position as the result of the individual's vacating a "qualifying position." Subsections b and c provide for such a change when the position is abolished or unfunded or the employee's spouse is transferred. Together these circumstances cover, and were obviously intended to cover, all of the normally expected reasons why an appointment to a specific position would come to an end. As the terms indicate, the change from active to inactive status is a routine procedure that normally follows when a family member's active incumbency of a specific position ends. The assignment (limited appointment) of a family member to a specific position is expected to terminate within a limited period. Family members often serve in a number of such positions at different posts. Routine reassignment of the family member to an inactive status position when a specific assignment ends, instead of completely terminating the individual's employee status, serves both agency and family member by continuing security clearance and other incidents of employment until a subsequent assignment to a specific position may be available.

When used as a transitive verb, as it is in section 8217.2, "vacate" means "(a) to cease to occupy or hold; give up; (b) to empty of occupants or incumbents." American Heritage Dictionary (Houghton Mifflin, 4th ed. 2000). Voluntariness is not an express or implied element of these definitions. For example, a person may cease to occupy or hold a position voluntarily or

involuntarily. Occupants of a dwelling may cease to occupy it because it no longer meets their needs or because they have been evicted. Although the term “give up” might be construed as conveying an element of voluntariness, it does not have to be so construed. For example, a person can give up an office on her own initiative or under pressure. When used as an intransitive verb, the definition of “vacate” – “to leave a job, office, or lodging,” *id.*, also does not include an element of voluntariness. Therefore, the fact that Grievant’s departure from her position was involuntary did not prevent the Agency from properly invoking section 8217.2 to place her in INWS status.

Grievant’s argument that she did not consent to placement in INWS status incorrectly assumes that her consent was required to make the placement effective. Grievant correctly notes that the HRO’s memo informed her that, “To confirm [her INWS] status, [she] will need to complete SF-2821 and SF-2819.” Moreover, Grievant’s assertion that she did not complete those forms is undisputed. However, the Agency maintains that employee consent is not necessary, and Grievant has cited no statute or regulation, and we are not aware of any, requiring that an employee confirm her placement in INWS status or complete certain forms before the action will be effective. Section 8217.2a strongly suggests otherwise.

Finally, Grievant argues that the Agency’s action should be viewed as a termination because the Agency’s stated reason for placing her in INWS status -- to better preserve her opportunities for further employment -- has

been rendered false because she has not been selected for other positions. She argues further that the Agency placed her in INWS status solely to circumvent her grievance rights and right to a pre-termination hearing.

These arguments are not persuasive. Although Grievant submitted evidence that she was not selected for several positions after she was placed in INWS status, we do not agree that that fact establishes that the Agency did not believe such placement would better preserve her employment opportunities. Moreover, it is clear that the primary reason for making Grievant vacate her position was the Agency's belief that she could not be depended on to be present for duty during consular rush seasons, or, as the agency phrased it in its August 19 explanation letter, "your requirements to be absent during significant periods of the time of year that most justifies the Consular Associate position" As Grievant's supervisor explained, "This is the peak season in the consular section [when] we do more than 50% of our annual workload." The Agency's decision to place her in INWS status rather than terminate her appointment was one within its discretion. Whether Grievant would have been entitled to a pre-termination hearing, as is required in connection with separation for misconduct, is a matter we need not decide in view of our findings that her appointment was not terminated but rather that she was properly reassigned to INWS status. However, the fact that the action was taken to "promote the efficiency of the Foreign Service," "without prejudice," and in a manner "to better preserve

opportunities for further employment," strongly suggests that perceived misconduct was not central to the Agency decision. Furthermore, placement of Grievant in INWS status has not deprived her of her grievance rights. As discussed below, we have found jurisdiction over her grievance and reviewed the merits of the Agency's reasons for placing Grievant in INWS status.

B. Jurisdiction

The Agency contends the Board lacks jurisdiction over Grievant's placement in INWS status because assignments and reassignments are not grievable matters, absent a violation of law or regulation. While we accept the principle cited by the Agency, we do not agree with the Agency's conclusion.

The term "grievance" is broadly defined to encompass "any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service . . . of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member...." 22 U.S.C 4131(a)(1). The term "grievance" does not include "an individual assignment of a member under chapter 5 [22 USCS 3981 et seq.], other than an assignment alleged to be contrary to law or regulation." *Id.* 4131(b)(1).

Placement in INWS status is considered to be an assignment. *See* 3 FAM 8217.2(a) ("The work schedule of an individual under the Family Member Appointment is changed to [INWS status], and the individual is

reassigned to a Department of State FMA Inactive Complement position . . .”). However, Grievant’s assignment has far greater adverse consequences than other assignments because, while assigned to the Inactive Complement, she performs no duties and receives no pay. In any event, as discussed above, Grievant has alleged that her assignment was contrary to regulation (3 FAM 8217.2) because it did not meet the criteria for such assignments. Therefore, we hold that the Board has jurisdiction over this matter.

C. Merits

Grievant bears the burden of establishing by a preponderance of the evidence that the grievance is meritorious. 22 C.F.R. 905.1(a). We hold that she has not met that burden.

As stated above, the HRO informed Grievant that there were three specific reasons for her placement in INWS status -- Grievant’s failure to return from home leave in the U.S. as scheduled during the “Consular rush season” in August 2001, her action of taking excessive leave during that season in 2000, and certain actions she took related to her job performance.

We address these reasons in reverse order. The third reason for the action was stated as follows in the HRO’s August 19 letter:

[T]he record indicates that you have neither accepted constructive criticism contained in your EERs for the past year nor been willing to write your own comments or even to sign the EERs. This, coupled with formal memoranda detailing considerable needs for improvement, points to a work environment that is inefficient for the office, and seemingly unpleasant for you.

The official who issued the Agency's September 21 decision on the grievance did not mention this reason in his decision. Moreover, the Agency submitted no evidence to the Board to support this reason. Thus, it appears that the Agency is no longer asserting this reason as providing support for its placement of Grievant in INWS status.¹ In the absence of any supporting evidence, we find that this reason does not support the agency's action.

The second reason for the Agency's action was Grievant's use of 39 days of annual leave, 36 hours of sick leave, and 48 hours of leave without pay during the 2000 consular rush season. Grievant admits she took leave on those occasions, but she contends this should not be considered a valid reason for the Agency's action because all of the leave had been approved by her supervisor. She argues, "[t]here is an ex post facto quality about blaming an employee for an annual leave request and then citing it as a reason for termination when the request is officially approved and then the employee takes leave."

We agree with Grievant. Although the Agency's action was based on Grievant's unavailability for duty during the busy consular rush season, not on any misconduct, fundamental fairness requires that she must have reason to know that her actions could be the basis for placement in INWS status before the Agency may take that action. There is no evidence Grievant was warned that her approved absences could lead to placement in INWS status,

¹ Grievant has argued persuasively that this reason lacks merit and has offered undisputed evidence to support her argument.

and that is not something a reasonable person would infer. *Cf. Cook v. Department of Army*, 18 *MSPR* 610 (1984) (approved leave may be the basis of an adverse action only if, inter alia, the employee is warned).

Regarding the first reason for the action - Grievant's absence in 2001 - it is undisputed that Grievant's request to take home leave from July 11 through July 31 was granted, that she returned to the U.S. during that period, and that she did not return to post until August 17. Grievant contended her untimely return was justified, and she submitted statements of witnesses and other documents in support of that contention.

The record reflects the following circumstances surrounding Grievant's 2001 absence. In June 2001 Grievant's husband contacted a travel agent to make flight arrangements for him, his wife, and their three daughters to travel to the U.S. He made reservations for the family to depart on July 11, but it was impossible to get a return flight for Grievant around the end of July, so the agent advised him to make a reservation for her return flight on August 16, the same date he and the children had planned to return, and to try to change it later. Grievant and her husband later called the airline "a couple of times" but were unable to schedule another return flight. There is no evidence Grievant told her supervisor about this development.

On July 9 Grievant learned from a post physician that a glucose tolerance test had revealed a mild elevation in her blood sugar level. Because there was insufficient time to schedule an appointment with a post specialist

regarding this problem, the physician advised Grievant to see a specialist while she was in the U.S. Grievant did so while in Washington, D.C., and the specialist performed another test on July 19. On July 23 he informed Grievant her test results were “good” and “suggested” she undergo a two-hour glucose tolerance test “in about 10-14 days” to see if her present exercise and diet had made an impact on her glucose tolerance. There is no evidence Grievant informed the specialist she was required to report for duty in [post] on August 1. Because of the specialist’s recommendation, Grievant did not make any further attempts to change her return flight. Rather, she made arrangements for the test at her home leave address on the West Coast. Grievant’s attorney alleges that she took the test “sometime before August 13.”²

After hearing the doctor’s recommendation for further testing, Grievant attempted to contact [name], a Department Psychiatric Social Worker, who had apparently treated one of her children for a learning disability. Due to [name]’s unavailability, Grievant was unable to speak with her until July 31. Grievant asked [name] to contact her supervisor in [post] and explain that she needed to overstay her leave. Grievant alleges she believed [name]’s medical background would “help to bring the message home

² On August 16 the specialist stated in a memo that the test revealed a “mild elevation” of Grievant’s glucose, that she was having difficulty losing the weight she had gained with her pregnancy, that he recommended she increase her exercise and have another test in three months, and that he “suspect[ed] that with diet and exercise she will be able to control her blood sugar without medications.”

to [her supervisor] that [her] need to overstay her leave was medically justifiable.”

On the same day [name] faxed to Grievant’s supervisor a memo stating that Grievant “asked me to let you know that she will be delayed in returning to post because of necessary medical appointments.” [name] sent the supervisor several additional messages concerning related matters. There is no evidence that Grievant’s supervisor responded to any of [name]’s written communications. [name] also called the supervisor at least once in this regard.

According to Grievant and her husband, [name] informed them that the supervisor understood the need for further testing and “had no problem with it.” He stated that Grievant “thought she had approval to stay until she would finish her medical testing. . . .” However, this version is not corroborated by the letter [name] wrote to Grievant’s attorney summarizing her involvement in this matter. In that letter [name] did not state that the supervisor had no problem with Grievant’s extending her stay in the U.S. Nor did she state that she told Grievant or her husband that the supervisor had consented to an extension of the stay. Rather, [name] stated that the supervisor “simply took the information and said she would pass it along to the man who was handling the personnel function on a TDY basis.” [name], unlike Grievant and her husband, is an independent witness who spoke with the supervisor. Moreover, her version is supported by the absence of evidence

that the supervisor made any response to her written communications, much less a response that consented to Grievant's overstaying her leave. Indeed, upon learning of her delayed return, the supervisor initiated the action leading to Grievant's reassignment. We find that Grievant's claim that she had good reason to conclude that her extended return had approval is not supported by the evidence, which indicates that the supervisor did not consent to Grievant's overstaying her leave, and that [name] did not inform Grievant or her husband that the supervisor had so consented.

Although we have found that two of the reasons discussed above cannot serve as support for the Agency's action, we note that the Department concluded in its decision denying the grievance that Grievant's "failure to return from leave as scheduled is grounds for [the action] inasmuch as your extended absence adversely affected the efficiency of consular operations." We sustain this judgment. Specifically, we agree that Grievant's failure to return from home leave until seventeen days after her leave had expired, standing alone, constitutes a valid reason for placing her in INWS status. Grievant's failure to report for duty as scheduled and unauthorized absence without leave for more than two weeks during the peak work period constitute material grounds for the Agency's action.

Before she departed post Grievant knew she did not have a timely return flight and that there might be a problem obtaining one, but she apparently neglected to inform her supervisor of those facts. Thus, her

supervisor was unable to plan for the eventuality that she might not return as scheduled. Grievant and her husband later called the airline only “a couple of times” to try to get a timely return flight. It is evident Grievant was not seriously ill; her July 23 test results were “good,” and no medication was prescribed. When the specialist suggested another test “in about 10-14 days,” Grievant apparently did not inform him of her need to return to duty on August 1, or ask him if the test could be scheduled at a time or location that would accommodate her job responsibilities. Moreover, instead of immediately contacting her supervisor on July 23 to explain the need for further testing and to request additional leave, Grievant used an intermediary, whom she was unable to speak with until July 31, to contact her supervisor and inform her that her return “will be delayed.” Thus, the supervisor had little notice that Grievant’s return would be seventeen days after her leave had expired.

Grievant has not shown that her failure to return to post in 2001 on time was unavoidable or excusable or that the Agency erred in resting its action on her failure to report for duty as scheduled. In sum, given the length of Grievant’s absence, the fact that it occurred during the busy consular rush season, and the other circumstances discussed above, we find that this matter, standing alone, is sufficient reason to warrant Grievant’s placement in INWS status. We conclude that Grievant has not demonstrated that her grievance is meritorious.

V. DECISION

The grievance appeal is denied.