



BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

And

United States Agency for International
Development

Record of Proceeding

FSGB 2007-007

January 22, 2008

**ORDER: MOTION TO DISMISS,
MOTION TO COMPEL, REQUEST
FOR A HEARING, AND MOTION TO
AMEND THE GRIEVANCE APPEAL**

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Harriet Davidson

Board Members:

Alfred O. Haynes

John H. Rouse

Special Assistant:

Linda B. Lee

Representative for the Grievant:

Pro Se

Representative for the Agency:

Sabrina Segal
Office of the General Counsel, Ethics and
Administration

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO DISMISS, MOTION TO COMPEL, REQUEST FOR A HEARING, AND MOTION TO AMEND THE GRIEVANCE APPEAL¹

I. THE MOTIONS

This Order addresses the motion of the United States Agency for International Development (USAID, agency) to dismiss the consolidated grievances of [REDACTED] (grievant), appealed to the Board on March 21, 2007. It also addresses grievant's motion to compel further agency discovery responses, her request for a hearing and her motion to amend her grievance.

II. BACKGROUND

On December 18, 2006, [REDACTED] filed three grievances with USAID. In the first, grievant contended that USAID had violated a settlement agreement between the parties by failing to work with her to find a suitable onward assignment, and in actuality by working against her efforts in locating an assignment over two assignment cycles. For a remedy for the alleged agency breach, she requested a Senior Foreign Service position or salary from May 1, 2006 until the date in 2009 when her time in class expired, monetary damages, and an order directing agency employees to stop saying negative things about her.

The Settlement Agreement and General Release signed by the parties on November 29, 2005 purported to resolve an incident that occurred on February 15, 2005, resulting in the placement of [REDACTED] on extended administrative leave and proposed disciplinary action against her. In principal part, the parties agreed that her administrative leave would end and she would report to work, initially on a temporary

¹ Although grievant calls the document, dated November 1, 2007, "Appellant's Clarification of Claims in Case No. 2007-006, 007, 008 (*sic*) and Clarification of Remedies Sought," the Board is treating it as a motion to amend the grievance.

basis, to the [REDACTED] USAID expressed its “intention to work with the employee to locate an ongoing assignment.” The agency reduced its proposed period of suspension without pay and agreed to hold the penalty in abeyance and to terminate it after one year, if no further incident occurred. [REDACTED] agreed not to initiate any action relating to these matters against USAID or its employees and released agency employees from any liability related to the incident and subsequent investigation.

In the second grievance, [REDACTED] sought monetary damages, contending that the agency had punished her, contrary to its agreement not to take disciplinary action, by removing her from her supervisory position and giving her an inappropriate assignment in a way that humiliated her and destroyed her career.

In her third grievance, [REDACTED] asserted that the settlement agreement had been rendered null and void due to the following: the agency’s breach of the agreement, the agency signatory’s lack of proper authority to sign the agreement, and because undue pressure had been placed on her to sign the agreement. She maintained that, as the agreement was void, she was free to contest the handling of the incident and agency investigation, which she alleged had been biased and conducted in violation of agency regulations and procedures. She asked that the agency pay all medical bills and attorney fees incurred by her because of agency wrongdoing and for monetary damages for her pain and suffering.

The agency issued its decision denying the three grievances on March 13, 2007. With respect to the first grievance, it determined that grievant’s claim that the agency had not worked with her to find a suitable assignment fell outside the definition of a grievance because it pertained to an “individual assignment of a member.” It concluded

that the evidence supported a finding that it had complied with the agreement, that [REDACTED] had accepted “valuable benefits” of the agreement, and that her claim had no merit.

In denying the second grievance, USAID found that, as [REDACTED] had accepted the agreement voluntarily and with her attorney’s advice, her placement could not be considered a punishment. Regarding grievance number three, the agency asserted that its signing official had authority to negotiate and conclude the agreement; but even if he did not have actual authority, USAID had carried out the agreement in good faith, and grievant should have raised any question about the signatory’s authority at the time the agreement was executed.

[REDACTED] appealed the three grievances to the Board, *pro se*, on March 21, 2007. She alleged that the first grievance, FSGB Case No. 2007-007, was not about an individual assignment, but concerned the agency’s breach of the settlement agreement. USAID had fraudulently induced her into signing the agreement by representing that it would work with her for a suitable onward assignment in return for her agreement not to sue the agency, when in reality, agency employees were working against her. She maintained that she received no benefit from the deferral of the penalty as the disciplinary process was faulty and, thus, the discipline would have been annulled absent the settlement.

In grievance number two, FSGB Case No. 2007-008, [REDACTED] alleged that the agency actions complained of not only violated the agreement, contrary to the promises made to get her to sign it, but constituted punishment. She was not represented by an

attorney during the final phases of negotiation upon the “strong recommendation” of agency personnel.

In appealing the third grievance, FSGB Case No. 2007-009, ██████████ claimed that she had been misled into signing the settlement and that the agency official executing the agreement did not have the authority to do so; but she noted that these claims were subordinate to her claim of agency breach.

On April 6, 2007, the Board received grievant’s request for a hearing on all three grievances. On April 19, USAID filed a “Statement in Opposition to Appeal” requesting that the grievances be dismissed because the grievances were precluded by the settlement agreement. ██████████ had received valuable benefits under the agreement, namely forbearance of the proposed discipline, and had agreed in return not to initiate any actions relating to the subject matter of agreement. Alternatively, USAID requested that grievance numbers FSGB 2007-007, 008 and 009 be consolidated as they shared a common core of facts and consolidation would advance resolution of the appeals.

Grievant opposed both dismissal and consolidation in a pleading dated April 20, asserting that each grievance was based on a different premise. She maintained that her claims were not precluded by the settlement agreement because the clause in the agreement in which she agreed not to institute any actions against USAID “with respect to any matters related to the above-stated actions” refers to the manner in which the agency had handled the incident of February 15, 2005 and not the agency’s non-compliance with the agreement. If the grievant were precluded from grieving the agency’s failure to fulfill its promises under the agreement, there would be nothing to obligate the agency to do what it had agreed to do. USAID had failed to follow through

on a critical obligation of the agreement, to work with her on obtaining an assignment; it made fraudulent representations regarding grievant's assignment; and its conduct amounted to punishment. These actions rendered the agreement null and void and relieved her of the obligation not to contest the agency's past actions. She renewed her contention that she received no benefit from the agreement since the agency discipline would have been invalidated.

Grievant retired from USAID, effective April 30, 2007. On that same date, she submitted an extensive narrative account of the events surrounding the February 15, 2005 incident and subsequent developments, arguing, inter alia, that the evidence demonstrated that she had been misled and pressured into signing the settlement agreement. On May 5, the Board issued an order consolidating the three grievances into FSGB Case No. 2007-007.

The Board held a telephonic status conference with the parties on May 16, 2007. The parties agreed to engage in mediation, and the Board suspended further action pending the outcome of the mediation. On July 16 the Board was informed that mediation had been unsuccessful. It held another status conference on July 30 for the purpose of clarifying the issues and requested remedies, discussing pending motions, and addressing other matters. At that meeting grievant withdrew a number of the remedies she had earlier sought, including all requests for monetary damages, her request for a Senior Foreign Service position or salary until her time-in-class expiration date, and cessation of negative comments about her by USAID employees. She reiterated her claims regarding the settlement agreement and her request that it be set aside on the grounds that she had been misled and coerced into signing it and that the agency had

materially breached it. She renewed her request for agency payment of her consequential medical bills and attorney fees. She stated that she felt that she had no option but to retire earlier than planned, but was not pursuing that matter at the time. She added to her remedies a request that she be placed on the agency “Surge Roster” – the agency said that it had already done so – and that she be provided temporary or part-time work for two years.

The parties explored several areas of possible settlement and subsequently continued their mediation. On August 3, 2007, the Board notified the parties that the grievance would again be held in abeyance pending possible settlement.

On November 1, 2007, grievant submitted to the Board a document, “Appellant’s Clarification of Claims . . . and Clarification of Remedies Sought” purporting to clarify her claims and requesting to “clarify and amend” the remedies sought. In that submission, her first five claims pertain to the agency’s investigation of, and her mandatory administrative leave resulting from, the February 15, 2005 incident. In claims numbered six through eight, grievant reiterates her assertion that USAID committed a material breach of the settlement agreement. In claims numbered seven and nine she asserts that the agency engaged in a “concerted effort to end [her] career” by placing her on a lengthy administrative leave, refusing to reassign her, and “in effect blackballing [her] and forcing[her] to retire.”

Grievant set forth the following requested remedies:

- that the settlement agreement be declared null and void;
- that she be given work assignments until her September 2009 time-in-class expiration date or be given a lump sum payment for the salary lost;

- that she be included on the “Surge Roster” and be promised one assignment per year for five years;
- that she be given priority in contractor opportunities;
- that USAID employees stop saying negative things about her;
- that she be informed whether pertinent USAID employees would give positive information to prospective employers; and
- that she receive “the engraved plaque all retired employees received from USAID.”

She also requested further discovery from the agency.

On November 13, 2007, the parties informed the Board that a second round of mediation had ended unsuccessfully.

III. MOTION TO DISMISS

USAID contends that [REDACTED] grievance should be dismissed because it is precluded by the following provision in the Settlement Agreement and General Release signed by the parties:

“[b]y signing this Agreement . . . [grievant] agrees not to initiate any other actions against the Agency...with respect to any matters related to the above-stated actions.”

Under the agreement, USAID reduced and deferred the proposed disciplinary action, and undertook to rescind it if no incident occurred in one year, to grievant’s benefit, in return for her agreement not to sue and general release, and accordingly grievant is bound by her contractual commitment.

In opposition to the motion, grievant claims that the clause cited by the agency refers to the initiation of an action relating to the agency’s handling of the incident on

February 15, 2005 and its actions in response thereto. It does not preclude her from grieving the agency's breach of the agreement, which renders the agreement null and void and frees her of any restriction in the agreement against challenging agency action. Grievant also contends that in the pressure imposed and promises made by USAID employees to get her to sign the agreement, she was fraudulently induced and coerced into signing it.

A settlement agreement is a contract to be determined under the provisions of contract law. Grievant has raised several defenses to the enforcement of the Settlement Agreement and General Release, namely that she was fraudulently induced and improperly coerced into signing the settlement agreement. The settlement agreement does not preclude grievant from asserting and proving these defenses. Although these allegations are not at this stage documented in detail by compelling evidence, the parties are still in the discovery stage, and [REDACTED] has not yet filed her supplemental pleading on the merits of her case. We hold that the settlement agreement does not preclude grievant's challenges thereto and grievant is permitted to seek to establish these claims with preponderant evidence.

There can be no doubt that grievant's submissions state that grievant, in signing the settlement agreement, relied materially on the agency undertaking "to work with" her in finding an ongoing assignment after her initial temporary placement. The agency statement can only be taken to mean at a minimum that the regular assignment processes would be followed and, certainly, that the agency would not seek to block or impede grievant's attempts at obtaining a position. Grievant's allegations, if substantiated, would indicate that USAID did not fulfill this commitment.

Even assuming, as USAID asserts, that its forbearance in not disciplining [REDACTED] was a substantial inducement for her in signing the agreement, its undertaking to cooperate in finding an onward assignment, which grievant says she was led to believe was the means of restoring her career, was unquestionably itself a material element of the agreement for her. While not making any determination on the merits of her arguments, we hold that grievant is entitled to seek to prove her allegations regarding the agency's breach of the agreement, and if she does, to have the Board consider the appropriate remedies.

While finding that grievant is entitled to pursue her challenges to the settlement agreement, we also hold that at this stage of the proceedings the case should be limited to those issues – whether grievant was coerced or fraudulently misled into entering the settlement and whether USAID materially breached the agreement.

Grievant's right to pursue her additional claims concerning the February 15, 2005 incident and agency handling of her administrative leave and disciplinary investigation are contingent upon our setting aside the settlement agreement on one or more of the grounds set forth above. To pursue the claims potentially precluded by the agreement now would involve extensive inquiry and evidence that would substantially delay a grievance decision, perhaps needlessly. We hold that the interests of the parties and efficient processing of the grievance would be best served by initially limiting grievant's claims and our decision to the contentions surrounding the settlement agreement. We will revisit the other issues, as appropriate, when these initial determinations are made.

IV. MOTION TO COMPEL

In April 2007 the Board received copies of three discovery requests from grievant to USAID broadly seeking numerous documents and answers to interrogatories regarding the settlement agreement, the agency's handling of her onward assignment efforts, the February 15, 2005 incident, and subsequent agency actions. After receiving the agency's responses on April 30² grievant on May 4 filed with the Board a response to the agency's discovery responses that contained additional evidence and argument. She did so again on May 7, while requesting additional agency discovery. On May 21 grievant filed with the Board a motion to compel further agency responses, seeking to overturn agency objections to queries as being too broad, vague, irrelevant or unduly burdensome. Although summarizing and characterizing the discovery exchanges with the agency, the motion did not quote or identify with adequate specificity each individual request made and the explicit agency response or objection made to it and the reasons why the Board should order a response. Without such specificity, the Board is unable to rule dependably on the appropriateness of the inquiry or the response or objection to it.

As noted above, [REDACTED] discovery requests have sought information on all aspects of her grievance. The Board has ruled, however, that only the contentions surrounding the settlement agreement should be pursued at this time. In light of our ruling, we will give grievant the opportunity to revise her motion to compel so that it is limited to the issues on which the Board is currently proceeding. In renewing her motion, grievant should be sure that her requests conform to the requirements of the Board's "Policy and Procedures Regarding Discovery." Each request for a Board ruling should quote the discovery request made, the agency response, and state the reason for grievant's

² Those responses were not copied to the Board. Absent disagreement, grievance discovery ordinarily takes place directly between the parties independent of the Board.

request to the Board and the additional information sought. Grievant will have until February 11, 2008 to resubmit the motion. The agency will have until February 22, 2008 to submit its opposition, if any, to the grievant's Motion to Compel. In her submission dated November 1, 2007, grievant renewed her motion to compel. Thus, this order governs that motion, as well.

V. REQUEST FOR A HEARING

Shortly after filing this grievance, [REDACTED] requested a hearing. If grievant still wishes to have the evidence that is relevant to the issues to be currently decided presented at a hearing rather than on the record, she should resubmit the request to the Board. As the decision on whether to hold a hearing in this type of grievance is discretionary with the Board (22 CFR Sections 906.1 and 906.2) grievant should state her reasons for the request; USAID will be given the opportunity to respond, before the Board reaches a decision. Grievant will have 10 days from the receipt of agency's discovery responses to resubmit her request for a hearing, if she decides to do so, and USAID will have 10 days from its receipt of such a request, to reply.

VI. GRIEVANT'S MOTION TO AMEND THE GRIEVANCE APPEAL

USAID has not had the opportunity to reply to grievant's November 1, 2007 pleading entitled "Appellant's Clarification of Claims . . . and Clarification of Remedies Sought," which we are treating as a motion to amend her grievance appeal. As the Board was only recently advised that mediation had ended, the agency will have until February 5, 2008 to file a response. In doing so, it is requested to address the applicability of 3 FAM 4452 and whether USAID requests or waives remand of any claims contained in grievant's motion.

VII. DECISION

1. The motion of USAID to dismiss the grievance is denied.
2. The submissions of the parties and the Board's initial consideration shall

be limited to three issues:

- whether grievant was coerced into signing the Settlement Agreement and General Release;
- whether grievant was fraudulently induced into signing the agreement;
- whether USAID materially breached the agreement.

3. Grievant will have until February 11, 2008 to resubmit her motion to compel further discovery in conformance with this order. USAID will have until February 22, 2008 to file any objections.

4. Grievant will have 10 days from receipt of the agency's responses to her discovery request to resubmit a request for a hearing on the questions currently at issue, with the reasons therefore. USAID will have 10 days from its receipt of any such request to respond thereto. For tracking purposes, parties are directed to provide copies of the discovery responses, related requests and responses to the Special Assistant, Linda B. Lee at the same time filed with the grievant/agency.

5. USAID will have until February 5, 2008 to respond to grievant's submission of November 1, 2007, as specified in this order.

For the Foreign Service Grievance Board:



Harriet Davidson
Presiding Member



Alfred O. Haynes
Member



John H. Rouse
Member