

FOREIGN SERVICE GRIEVANCE BOARD
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August 9, 2007

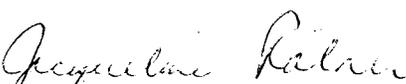
SUBJECT: Appeal of [REDACTED]
FSGB Case No. 2007-016
ORDER: INTERIM RELIEF

The Board has issued its **ORDER: INTERIM RELIEF** in the subject appeal.

I hereby certify that a true and correct copy of the Board's **ORDER: INTERIM RELIEF** has been sent to:

Bridget Mugane, Esq.
Mark Tallarico, Esq.
American Foreign Service Association

on this ninth day of August 2007.


Jacqueline Ratner
Executive Secretary

Attachment:
As stated.

cc: Panel: Reidy, Blanford, Lecce

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceeding
FSGB No. 2007-016

And

August 9, 2007

Department of Commerce

ORDER: INTERIM RELIEF

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Edward J. Reidy

Board Members:

James E. Blanford
Gail M. Lecce

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Bridget Mugane, Esq.

Representative for the Department:

Mark Tallarico
Attorney
Office of the General Counsel

Employee Exclusive Representative:

American Foreign Service Association

ORDER: INTERIM RELIEF

I. THE GRIEVANCE

██████████ (grievant) is a tenured Class 2 officer in the Foreign Commercial Service (agency) who filed an appeal to this Board on April 23, 2007 challenging the agency's decision to separate him for time-in-class (TIC) on April 22, 2007. ██████████ claims that his ██████████ performance appraisals for the periods June 1, 2003 to May 31, 2004 and June 1, 2004 to May 31, 2005 and a Memorandum of Performance for the period June 1, 2005 to July 15, 2005 are falsely prejudicial. Although the appraisals are favorable, grievant contends that the agency compelled him to perform under-grade duties that deprived him of a full and fair opportunity to demonstrate competitiveness for promotion. Grievant argues that, because of the under-grade duties, promotion boards ranked him near the bottom of his class, leading to his separation. For relief, ██████████ requests:

1. interim relief suspending his separation during the pendency of his Board appeal;
2. removal of the appraisals for the periods June 1, 2003 to May 31, 2004 and June 1, 2004 to May 31, 2005 and Memorandum of Performance for the period June 1, 2005 to July 15, 2005;
3. promotion to Class I as of 2004;
4. if not granted promotion, extension of time-in-class for two full years after commencement of a new, at-grade assignment;
5. attorney's fees and costs;
6. such other remedies as may be deemed just and proper.

II. BACKGROUND

On August 28, 2006, grievant sent an e-mail message to [REDACTED] Chief of Workforce Management and Oversight, Office of Foreign Service Resources. In his e-mail message, [REDACTED] asked [REDACTED] to confirm that, if not promoted by the 2006 Selection Board (SB), he would reach the end of his TIC on October 30, 2006 and be separated six months later. [REDACTED] replied on September 9 that, according to agency records, [REDACTED] TIC date was October 23, 2006 and his separation date would be April 22, 2007, if he were not promoted.

The Foreign Service Selection Boards met from September 25 through October 26, 2006, with results announced on November 2. Not receiving notice of the Boards' results, grievant inquired of a colleague who told [REDACTED] in mid-November that his name was not on the promotion list. On January 5, 2007, the agency's Director General (DG) sent grievant a letter, informing him that he was to be retired from the Foreign Service due to the expiration of his time-in-class limit, with an effective retirement date of April 22, 2007. Paragraphs 4, 5 and 6 of the letter explained that [REDACTED] had a right to file a grievance with the agency and, if the grievance was not resolved satisfactorily, to file a grievance with this Board. On January 10, grievant notified [REDACTED] that he had received his TIC letter from the DG on that day.

On January 22, 2007, [REDACTED] retained Bridget R. Mugane as counsel to represent him in a grievance action. She began her analysis of [REDACTED] case on February 9 and dispatched the agency level grievance on February 20. The agency denied the grievance on April 17 and [REDACTED] filed an appeal to this Board on April 21 (with an effective filing date of April 23). The Board's April 27 acknowledgment letter noted the agency's

opposition to grievant's request for Interim Relief (IR) and invited the parties to submit arguments on the matter. A series of submissions and exchanges on IR culminated on June 6 with grievant's comments on the agency's June 4 sur-reply. Submissions on discovery issues have continued.

This Order addresses only the matter of Interim Relief.

III. POSITIONS OF THE PARTIES ON INTERIM RELIEF

THE AGENCY

According to the agency, the Board's authority to grant interim relief flows from Section 1106(8) of the Foreign Service Act, which authorizes the Board to grant such relief in cases of involuntary separation when, and if, "the Board determines . . . such actions should be suspended." FSGB Case No. 97-104 (Order: Interim Relief dated Feb. 24, 1998 at 10) quoting 22 U.S.C. 4136(8), as amended. Given that broad discretionary authority, "the Board has adopted the policy of making an independent decision based on the particular circumstances involved in each case." FSGB Case No. 97-104 at 10, citing FSGB Case No. 95-4 (Order dated March 1, 1995). The Board has previously "denied interim relief to career members only in special circumstances, e.g., where it is apparent to the Board that a grievant delayed filing until shortly before the separation date solely to take advantage of the interim relief authority." FSGB Case No. 2001-002 (Order: Interim Relief dated March 20, 2001), citing FSGB Case No. 97-01 dated October 3, 1997; FSGB Case No. 92-83 (Order: Prescriptive Relief dated January 8, 1993).

The agency recognizes the severity of the consequences should [REDACTED] be denied IR. However, a review of the totality of the factors establishes that the personal consequences associated with grievant's impending separation are insufficient for the

Board to grant him IR. The instant grievance lacks merit; it is not directly linked to grievant's separation because the challenged appraisals form just a part of the body of work on which the SBs judged [REDACTED]. Indeed, grievant acknowledges that the appraisals were favorable. Grievant's assertions about the amount of under-grade work he had to perform are contradicted by three officials who reviewed and rated him. [REDACTED] was dilatory; he could have filed a grievance over his appraisals as far back as July 2005 but instead waited until two months before his separation date. He could have filed a grievance in November 2006 when he learned of his non-promotion. [REDACTED] failed to exercise due diligence in seeking interim relief in a timely manner.

Circumstances in the present case are no different from those in FSGB Case No. 2001-002 (Order: Interim Relief dated March 20, 2001), in which the Board denied interim relief, finding that grievant's "failure to exercise due diligence, in seeking interim relief in a timely manner, impels us to conclude, in the circumstances at hand, that his request should be denied." [REDACTED] was on notice in August 2006 that he would be forced to retire in April 2007 if he was not promoted. Yet he waited to file his grievance until almost four months after he learned that he was not promoted. Davia's delay in filing his grievance is an attempt to take advantage of the Board's interim relief authority.

GRIEVANT

[REDACTED] maintains that he was not dilatory in filing his grievance. Only three months elapsed between mid-November 2006, when he learned that he was not promoted and February 20, 2007, when his counsel filed the grievance. His grievance is not frivolous; the FSGB has ruled for the grievant in a number of instances where the officer was denied an adequate opportunity to perform in suitable assignments and thus be

competitive in promotion reviews. Although this is not the time to argue the merits, the fact that grievant's assignment collapsed, leaving him with severely under-grade duties which could not support promotion, is a winnable issue.

Although grievant was disappointed that his original position as Trade Center Director was eliminated, he viewed his 2004 and 2005 appraisals as positive. Until he consulted counsel in January 2007, he did not realize the appraisals were flawed (because the nature of his duties did not provide a full and fair opportunity to compete for promotion). This lack of knowledge and motive demonstrates he did not deliberately delay filing in order to extend his time on the rolls. Denial of IR for tenured officers is extremely rare and is usually confined to those who were aware of a grievable issue much earlier and yet filed a few days before separation. Far from delaying the process to extend interim relief, grievant and his counsel have acted expeditiously since identifying the grievable issue.

In considering the particular circumstances of each interim relief request, the Board looks at these factors:

- Ensuring the fullest measure of due process;
- Avoidance of significant and perhaps irreparable interruption of a Foreign Service career;
- Avoidance of personal and organizational disruption;
- Presence of exceptional, egregious circumstances such as:
 - Delay in filing solely to extend interim relief
 - A grievance which is frivolous or manifestly without merit on its face.

All the factors supporting a grant of interim relief are present in ██████████ case. Without interim relief, there will be irreparable damage to his career and to his promotion chances. His case is not at all like FSGB Case No. 2001-002. There, the grievant's career was ending and he filed only three days before separation. ██████████ is a single parent

with two children, one of whom receives special services because of a learning disability. To uproot her now and then a second time for grievant's reinstatement would be deleterious. [REDACTED] grievance is not frivolous. His under-grade duties doomed him to non-promotion and separation for TIC. Yet, because he believed the appraisals to be favorable, grievant did not know until he contacted counsel that he had a grievable issue. He did not delay at all in filing a grievance once he was aware he had grounds.

IV. DISCUSSION AND FINDINGS

The Interim Relief Order in FSGB Case No. 97-104 (dated February 24, 1998) states that:

The Board's authority to grant interim relief flows from section 1106 (8) of the Act which authorizes the Board to grant such relief in cases of involuntary separation when, and if, "the Board determines . . . such actions should be suspended" Given that broad discretionary authority, the Board has adopted the policy of making an independent decision based on the particular circumstances involved in each case (FSGB 95-4, Order dated March 1, 1995).

In practice, the Board has usually granted a request from a career member of the Service for a stay of separation pending Board resolution of the appeal. We have seldom, if ever, considered the career officer's personal rank or his/her career stage to be the predominant factors. In the Board's view, such a grant of interim relief accords with the evident intent of Congress in conferring this authority to avoid the significant and perhaps irreparable dislocations which interruptions of a Foreign Service career may entail. Such action is also consistent with the Board's responsibility to insure the fullest measure of due process for members of the Service. . . .

The Board has denied interim relief to career members only in special circumstances, e.g., where it is apparent to the Board that a grievant delayed filing until shortly before the separation date solely to take advantage of the interim relief authority (FSGB 97-01, FSGB 92-83). . . .

In the case before us, both parties have acknowledged the severe personal consequences that would result from denial of IR. In addition to damage to his career,

██████ has pointed out the harm his family would suffer as a result of dislocation. The agency has not disputed his assertion. In this, at least, ██████ case is unlike the case of the grievant in FSGB Case No. 2001-002, whose career was shortly coming to a close regardless of the outcome of the grievance. The questions for this Board, therefore, are whether ██████ case is frivolous or manifestly without merit and whether he delayed filing solely to extend interim relief.

We find persuasive counsel's argument that grievants have prevailed where they were able to show they were denied an adequate opportunity to perform in suitable assignments. The agency disputes the merits of ██████ arguments concerning his allegedly under-grade duties but does not successfully demonstrate that the assertions themselves constitute other than a genuine, grievable issue. We note that in FSGB Case No. 1992-78, the Board found that the actions of the agency in its pattern of assignments improperly preordained the grievant to failure. We make no such judgment here. However, we do find that the issues presented by ██████ are not frivolous or manifestly without merit on their face. Indeed, in FSGB Case No. 97-104, the Board stated, "The complaints made as to pattern of assignments and denial of assignments, especially for senior officers, are not patently frivolous. This Board has developed in recent years a portfolio of precedents encompassing precisely this arena."

Similarly, we find that the agency has not sustained its claim that ██████ delayed filing his grievance solely in order to extend interim relief. Both parties agree that grievant believed the challenged appraisals were positive; they even recommended promotion. The agency goes further, contending that the appraisals were not only favorable but largely represented duties that were at the grade of the position. We find it

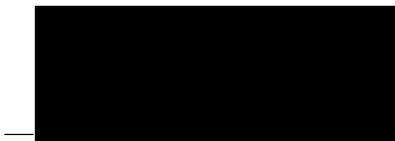
inconsistent that the agency would argue that the appraisals were positive and reflected suitable duties and yet fault ██████ for not grieving them earlier. It is logical that he did not do so. We also find no basis for the agency's claim that ██████ failed to exercise due diligence by not grieving the appraisals in November 2006 after failing to be promoted. Again, ██████ would not grieve appraisals he thought positive. An even more striking argument against the agency's position is the letter from the Director General (DG), which grievant received on January 10, 2007. It extensively details the recipient's right to file a grievance and the process for doing so. Why would the DG devote half of his missive to explaining the grievance process if grieving at that point would constitute deliberate delay or lack of due diligence? The letter, after all, was received only three months before the planned separation date. Clearly, the DG did not believe that time had run out for grievance submissions.

Twelve days after receiving the DG's letter, with its emphasis on grievances, ██████ retained counsel. Eleven days after receiving her retainer payment, counsel filed an agency level grievance. It appears to this Board that ██████ who, up until receipt of the DG's letter was unaware of any grounds for grieving, was prompted by that letter to examine the matter further. Following his meeting with counsel and discovery of a non-frivolous basis for a grievance, he acted within a reasonable time. The Board finds that he did not delay filing his grievance solely in order to extend interim relief.

V. ORDER

Interim relief is granted for one year from April 23, 2007 or the pendency of the grievance, whichever comes first.

For the Foreign Service Grievance Board:



Edward J. Reidy
Presiding Member



James E. Blanford
Member



Gail M. Lecce
Member