

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

And

Department of State

Record of Proceedings
FSGB No. 2007-026

Date: March 18, 2008

**DECISION
EXCISED**

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

James E. Blanford
Jeanne L. Schulz

Special Assistant:

Joseph Pastic

Representative for the Grievant:

pro se

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant's circumstances met the agency's requirements for emergency visitation travel, specifically, unusual personal hardship.

OVERVIEW

Grievant, a Foreign Service Human Resources Specialist with the State Department, claimed that his travel from overseas to assist his 19-year-old daughter in the U.S., after she flat-lined during a medical test, fit the criteria set forth at 3 FAM 3740 and the agency's practice for Emergency Visitation Travel. The Board agreed with the agency that grievant did not qualify under two of the claimed criteria for travel (death, and serious illness or injury in which death is imminent). The Board found, however, that grievant had sustained his claim under the third criterion: unusual personal hardship. Grievant established by a preponderance of the evidence that his daughter required physical and emotional care after the flat-line episode that no other family member was capable of providing. The daughter's circumstances were commensurate with other cases in which the agency had authorized travel. The Board directs the agency to reimburse grievant the cost of one round-trip ticket from post to the U.S.

DECISION

I. THE GRIEVANCE

[REDACTED] (grievant), a Foreign Service Human Resources Specialist with the State Department (Department, agency), grieves the agency's denial of his request for reimbursement for emergency visitation travel (EVT). He contends that his request fits the criteria set forth at 3 FAM 3740 for Emergency Visitation Travel. For relief, grievant asks that the agency reimburse him \$2,749.64, the cost of one round-trip air ticket from [REDACTED] to [REDACTED].

II. BACKGROUND

In 2006 the [REDACTED] were stationed at the U.S. Embassy in [REDACTED], [REDACTED] where [REDACTED] was the Regional Human Resources Officer. [REDACTED] wife, [REDACTED], was residing with him at post. Their daughter, [REDACTED] was attending college at [REDACTED].

On March 15, 2006, [REDACTED] was undergoing a "Tilt Table Test" at the [REDACTED]. [REDACTED] The Center is a medical office building and does not accommodate in-patient or overnight stays. Her attending physician, [REDACTED] described [REDACTED] as, "a young woman with a history of 'seizure disorder' since she was five years old." During the test, she developed asystole ("flat-lined") for more than a minute but recovered when cardiopulmonary resuscitation (CPR) was administered. Following a period of close observation, [REDACTED] released [REDACTED] to return home with her grandmother for continued close observation. [REDACTED] commented that "he had never seen such an extreme case indicative of such a serious nature, and that the episode was very frightening and unexpected." The compression of

her sternum necessary to revive [REDACTED] left her physically injured. She received medication and counseling in order to deal with the trauma of her near-death experience.

The [REDACTED] medical unit health practitioner, [REDACTED] assisted the [REDACTED] in requesting Emergency Visitation Travel (EVT) to return to the United States. He affirmed that they were warranted in making the EVT request to the Office of Medical Services (MED). [REDACTED] stated that the nature of the illness was: "near fatal arrhythmia and mitral valve prolapse." The cable noted that the attending physician characterized the nature of [REDACTED] condition as "worst case ever experienced." The cable added that, "due to the serious condition of daughter," the [REDACTED] would travel in advance of EVT approval and file for reimbursement if MED approved EVT.

MED denied the request on March 17, explaining:

MED spoke with [REDACTED] nurse regarding . . . subject's daughter. [REDACTED] is not hospitalization [sic] and is doing well on recent medication change. She is in stable condition. . . . The Medical Director . . . cannot advise HR [Office of Human Resources] to authorize EVT at the present, pursuant to 3 FAM 3745-6. EVT is granted in the event of serious illness or injury in which death is imminent or likely to occur as determined by the attending physician. While the illness and its treatment are serious, the patient's . . . present medical condition does not meet this criteria [sic]. . . . Even though the nature of the present illness does not allow for government paid travel, personal travel is certainly not discouraged if [REDACTED] deem it necessary.

Notwithstanding the denial of EVT, the [REDACTED] left for the U.S. on March 19. After expending 156 hours of sick leave in [REDACTED] under the Family Medical Leave Act, they returned to [REDACTED] and requested reconsideration from MED to allow reimbursement for EVT. In his May 3, 2006 e-mail message to [REDACTED] Deputy

Director of the Foreign Service Health Practitioner Program, grievant complained that MED had not spoken to [REDACTED] doctors, but rather to a nurse assistant.

[REDACTED] May 17 response (subject: “EVT on a medical basis is not recommended”) confirmed that MED had reviewed grievant’s request and still found that [REDACTED] case did not meet the criteria for MED to recommend authorization of travel on a medical basis. She suggested that [REDACTED] review the EVT regulations and contact the Bureau of Human Resources (HR) if he believed the regulations could help him. [REDACTED] clarified that HR administers the EVT benefit, with MED’s recommendation in some cases.

On February 27, 2007, [REDACTED] submitted his agency-level grievance. In it, he recounted the events of the previous year and added a lengthy November 29, 2006 report from the [REDACTED]. Citing 3 FAM 3749, grievant argued that his daughter’s case met three criteria for EVT: 1. Medical (serious illness or injury); 2. Death¹ (of an immediate family member); 3. Unusual Personal Hardship. The medical reports from the [REDACTED] and the [REDACTED] “unquestionably substantiate the profoundly serious nature of [REDACTED] illness.” [REDACTED] was clinically dead for a period of one to two minutes. She was a minor with limited available assistance (her grandmother who lived in [REDACTED] was in ill health) and she continues to suffer from unpredictable and potentially life-threatening occurrences.

The April 9, 2007 agency decision affirmed MED’s denials of [REDACTED] original EVT request and request for reconsideration under the category of “serious

¹ The word “death” is capitalized in this decision when referencing criteria 2 of 3 FAM 3749.

illness.”² With respect to grievant’s argument that he qualified under 3 FAM 3744(2)³ because his daughter experienced “clinical death,” the agency found that the circumstances of [REDACTED] situation did not satisfy the plain language of the regulation. The agency also rejected grievant’s third and final claim, that he was entitled to EVT under 3 FAM 3744(4)⁴ for “unusual personal hardship.” The agency denied [REDACTED] grievance in its entirety.

On June 16, the Board advised [REDACTED] that his appeal had been accepted for filing as FSGB Case No. 2007-026, with an effective filing date of June 14, 2007.

On July 2, 2007, [REDACTED] First Discovery Request sought information about the agency’s handling of previous EVT requests. The agency responded on August 10, providing a list of approved EVT cases. Grievant received that response on or about September 4 and provided a Supplemental Submission on September 7. In it, he argued that his daughter’s case was similar to case numbers 7, 13, and 34 (all approved for unusual personal hardship) in the agency’s response to discovery.

On September 20, the agency provided comments on grievant’s supplemental submission. It maintained that grievant’s request did not meet the plain language of sections 3 FAM 3744 (1) and (2) and that its denial of grievant’s request was consistent with action taken in other cases. The agency found cases 7, 13, and 34 clearly distinguishable from grievant’s situation.

² 3 FAM 3744 (1) MEDICAL - A member of the employee’s or the employee’s spouse’s immediate family is seriously ill or injured and faces imminent death (Requires approval by the post upon recommendation by the Office of Medical Services.)

³ 3 FAM 3744 (2) DEATH - A member of the employee’s or employee’s spouse’s immediate family has died (Requires approval by the post.)

⁴ 3 FAM 3744 (4) UNUSUAL PERSONAL HARDSHIP - An employee or employee’s spouse requires emergency family visitation in certain exceptional circumstances involving personal hardship

██████████ presented his final rebuttal on October 4. He offered additional details concerning Midodrine, one of his daughter's medications, and presented additional argument regarding the similarities between his case and cases 7, 13, and 34. He reiterated his request for relief in the amount of \$2,749.64 for the cost of one round-trip ticket from ██████████ to ██████████

The Record of Proceedings (ROP) was closed on February 5, 2008.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

██████████ argues that his daughter's case meets the criteria for three of the agency's four categories of EVT.⁵

With respect to medical grounds (serious illness or injury of an immediate family member), grievant declares that ██████████ and the team of doctors and technicians at the ██████████ who tested and evaluated ██████████ attested that her illness was profoundly serious. ██████████ diagnosed "profoundly positive cardioinhibitory neurocardiogenic syncope associated with seizures." An article quoted by grievant stated, "[s]yncope is associated with considerable morbidity The mortality due to syncope varies according to the cause; cardiac causes . . . have a 20-30% mortality." The nurse who informed MED that ██████████ was stable told grievant that she answered the agency as she did because she was attempting to dispel alarm about ██████████ condition. ██████████ maintains that he and his wife had no reason not to think that the flat-lining might be repeated and that, in fact, his daughter faced imminent death.

⁵ The remaining category (never raised for obvious reasons) is travel to assist an incapacitated parent.

With respect to the grounds of Death (of an immediate family member),

██████████ observes that his daughter was clinically dead for a period of one to two minutes.

With respect to the final category, Unusual Personal Hardship, grievant explains that ██████████ is an only child and lived alone at college. The single relative nearby was her 66-year-old grandmother, whose ability to provide assistance was limited by her own ill health and medical conditions. ██████████ described her as a chronically ill grandmother who has neurological disorder and requires considerable care in the home.

After her flat-line experience, ██████████ was physically injured due to compression of her sternum. She received professional counseling as well as prescribed medication to deal with severe emotional and psychological trauma. ██████████ medical condition prevented her from driving for six months and she was told to avoid standing for long periods. ██████████ indicated that another episode could occur and it would need immediate recognition as well as immediate response. He suggested that family, friends, and authorities should be briefed on ██████████ symptoms so they could respond appropriately. ██████████ condition required lifestyle modifications such as changes in diet, decreased level of activity, avoidance of stress, behavior modification, stress management counseling and precautions such as wearing a medical bracelet. She also required daily medication and continued medical monitoring and follow-ups. She has a progressive life-long illness with no expectation of recovery and faces the prospect of eventual surgery for a heart pacemaker implant.

Examining the list of authorized unusual personal hardship EVT's the agency furnished in discovery, ██████████ found similarities to his daughter's situation. In case number 7, a daughter in college required pre- and post-operative care and there was no other family member to serve in place of the parent. ██████████ also required care and attention that her grandmother was unable to provide. ██████████ and his wife returned to the U.S. to ensure their daughter received follow-up treatment, drove her to appointments, got her to school, and ensured she could return to a reasonable quality of life. In case number 13, one spouse cared for the other spouse until she could be taken for treatment in a psychiatric facility. Regardless of details about the spouse's condition, the other spouse was like ██████████ in that he felt the need to be with his loved one until the situation was resolved. Case number 34 is also similar in that a spouse traveled to remain with a son who had to stay in the U.S. for 12 weeks of medical treatment. The fact that ██████████ was 19 and the son was 10 is irrelevant. In ██████████ case, the doctors told the ██████████ that she had actually died. He had no idea if she would suffer a similar episode in the near future or what her health condition would be after the episode. She was owed the same level of care and supervision that any parent would provide a sick or ailing child.

Although ██████████ has a history of seizures, she never before faced a situation where she was determined to be clinically dead. When the ██████████ arrived, the trauma had left her both physically and emotionally unstable. Due to this life-changing event, she needed the support and reassurance that only a parent can give.

THE AGENCY

On April 9, 2007, Deputy Assistant Secretary for Human Resources Linda S. Taglialatela denied [REDACTED] grievance, stating that [REDACTED] failed to show that he met the requirements of 3 FAM 3740 *et seq.* for Emergency Visitation Travel.

With respect to Medical grounds for EVT, the agency emphasized that by the time grievant arranged for his tickets on March 17 and traveled on March 19, his daughter had recovered from the flat-line episode and there was no apparent “danger of imminent death.” Approval requires that the family member be both seriously ill or injured and facing imminent death. As a standard practice, MED determinations are based on statements from a variety of medical personnel, not just attending physicians. There is no basis on which to conclude that the information furnished by the attending physician’s nurse was incorrect. It is speculative to suggest that a discussion with the attending physician would have resulted in a different MED recommendation.

With respect to Death, there is no language in the regulation to suggest that another interpretation is intended than the actual death of a family member. Thankfully, at the time of travel, grievant’s daughter had recovered from her flat-line episode.

Finally, the agency noted that [REDACTED] consulted with the Office of Employee Relations (HR/ER), which is charged with the responsibility of approving “unusual personal hardship” EVT, prior to suggesting that grievant seek HR/ER’s advice. Although the record does not show that [REDACTED] ever approached HR/ER directly, the agency stated in its April 9, 2007 decision that HR/ER reviewed MED’s findings in an effort to ascertain whether or not an emergency existed. Based on those findings, including the fact that [REDACTED] was not held for treatment, that she was not admitted to a

hospital for observation or monitoring, and that the medical staff did not believe that she was in imminent danger of dying, HR/ER concluded that her situation did not constitute an “emergency” for purposes of unusual personal hardship EVT. The agency pointed out that most of the 38 cases authorizing unusual personal hardship EVT in the past involved instances where family members could not care for their basic needs due to age, mental or physical illness, serious injuries, surgical procedures or accidents. In Case number 7, cited by grievant as similar to his daughter’s, the college-aged daughter underwent surgery in a location where no other family member was able to assist in her care. After the operation, she required transportation assistance as well as help in dressing, bathing, lifting objects weighing more than five pounds, and making meals. Nothing in the record indicates that [REDACTED] day-to-day lifestyle was significantly altered or that she required the degree of basic care provided in case number 7.

The summarized information in case number 13, referencing psychiatric treatment, clearly distinguishes it from the grievant’s situation without further discussion.

Case number 34 involves a 10-year-old child in need of parental care and supervision due both to age and medical condition. Grievant’s daughter was 19 and lived separately and at a considerable distance away from her parents. She did not require the level of care and supervision necessary for a 10-year-old.

[REDACTED] request does not meet the plain language of sections 3744 (1) and (2). He has not demonstrated that he was treated unfairly since a review of the Department’s actions in other cases shows a consistency of interpretation and application of policy and regulations.

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious. 22 CFR 905.1(a).

This case involves a claim by [REDACTED] that he should be reimbursed \$2,749.64 for emergency visitation travel. We note that the appeal's path to this Board bypassed two other possible forums in which the case might have been resolved or potentially useful information might have been developed. Neither the Exceptions Committee (14 FAM 514) nor HR/ER has dealt with grievant's contention officially and issued a decision. Although HR/ER/EP (Employee Programs) is the office that authorizes EVT for unusual personal hardship,⁶ there is no statement in the record by that office. The agency affirms that it consulted with HR/ER but reports HR/ER's views secondhand. Furthermore, while the agency declared that HR/ER was "familiar with the facts of [REDACTED] case," the record does not clarify whether HR/ER had before it the full arguments and documents provided by grievant.

In accordance with 3 FAM 3740, EVT may be authorized only in accordance with four specific circumstances: medical (serious illness or injury), death, incapacitated parent, and unusual personal hardship. After reviewing the record in this case, the Board finds that neither death nor serious illness has been shown (as those terms are used for purposes of 3 FAM 3740). At the time of grievant's travel, [REDACTED] was not dead. As regards serious illness, the agency has pointed out that 3 FAM 3745 (6) defines a serious illness or injury as one in which death is imminent or likely to occur as determined by MED. Grievant has provided no substantiation that his daughter faced imminent death.

⁶ 3 FAM 3746.4 c.

The record is replete with testimony that [REDACTED] illness was grave, but nowhere in the extensive medical documentation in the ROP does a medical authority state that [REDACTED] faced imminent death following her flat-line episode. [REDACTED] argues that the agency erred in relying on the nurse's assurance that [REDACTED] was doing well on a recent medication change and was in stable condition, but he does not provide any medical evidence to contradict the nurse's declaration. [REDACTED] March 22, 2006 statement, attached to grievant's appeal, gives no indication that he considered [REDACTED] to be under threat of imminent death.

The Board finds, however, that the ground of unusual personal hardship supports the claim for travel reimbursement in this case. 3 FAM 3744 (4) describes this EVT category as follows: "An employee or employee's spouse requires emergency family visitation in certain exceptional circumstances involving unusual personal hardship other than those provided in 3 FAM 3744, paragraphs (1) through (3)." 3 FAM 3746.4 b. goes on to say that:

"Generally, requests will be limited to instances of travel in which:

(1) The traveler would travel to attend funeral services of a deceased person who has stood in the place of a parent or to visit a seriously ill or injured person who stands in the place of a parent. . . ; or

(2) The traveler is the sole surviving member of the family of a seriously ill, injured, or deceased person."

While these examples appear to narrowly limit the category, the visitation objective stated in the synopsis chart at 3 FAM 3749 is expressed more expansively: "Exceptional circumstances warrant travel otherwise precluded by EVT limitations." In addition, the agency's response to grievant's discovery request furnishes brief descriptions of 38

authorized cases of unusual personal hardship EVT's. These illuminate the agency's interpretation of its regulations.

Some of the approved cases have to do with travel to attend the funeral or deathbed of an individual not covered elsewhere in 3 FAM 3740, but the majority involve travel to provide care for a family member who is suffering from physical or psychological troubles. In some instances, it appears that the person traveling is deemed the only person available to provide the necessary care. For instance, case number 2 involved a child in a halfway house with serious physical, emotional, and drug-related problems. The father was authorized EVT because the mother (separated from the employee) couldn't control the daughter. Case number 3 involved a daughter who attempted suicide and was in a psychiatric ward. There was no competent relative in the United States.

Some cases do not fit neatly. In case number 1, an employee spouse was authorized MED EVT to visit a dying father. Her children were authorized unusual personal hardship EVT to accompany her because her spouse was serving at another hardship post and could not care for the children while their mother was in the U.S. In case number 20, the employee and spouse were both⁷ authorized travel due to "dire family circumstances resulting from Hurricane Katrina." In case number 29, unspecified travelers were authorized to visit an adult son with psychiatric problems who cut off ties with his care provider. These examples and others indicate that HR/ER/EP exercises wide latitude in authorizing unusual personal hardship EVT's.

██████████ cites case numbers 7, 13, and 34 as similar to ██████████. The common thread he identified from the short descriptions the agency provided was

⁷ Usually, only one of the two may travel at government expense.

necessary care for an immediate family member in serious condition when no other relative's help was available. The agency, having retrieved additional information concerning these three cases, disputed the claim of similarity, pointing out that the daughter required more basic care (such as help in dressing); that the son was 10, not 19; and that the spouse needed psychiatric care while ██████████ did not. In this regard, we find the agency misses the point. Every case will present differences to a greater or lesser degree. The very nature of "exceptional circumstances" guarantees that not all cases will fit one mold. Unusual personal hardship is not a wholly medical decision as is the case with medical grounds for EVT. Nor is it a clear-cut case of death or incapacitation. HR/ER/EP exercises judgment on a case-by-case basis. The standard is exceptional circumstances involving unusual personal hardship other than those provided for in 3 FAM 3746.1, 3746.2, and 3746.3. Since we do not have a statement from HR/ER and do not know how thoroughly that office reviewed grievant's case or what information was available to it, we must turn to the guidance contained in the 38 instances of approved EVT. The question is whether a reasonable person would conclude that ██████████ need for care was commensurate with the seriousness of the authorized EVT cases and whether a relative other than her parent could have provided the necessary care.

A less complex question concerns the availability of a caregiver. ██████████ asserts that the sole nearby relative was ██████████ grandmother who was in ill health and unable to provide assistance. Since the agency does not dispute this contention, we accept it and turn to the question of whether the care ██████████ needed was comparable to that evidenced in other authorized EVTs.

Although the ROP shows that [REDACTED] was not on her deathbed when grievant traveled to the U.S., the record overwhelmingly demonstrates that she had a serious illness. [REDACTED] May 17, 2006 e-mail to [REDACTED] explicitly says as much:

There are many cases of serious health problems that the medical portion of EVT regulations are not designed to cover, and MED believes that this is the case here.

I know that this does not lessen the impact that [REDACTED] serious illness has had on she [sic] and your whole family. If there is some other way that you believe EVT regulations can help you, you should review the regulations and contact the appropriate Human Resources office. . . .

The flat-line (asystole) event that triggered [REDACTED] emergency travel sprang from his daughter's acknowledged serious illness but was of a far more critical nature than she had experienced before. Dorland's Medical Dictionary defines asystole as "cardiac standstill or arrest; absence of heartbeat." [REDACTED] was in asystole between one and two minutes before [REDACTED] was able to revive her with CPR and atropine. Clearly, this event was not simply another in a series of seizures. Death could easily have resulted. Moreover, if she suffered another incident of asystole, death could well have occurred. The record indicates it was far more serious and life threatening than anything [REDACTED] had experienced before and it left her in quite a different condition. The agency argues that there is nothing in the record to indicate that her overall medical condition or her day-to-day lifestyle was significantly altered. We believe the ROP shows otherwise. [REDACTED] sternum was injured from the CPR; she suffered psychological and emotional trauma from her near-death occurrence that necessitated professional counseling and prescribed medication; she had to arrange urgent medical monitoring and follow-up appointments to identify the cause of her clinical death and avoid recurrence; she could not drive and was told to avoid standing for long periods;

she needed to ensure that family, friends, and authorities would recognize her symptoms and respond immediately and effectively; she needed to change her diet, her level of activity, avoid stress and take stress management counseling and precautions such as wearing a medical bracelet. We agree with [REDACTED] that it does not seem reasonable to expect a 19-year-old attempting to attend school while being helped by an invalid grandmother, and with parents living eight time zones away, to cope by herself with these enormous demands. The Board finds that the exceptional circumstances [REDACTED] and her parents faced were equal to or exceeded the hardships outlined in many of the cases of approved EVT. We equate the circumstances in this case with the dependent son in college in case number 16 who was “troubled;” with the two children in case number 21 who needed assistance with funeral arrangements for a former spouse; with the 13-year-old in case number 26 experiencing emotional distress because of the employee’s absence; with the 22-year-old son in case number 35 who had a psychological breakdown and was in treatment; and with the employee in case number 36 visiting a spouse who suffered a “mild” stroke while living with her father. In each of those cases, EVT benefits were granted by the Department. Although the full circumstances of these cases are unknown to us, they appear on their face to be far less compelling than that of the [REDACTED]. We find that the agency’s handling of grievant’s request for EVT is not consistent with its handling of similar cases.

Grievant has carried his burden to demonstrate the merits of his appeal through a preponderance of the evidence.

V. DECISION

1. We hold that the grievance is meritorious.

2. The Department is directed to reimburse [REDACTED] in the amount of \$2,749.64.

For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



James E. Blanford
Member



Jeanne L. Schulz
Member