

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

██████████  
Grievant

Record of Proceeding  
FSGB No. 2007-042

And

July 9, 2010

Department of State

**FINAL DECISION**

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EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Harriet Davidson

Board Member:

Garber Davidson

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Sharon Papp, Esq.  
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman  
Director  
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** On remand from this Board, the Department assessed grievant's experience as a Marine Security Guard (MSG) on an individual basis, thereby complying with the requirements of Department regulations and published procedures for determining grievant's starting salary and step.

## OVERVIEW

Grievant, a DS Special Agent with the Department of State, alleged that the Department had erroneously evaluated his experience as an MSG in determining his entry-level salary and step. As remedy, grievant sought to have his salary level raised retroactively by several steps with back pay and interest. Grievant had served as an MSG and had included his MSG experience on his application for employment. The Department's Office of Recruitment, Examination and Employment (HR/REE) had granted grievant 20% credit for his MSG experience in accordance with its customary procedure. The Department grants either 100% credit for specialized experience directly related to the responsibilities of a Special Agent, or 20% credit for other service, which though deemed "highly desirable," is considered not to meet the criteria for full credit. Credit of 20% is automatically given for MSG experience regardless of the applicant's actual experience in that position, and thus grievant was given the automatic 20% credit. Grievant contended that his MSG experience was directly related to the responsibilities of a DS Special Agent and therefore should have been given full (100%) credit pursuant to published agency procedures and regulations.

The Board reviewed the published procedures, SOP-98, and attendant authorities and held that the Department's assignment of 20% credit for grievant's MSG experience without individual review of his qualifications was arbitrary and capricious. The regulations and attendant authorities require the Department to conduct an individual review of grievant's application to determine if he sufficiently identified other directly related specialized experience that would merit an entry salary level above the minimum. The Department was directed to conduct such a review.

After receiving supplementary information from grievant, on remand, the agency conducted an individual evaluation of grievant's application and prepared a detailed written analysis in which it concluded that grievant's initial entry level salary was correctly established.

Grievant argued that the new review was still arbitrary and capricious, and that the Department's Senior Examiner who carried out the review was biased. The Board concluded that the evaluation conformed to the Department's regulations and other published material and that it had exercised informed discretion in setting grievant's starting salary. It further found no bias on the part of the Senior Examiner. The grievance appeal was denied.

## **FINAL DECISION**

### **I. THE GRIEVANCE**

Grievant, [REDACTED], a Diplomatic Security Special Agent (DSSA) career candidate with the Department of State (Department, agency) appealed an agency decision, which partially denied his grievance that disputed the step of his amended initial salary level. Grievant claimed that the Department should have assigned full credit for his experience as a Marine Security Guard (MSG) in its calculation of his initial salary instead of the 20% given for prior MSG experience. [REDACTED] requested that his entry level salary be revised to FP-6, step 11 and made retroactive to his start date, and all other benefits; in the alternative, he requested that his entry-level grade and step be adjusted to a grade higher than FP-6, step 7. The appeal was remanded to provide the Department with an opportunity to conduct a new qualifications evaluation and salary review in accordance with Departmental regulations. The Department submitted the results of its review, and grievant responded to the Department's submission.

### **II. BACKGROUND**

On March 6, 2007, [REDACTED] filed a grievance with the Department alleging that his entry level grade and salary had been erroneously established too low contrary to agency regulations. The Department denied his grievance in part, and [REDACTED] filed an appeal with this Board on October 4, 2007.

On September 8, 2009 the Board held that the Department had failed to comply with its own Standard Operating Procedures (SOP) to conduct a valid qualifications review of grievant's prior MSG experience, and that the review of that experience for the purpose of establishing his entry-level salary was arbitrary and capricious. The Board

remanded the appeal to the Department and directed it “to consider the full extent of grievant’s MSG experience as set forth in all of his application materials in conducting a new qualifications evaluation and salary review in accordance with the standards set forth in [Standard Operating Procedure] SOP 98 and [Vacancy Announcement] VA SA-05-02.”

The Department reported on its reassessment of grievant’s application materials on December 2, 2009, and grievant filed a response thereto on February 19, 2010. Based on the reassessment of grievant’s application materials, the Department concluded that the original determination of 20% credit for the performance of MSG duties is correct and that grievant has not been improperly denied a financial benefit.

### **III. POSITIONS OF THE PARTIES**

#### **GRIEVANT**

Grievant avers that the Department’s comprehensive response to his supplemental application material is flawed for several reasons. The new salary determination was conducted using the same criteria, i.e. SOP 98 and VA SA-05-02, and by the same Senior Examiner for Diplomatic Security Recruitment (Examiner), Christopher Disney, as in the previous reviews. While the use of the criteria may be appropriate if used correctly, Disney could not possibly conduct a new objective salary determination. Disney was already on record as indicating the candidate’s MSG experience has no relationship to the VA, and therefore Disney’s review of grievant’s qualifications against what grievant terms the “core functions” of a DS agent as described in the VA has no credibility. Grievant points out the inconsistencies in Disney’s position regarding the significance and applicability of the core functions.

The Department failed to perform the directives of the Board's remand order because it did not evaluate his application materials in accordance with the standards set forth in SOP 98 and VA SA-05-02. Its review on remand, therefore, is no less "arbitrary and capricious" than the Board found the original review. The Department did not properly assess grievant's individual qualifications as an MSG in the four core functions that he identified as relevant to his prior experience. ██████ states that the Department disregarded facts that he included in his experience description, and wrongfully compared his experience with that of a Regional Security Officer (RSO), a position that ██████ was not applying for. An entry-level DS Agent does not perform the duties of an RSO; entry-level DS duties, in fact, are more in line with the duties of an Assistant MSG Detachment Commander, a position grievant held as an MSG.

Moreover, the "generic descriptions" of the functions of an MSG are at variance with those described in the Memorandum of Agreement (MOU) between the Department and the Marine Corps. Grievant cites several examples of the alleged variances. The MOU cites numerous examples of the extensive duties required by an MSG that support grievant's argument and that contradict the Department's descriptions of relevant experience. In addition, grievant draws upon the statement of a former MSG who subsequently became a DS agent and who further buttressed grievant's assertion that the experience of an MSG is closely related to that of a DS agent.

In sum, grievant asserts that he has consistently demonstrated that his experience "in at least four core functions" is directly related to the work of a DS Agent, and requests the Board to recommend an increase in his entry level salary to FS-06, Step-11 with back pay and interest.

## **THE DEPARTMENT**

The Department bases its analysis of grievant's supplemented application materials<sup>1</sup> on the seven "functions" listed in the VA. The Department, without acknowledging that the functions grievant lists are "core functions," nevertheless uses them as criteria by which to judge the military experience that grievant has provided in his application materials. Grievant has identified four of the seven as relevant criteria against which he describes his experience. The grievant does not respond to the remaining three functions, however.

The three functions that grievant declines to provide information for are "central to the role of a DSSA whether stationed overseas or domestically" according to the Department. The Department analyzes each of the three, which include: conducting various types of investigations, including counter-intelligence and counter-terrorism inquiries; managing security related requirements of new building construction; and conducting security-related training for personnel of U.S. agencies and police/security officials of foreign governments. In each case, the Department found generally that grievant did not possess the experience commensurate with the criteria listed.

The Department then reviewed the four functions listed by grievant as relevant regarding his military experience. In each instance, the Department found that while grievant had some requisite experience within the function, the scope of an MSG's operational mission is narrower and more focused than that of a DS agent. For example, while the MSGs are responsible for protecting classified information and equipment, as well as persons within the Controlled Access Area of the embassy, they are not

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<sup>1</sup> Although the Department refers to [REDACTED] "supplemental application" in its materials, this application is not part of the Record of Proceedings (ROP).

responsible for the security of the outlying buildings and residences that are part of the overseas mission. They are not involved in the protective security provided by DS agents to the Secretary of State and foreign dignitaries domestically.

Similarly, while MSGs have certain functions involved in protecting facilities and sensitive information, the RSO is ultimately responsible for all protective resources within the mission, including the MSG program and the local contract guard force. The RSO is responsible as well for the training of MSGs and the local guard force. The responsibilities of the RSO entail numerous duties, such as scheduling contract guard coverage, assessing the scope of the post's threat level, and determining the amount of surveillance detection staffing required. Grievant undertook none of such duties as an MSG.

While the Department acknowledges that MSGs are responsible for protecting classified and sensitive information and equipment, their scope is confined to the Chancery and behind the Chancery "hardline." Other sensitive information is stored in annex buildings, and the protection of such non-Chancery buildings is the exclusive duty of the local contract guard force under the supervision of the DS agents.

Finally, grievant's experience that he lists regarding the assessing of security threats against U.S. interests and investigating hostile intelligence attempts to subvert U.S. personnel and interests overseas is inapposite. The scope of duties performed by DS agents both domestically and overseas in terms of security threats is "clearly beyond the scope of an MSG's duties." Domestic evaluation of intelligence, the determination of individual post threat levels, and cooperation with foreign law enforcement and security agencies are functions that DS agents perform; overseas, the functions involve liaison

with international organizations and the host country's national law enforcement and security forces.

#### **IV. DISCUSSION**

Grievant bears the burden of establishing his claim by a preponderance of the evidence (22 CFR 905.1(a)). To do so, he must show that the Department, in determining his entry-level salary, violated law, regulation, published policy, or collective bargaining agreement, or acted arbitrarily and/or capriciously.

Throughout this appeal, grievant has maintained that he is entitled to 100% credit for his service as a Marine Security Guard in the establishing of his entry-level salary. On remand, grievant was provided an opportunity to supplement his application submission to include all of the necessary military experience that he deemed relevant. The Department maintained that after a review of his military experience as an MSG, grievant was still only entitled to 20% credit.

The statutory, regulatory and policy parameters for establishing entry-level salaries were set out in detail in the Board's Decision of September 9, 2009, and do not need to be repeated here. Suffice it to say that the Department has broad discretion in the setting of entry-level salaries for DS agents, but must establish the salaries in accordance with the governing authorities, within a reasonableness standard and not in an arbitrary or capricious manner. The Board held that the governing authorities required a "review of the qualifications of each applicant sufficiently detailed to disclose both whether the candidate meets the minimum requirement for appointment and whether he or she has shown other directly related specialized experience warranting appointment at a salary level above the usual entry level." FSGB Case No. 2007-042 at 12. The Board further

found that by automatically awarding grievant only 20% credit for his MSG experience, without a review of his specialized experience, the Department had violated its own regulation, SOP 98, and that the setting of grievant's entry-level salary was therefore arbitrary and capricious.

On remand, the Department evaluated the grievant's experience in light of the functions of a DS Agent listed on the VA and concluded the following:

The Department believes that [REDACTED] has not shown that his performance of MSG duties is directly related to or encompasses the duties of a DSSA. [REDACTED] only addressed four of the seven VA sections that he referred to as "core functions." The Department has shown that the remaining four [sic] "core functions" contained significant duties that are not required or expected of MSGs. [REDACTED] has never addressed the fact that DSSAs perform many important duties when stationed domestically that are also well outside of the scope of MSG duties. The Department therefore feels that the original determination of 20% credit for the performance of MSG duties is correct and that [REDACTED]. [REDACTED] has not been improperly denied a financial benefit.

...

It specifically stated that grievant did not list any experience regarding criminal and personnel investigations, counterintelligence and counter-terrorism inquiries, and investigative work in preparation for court appearances. He did not perform duties such as "managing or implementing security-related aspects of new office building construction," developing and implementing counter-terrorism controls for new and existing buildings and conducting and managing security related training programs.

The Department compared the material grievant had submitted on the remaining four functions listed on the VA and offered comparisons of grievant's experience as an MSG with the duties and requirements of DS agents. For example, grievant did not perform the DSSA function of "conducting or implementing projects or programs involved with the safeguarding of classified or sensitive information and materials" in the

same manner as required by the position. Grievant's experience with regard to the assessment of security to U.S. interests only partially reflected the duties performed by a DSSA.

In some cases as grievant notes, it compared his experience with the requirements of an RSO, a somewhat dubious comparison given the entry level of the position. However, those references can be read to be expansive and to simply set out the general scope of responsibilities of the Diplomatic Security operations at an embassy rather than peg specific functions of the RSO to those of an MSG. As we stated in our initial decision:

The Department, in our view, should make its informed discretion "reasoned," but the result may not always appear "reasonable" to the independent observer. Given the wide latitude accorded the Department by statute and regulation in these matters, the agency's determinations should not be set aside simply because this Board might have reached a different result, but only where they are found to be arbitrary and capricious or discriminatory, or contrary to some express limitation on the Department's exercise of that discretion (e.g., violative of law or regulation), citing FSGB Case No. 2007-50, *supra*,

We find that, on remand, the Department did in fact conduct a new individualized qualifications evaluation and salary review of grievant's supplemental application in accordance with the standards in SOP 98 and utilizing the functions listed in the VA. The Department has exercised informed discretion in providing a fair and adequate review of the specific experience submitted by grievant and arrived at a reasoned decision regarding grievant's MSG experience.

We find no probative evidence of bias by the Department's Senior Examiner for Diplomatic Security Recruitment, Christopher Disney, in his review on remand of [REDACTED] application. When the Examiner, Christopher Disney, earlier found that

grievant's experience as an MSG was only worth 20% credit, he was apparently following Departmental policy, albeit unwritten. The fact that he had once determined that [REDACTED] experience was not creditable to more than 20% for salary considerations does not prejudice his capacity to be objective with respect to the later examination. In sum, we find that the grievant has not carried his burden of proof that the Department acted contrary to law, regulation or collective bargaining agreement, or that it was arbitrary or capricious in its reexamination of grievant's experience or its final decision regarding the weight to be given that experience.

**V. DECISION**

The grievance appeal is denied.