

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████
Grievant

Record of Proceeding
FSGB No. 2007-042

And

September 8, 2009

Department of State

Decision

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: Grievant established that in setting his initial salary as a Diplomatic Security Special Agent (DSSA), the Department's automatic denial of 100 percent credit for all or part of his Marine Security Guard (MSG) Experience was done without adherence to the standards set forth in Standard Operating Procedure (SOP) 98, which require that consideration be given to all of the grievant's prior employment experience. The Board directed the Department to conduct a new individualized qualifications evaluation and salary review and report its finding.

OVERVIEW

Grievant submitted an application for employment as a Diplomatic Security Special Agent (DSSA). After completing the review process, the Department confirmed an offer of employment with an initial salary set at the FP-6, step 6 level (subsequently raised to FP-6, step 7). Grievant filed an agency level grievance asserting that the Department had failed to take into account the full extent of his military service in establishing his entry level salary. Specifically, the agency had awarded him only 20 percent credit for the time he served as a Marine Security Guard (MSG) at U.S. diplomatic posts abroad, rather than 100 percent credit. Through discovery grievant learned that the Department had an unwritten practice that mandated that MSG experience would receive only 20 percent credit. The issue before the Board was whether grievant had shown that this practice violated SOP 98, the Department procedure applicable to the evaluation of prior military experience, in determining initial salary.

Although Section 404 of the Foreign Service Act of 1980 grants broad discretion to the Department in establishing the entry level salary of career candidates, SOP 98 and the Vacancy Announcement, under which grievant applied, constitute a restriction on this broad discretion relative to initial crediting of salary steps. SOP 98 states in pertinent part:

Candidates having *closely related progressive work experience* beyond the required minimum qualifications requirements needed to qualify for the occupation and grade level in question will be given one additional step for each full year of this excess experience.

The Vacancy Announcement contains similar language.

The evidence demonstrated that, in accordance with a longstanding unpublished practice, the individuals reviewing grievant's application materials were constrained to accord grievant an automatic 20 percent credit for his MSG experience without regard to the actual duties and responsibilities listed in the application. The Board found nothing in the record to indicate whether the Department had made an independent assessment when it initially adopted the practice or subsequently, but prior to when grievant submitted his application materials, that all MSG service is sufficiently uniform as to

warrant treating such service as other than closely or directly related specialized experience vis-à-vis the DSSA position. Grievant argued that all MSG experience is not the same and that there is a hierarchy of responsibilities that the Department failed to take into account when making its determination.

The record in this case established that the Department did not comply with SOP 98 and attendant authority to conduct a valid qualifications standards review of grievant's claimed prior employment experience. There is insufficient evidence in the record to support a finding that MSG service is so uniform that: 1) it could properly have been evaluated by the Department on an across-the-board basis; and 2) the proper assessment of all MSG experience is that such experience may not constitute closely or directly related progressive experience entitled to full credit under SOP 98. The Board found, therefore, that the initial salary review was arbitrary and capricious.

The Board directed the Department to conduct a new, individualized evaluation of grievant's application, including his MSG experience, and to report its results to grievant and the Board.

DECISION

I. THE GRIEVANCE

Grievant [REDACTED], a Diplomatic Security Special Agent (DSSA) career candidate with the Department of State (Department, agency), challenges the agency's partial denial of his grievance contesting the step of his amended initial salary level, FP-6, step 7, as established by the agency. Grievant disputes the weight the Department assigned to his experience as a Marine Security Guard (MSG) in establishing that salary level.

For relief, he requests that:

- his entry-level salary be revised to FP-6, step 11, retroactive to his Entry on Duty date of September 3, 2006, and that he receive retroactive pay and all other appropriate benefits;
- in the alternative, his entry-level grade and step be adjusted to a grade higher than that of FP-6, step 7; and
- all other appropriate relief deemed just and proper.

II. BACKGROUND

In response to Vacancy Announcement (VA) No. SA-05-02, Schiesser submitted an employment application dated March 23, 2006, to the Department. In a letter dated August 1, 2006, the Department confirmed an offer of an appointment to [REDACTED] as a career candidate DSSA in the Foreign Service.¹ Therein, grievant's initial salary level was established as FP-6, step 6 - three steps above the basic starting salary for DSSAs, namely FP-6, step 3. There was no information provided to grievant indicating the basis for the Department's determination that his prior experience warranted three additional

¹ The letter was signed by Ms. Shirley Hart-Smith, Human Resources Specialist, Board of Examiners for the Foreign Service. In its October 25, 2007 response to grievant's first discovery request, the Department advised that Shirley Hart-Smith is now Shirley Wimberly.

steps. His appointment to the Foreign Service, at the FP-6, step 6 level, was effective September 3, 2006.

On March 6, 2007, ██████ filed an agency level grievance asserting that the Department had failed to take into account the full extent of his military experience in establishing his entry-level salary when it failed to award 100 percent credit for the time he served as an MSG at U.S. diplomatic posts abroad. While denying his request that he be awarded 100 percent credit for his service as an MSG, the Department decision dated August 7, 2007, found that Human Resources/Office of Recruitment, Examination and Employment (HR/HEE) had erred in setting grievant's initial salary. Specifically, based on his experience, his entry-level salary warranted a grade of FP-6, step 7. His initial salary was subsequently amended to grade FP-6, step 7 to reflect this finding.

██████ appealed to this Board on October 4, 2007, asserting that he qualified for an initial grade of FP-6, step 11. He submitted his initial discovery request on October 18. Following receipt of the agency's response, he submitted follow-on discovery on November 2 and a third discovery request on November 21. After receipt of the agency's December 7 response, grievant submitted a Motion to Compel Discovery (MTC) on December 21. The Department responded on January 9, 2008.

After reviewing the parties' submissions, the Board held a status conference on February 11. During that conference, the parties acknowledged that the only issue in dispute was the weight that the Department had awarded grievant's experience as an MSG from May 1999 to April 2003 in establishing his initial salary grade and step.

In response to Board inquiries about the process for establishing initial salaries for DSSAs, counsel for the Department offered to make Christopher Disney, a Senior

Examiner for Diplomatic Security Recruitment (SEDSR), available to grievant's counsel for questioning regarding the review of grievant's qualifications in determining the initial salary offered him. Based on information provided by Disney during that meeting, grievant submitted a follow-on discovery request on February 20. The Department responded on February 26. Grievant's supplemental submission was dated March 28. The Department responded on April 14 and grievant's rebuttal was dated April 24. The Record of Proceedings (ROP) was closed on May 13, 2008.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant asserts that the Department committed procedural error when it did not comply with its own regulations in assessing his prior education and experience. It failed to adhere to the applicable Standard Operating Procedure (SOP) 98 dated December 15, 1997, entitled "Entry Grade and Salary Standards for Foreign Service Specialist Career Candidates,"² as well as the qualifying requirements of the subject position as set forth in the VA under which he applied, and relevant sections of the Foreign Affairs Manual (FAM). By so doing, the Department denied him a financial benefit to which he is entitled.

The Department did not exercise reasonable discretion in establishing his entry level salary. The Department awards 20 percent credit for military experience determined not to be directly related to that of a DSSA. For military experience deemed directly related to that of a DSSA, the Department awards 100 percent credit. It has been

² SOP 98 was superseded by SOP 115A dated November 3, 2006. SOP 98 is applicable in the instant case because the relevant timeframe occurred before SOP 115A took effect.

the Department's consistent³ practice for at least a decade to grant only 20 percent credit for military service as an MSG. This arbitrary practice to grant only partial credit for MSG experience is "unwritten, non-dated, unregulated and has not been reviewed in a decade."

Utilizing the VA and the Instructions for the Application for Employment (form DS-1950), ██████████ framed his job "application based on how [his] work experience in the military was directly related to the functions of a DS agent as laid out in the Announcement." He reasonably assumed that the information he provided, and the way he presented it, would be considered by the Department in determining his entry-level salary. Instead, according to Disney,⁴ a candidate's experience as set forth in relationship to the language of the VA has "absolutely no bearing as to his/her entry-level salary determination." Disney provides the following explanation:

[E]xamples of some of a DS agent's duties are listed on page two of the vacancy announcement. These are not referred to by the Department as 'core functions.' Instead they are illustrative examples of functions that agents might perform. This list of examples is not used as a checklist or tool to determine whether work experience is directly related. That determination is made by relating a candidate's work experience to the work of a DS agent.

Disney's analysis and position are "unreasonable." Disney admitted that the decision to award 20 percent credit to experience as an MSG is not discretionary; thus, DS and HR/REE are making decisions based on job title rather than an evaluation of a candidate's description of his actual work experience in the military. It is difficult to imagine many other jobs more related to that of a DSSA than an MSG. An analysis of

³ Although the grievant and the Department refer to this practice as a "policy" in their submissions, the Board believes that it is more appropriately described as a "practice."

⁴ Previously, Disney served as a naval officer, a Regional Security Officer, and Director of Diplomatic Security operations overseas.

the “Memorandum of Agreement between the Department and the Marine Corp for the Operational and Administrative Supervision of the Marine Security Guard Program” demonstrates that MSG duties are neither a sporadic nor incidental security related role; rather they are substantively security-related and closely attuned to the work of a DSSA. An MSG is part of a hierarchy at each overseas post; the Department’s arbitrary practice of awarding only 20 percent credit for service as an MSG does not allow for consideration of the specific duties an individual performs or the level of MSG experience. The Department did not consider his experience as an Assistant Detachment Commander as evidenced by Disney’s statement that “the functions of MSGs are the same.”

The three primary duties of an MSG are protection of classified information, personnel, and property. A DSSA’s responsibilities fall into two main categories: protective and investigative. “MSG work is directly related to the protective work aspect.” MSGs develop a “repository of skills that are directly applicable to [his] current job as a Diplomatic Security Special Agent,” an opinion supported by Michael Cygrymus, a DSSA for seven years and former MSG currently serving as Assistant Regional Security Officer in Azerbaijan, who asserted that experience gained from MSG duty is “directly related to the DS Special Agent functions.” The record clearly demonstrates that the primary duties of an MSG are directly related to those of a DSSA.

The Agency

Service as an MSG is not considered specialized experience directly related to the work of a DSSA. For nine or ten years, if not longer, the Department, utilizing reasonable discretion, has applied the practice of awarding 20 percent credit for MSG

service and “properly considers the substance of that service as well as its nature and level of responsibility.”

In FSGB Case 2006-50 (May 10, 2007), the Board stated:

By statute, the Department is granted broad discretion in establishing the entry-level salary of a new hire. [Grievant] has provided no argument that the Department’s determination in his case is inconsistent with those reached in establishing the entry-level salaries of other DS Special Agent career candidates or that governing regulations have not been followed. . . . Grievant has failed to meet his burden to demonstrate by a preponderance of evidence that the agency’s actions were a violation, misinterpretation, or misapplication of applicable laws or regulations.

The same circumstances apply in this case. ██████████ has failed to demonstrate that the agency overreached its broad discretion in establishing entry-level salaries or that the practice with respect to credit for service as an MSG has been inconsistently applied.

When on assignment overseas, a DSSA encumbers a position entitled Regional Security Officer (RSO) or Assistant Regional Security Officer (ARSO). When reassigned to a position in the United States that individual’s title reverts back to DSSA, with a range of responsibilities totally outside the experience of the overseas serving MSGs. While MSGs provide vital functions, their primary duties are not directly related to those of RSOs or ARSOs whose responsibilities are broader and at a higher level. The primary duties of MSGs are directed and monitored by an RSO and form part of the portfolio of an RSO.

There is no merit to grievant’s argument that the examples of functions performed by DSSAs contained in the VA are core functions of that job. To the contrary, the listing is illustrative only - intended to provide potential candidates an idea of some of the functions the work of a DSSA might entail.

IV. DISCUSSION AND FINDINGS

“In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.” 22 CFR § 905.1(a) To carry this burden, ██████████ must demonstrate that in determining his entry-level salary, the Department violated law, regulation, or collective bargaining agreement, or acted arbitrarily and/or capriciously.

While the enabling statute and FAM provisions vest broad discretion in the Secretary to determine whether to grant additional initial salary steps based upon prior work experience, claims that a member of the Service has been deprived by an act, omission, or condition subject to the control of the Secretary of a financial benefit, to which the member is entitled under applicable laws or regulations, are grievable. 22 U.S.C. § 4131(a)(1)(G) If the Board finds the grievance meritorious, it has “the authority to direct the Department to reverse a decision denying the grievant compensation” when the Board finds such decision to be “arbitrary, capricious, or contrary to laws or regulations.” 22 U.S.C. § 4137(b)(2)

We begin our analysis with a review of the statutory and regulatory framework for setting initial salary grades and steps as well as the language of the governing Standard Operating Procedure (SOP) and Vacancy Announcement (VA). Section 404 of the Foreign Service Act of 1980 (FSA), as amended, (22 U.S.C. § 3964), grants authority to the Secretary of State to assign all Foreign Service personnel to “appropriate salary classes in the Foreign Service Schedule.”

This authority gives the Department broad discretion in establishing the entry level salaries of career candidates. This Board has stated that in setting these entry level

salaries, the Department needs to have exercised “informed discretion fairly.” *See* FSGB Case No. 2007-003 (September 21, 2007). For discretion to be informed in the context of initial salary cases, it must be “based upon a review of the information that applicants have been given a full opportunity to provide” and should be made upon a “reasoned” basis. *See* FSGB Case No. 2007-050 (November 18, 2008). As the Board stated in FSGB Case No 2007-050, *supra*

...[T]he 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).

The Department’s implementing regulation at 3 FAM 3121.1-2 provides evaluative factors and a framework for establishing initial salaries for Foreign Service Specialist career candidates:

A Foreign Service Specialist career candidate is appointed at a class in the Foreign Service Schedule, and at a salary rate within the class, which the Secretariat of the Board of Examiners for the Foreign Service, taking into consideration factors including qualifications, *experience*, and education, shall determine to be appropriate. (emphasis added)

SOP 98 is a valid policy published by the Department and constitutes a restriction on the broad discretion enjoyed by the Department under the FSA and the FAM relative to initial crediting of salary steps. It also sets forth the internal procedures for establishing the entry grade of a career candidate, which “will be determined by a qualifications evaluation performed by the Staffing Specialists in the Registrar’s Office at the time an offer is made.” SOP 98 states in pertinent part:

Candidates having *closely related progressive work experience* beyond the required minimum qualifications requirements needed to qualify for the occupation and grade level in question will be given one additional step for each full year of this excess experience.

Specific examples of work experience that qualifies as being closely related to the work of the Foreign Service specialties covered by this SOP are outlined in the relevant Vacancy Announcement⁵. (Emphasis added.)

Vacancy Announcement (VA) SA-05-02, under which [REDACTED] applied, contains similar language regarding initial salary determinations :

Initial salary at appointment will normally be at Foreign Service grade FP-6, step three. Exceptions may be made to increase the number of steps based upon such factors as a master's degree in a related field (e.g., criminal justice), or a law degree, and/or directly related specialized experience.

We interpret the governing authorities to require 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.

Through discovery, grievant learned that the Department has an unwritten practice of unknown origin and duration that mandates that any applicant with Marine Security Guard (MSG) experience will only receive the 20 percent credit granted for all military service for that experience regardless of the specific duties actually performed by the applicant. In fact, Christopher Disney, the Senior Examiner for Diplomatic Security Recruitment responsible for completing [REDACTED] Qualifications Sheet, confirmed that the decision to award grievant 20 percent credit (and only 20% credit) for his MSG

⁵ Despite this language in the SOP, no examples of work experience that qualified as being closely related to the work of a DSSA were outlined in the VA under which [REDACTED] applied.

experience was not discretionary. This practice was not disclosed on SOP 98⁶, the applicable VA, or on any document provided to grievant.

It is the application of this practice that is at the core of this case. Thus, the issue before us is whether grievant has shown that the Department violated SOP 98 by automatically awarding him only 20 percent credit for his MSG experience without an independent evaluation of his particular MSG experience. The evidence of record supports a finding that the denial of full credit for all or part of grievant's MSG experience was done without adherence to the standards set forth in SOP 98.

Grievant's service as an MSG was not evaluated in light of the duties described by him in his application materials. No matter what grievant had included in his application about his MSG duties, it would not have been considered by the Department since, at some unknown point in time, it was pre-determined that all MSG experience would receive only 20 percent credit.

There was no determination made by the Department in the first instance that [REDACTED] individual MSG experience as presented in his application materials was not sufficiently closely or directly⁷ related to the work of a DSSA to merit 100 percent credit for initial salary purposes. Rather, the evidence reveals that the Department categorized grievant's experience based solely on job title and, in effect, applied an irrebutable presumption that no MSG experience warranted 100 percent credit. The record is devoid of any rationale as to why the Department adopted or continued the practice of granting MSG experience only 20 percent credit for the purpose of initial salary determinations.

⁶ The Board notes that the Department did not provide SOP 98 to grievant during the application and appointment process.

⁷ SOP 98 and VA SA-05-02 have different criteria for evaluating prior work experience. SOP 98 uses the standard of "*closely related progressive work experience . . .*" and the VA uses the standard of "*directly related specialized experience.*" We will combine the two standards for the purpose of analysis.

Rather, the record reveals simply that the Department has consistently treated MSG duties as qualifying only for the general 20 percent military service credit for initial salary purposes for many years. There is nothing in the record to indicate whether the Department made an independent assessment when it initially adopted the practice, or subsequently, that all MSG service is sufficiently uniform as to warrant the same amount of credit.

Grievant strenuously argues that all MSGs are not the same and that there is a hierarchy of responsibilities that the Department does not take into account when making its determination. He outlined his additional duties as an Assistant Detachment Commander on his application, which the Department did not cite in its submission to the Board. Furthermore, there is no explanation of whether the job duties of a Marine Security Guard, Assistant Detachment Commander or DSSA have changed since the initial determination was made so that the prior conclusion remains valid.

The record in this case establishes that the Department did not comply with SOP 98 and attendant authority to conduct a valid qualifications review of grievant's claimed prior employment experience. There is insufficient record evidence in this case that would support a finding that MSG service is so uniform that: 1) it could reasonably have been evaluated by the Department on a class basis; and 2) the proper assessment of all MSG experience is that such experience may not constitute closely related progressive

experience entitled to full credit under SOP 98.⁸ The Board finds, therefore, that the review by the Department of grievant's prior military experience for the purpose of establishing his initial salary was arbitrary and capricious.

In this case, the Board is unpersuaded that it would be appropriate for it to initially evaluate the grievant's claimed experience and determine whether some or all of that claimed experience was sufficiently closely or directly related progressive experience for the DSSA position that it should have been credited at the 100% level. Rather, the Board directs that the Department do so and report to the Board and grievant the results of that analysis. If the grievant is dissatisfied with the results, he may raise the matter with the Board which retains continued jurisdiction over the grievance to engage in appropriate review of the Department's decision in that regard.

V. DECISION

The appeal is remanded to the Department. The Department is directed 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 SOP 98 and VA SA-05-02. The reassessment shall be completed and its results reported to grievant and this Board within 30 days of receipt of this Decision. The grievant will have 30 days after his receipt of the Department's determination to raise any objections to that determination with the Board.

⁸ A practice that treats all MSGs alike regardless of actual experience requires justification especially since the decision makers have equated MSG experience with that of a violinist in the military, who also receives 20 percent credit for such experience. This case, however, does not present the question of whether, on the basis of adequate factual evidence, such a class-wide system of evaluation based on job title or classification may be used and whether or under what circumstances, if such a class-wide evaluation system is justified, the Department must still perform an individualized assessment in cases where the applicant has demonstrated prior job experience significantly different from the usual duties associated with the position in question and which arguably are more closely related to the duties of a DSSA than the norm for that job title.

For the Foreign Service Grievance Board:

Harriet Davidson
Presiding Member

Garber Davidson
Member