

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{ Grievant }

Grievant

And

Department of Commerce

Record of Proceeding

FSGB 2007-047

June 5, 2008

**ORDER: TIMELINESS
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Roger C. Hartley

Board Members:

James E. Blanford

John H. Rouse

Special Assistant:

Linda B. Lee

Representative for the Grievant:

Pro Se

Representative for Department:

Adam Chandler
Agency Representative
Office of General Counsel

Employee Exclusive Representative:

American Foreign Service Association

ORDER: TIMELINESS

I. ISSUE

This order addresses the issue of whether the grievance was timely filed.

II. BACKGROUND

{Grievant} (grievant) is a former member of the U.S. and Foreign Commercial Service of the Department of Commerce (USFCS, Department, agency). On June 26, 2001, the agency assigned the grievant to {post}. In June 2004, {Grievant} contacted the agency's Office of Foreign Service Human Resources (OFSHR) to ask about his eligibility for language incentive pay while he was in {post}. He received a response in a July 1, 2004 e-mail from OFSHR employee Dorothy Collins that stated she had checked with OFSHR employee Shirley Porter and he was not eligible. On July 2, 2004, the grievant replied to the e-mail with additional information and asked the agency to review the question once more. Collins responded on July 9, 2004, saying she and Porter would revisit the issue and get back to the grievant.

{Grievant} resigned from the agency effective July 16, 2004. He contacted the agency by telephone and e-mail in August, September, October and December, 2004. Human Resources Director Nancy Kripner told him in response to a December 14, 2004 e-mail that she would get the staff to focus on his question.

On December 21, 2005, the grievant e-mailed Kripner to express condolences over the death of a Foreign Service colleague. He again raised the question of language incentive pay but received no reply.

{Grievant} sent an e-mail to Denise McGann, Chief, Human Resources Operations and Services, on July 24, 2006. McGann responded that Reba Elerbe was

looking into the issue. Several phone calls and e-mails ensued, and on October 29, 2006 McGann notified the grievant that Elerbe had reached a recommendation that was being sent to Kripner. However, on January 4, 2007, McGann informed {Grievant} by e-mail that the matter was still pending. After receiving no further response from the agency, {Grievant} filed his agency level grievance on June 13, 2007. On September 14, 2007, the agency denied the grievance on its merits, holding that grievant was not entitled to language incentive pay. {Grievant} appealed to this Board on November 13, 2007.

In its acknowledgement letter dated November 21, 2007, the Board directed the parties to file briefs on the issue of whether the grievance was timely filed. The “Grievant’s Brief on Timeliness” was filed on December 6, 2007. The “Agency Response to the Grievant’s Jurisdictional Submission” was filed on December 28, 2007. On January 2, 2008, grievant requested the opportunity to reply to the agency’s response. The agency filed an objection on January 3, 2008 and in the alternative requested that if the grievant was given the opportunity to respond, the Board grant the agency the opportunity to respond to arguments raised in the grievant’s supplemental submission. The Board granted the grievant’s motion to file a reply and denied the agency’s motion to be permitted to file a reply. {Grievant} furnished his reply on January 11, 2008. On January 15, 2008, the agency filed “Agency’s Motion to Strike New Arguments Raised for the First Time in Grievant’s Reply to Agency’s Response to Grievant’s Jurisdictional Submission.” Alternatively, it requested permission to respond to the grievant’s reply. The grievant opposed the agency’s Motion to Strike in a submission filed on January 25, 2008. By Order dated January 31, 2008, the Board denied the agency’s Motion to Strike and granted the alternative motion for an opportunity to respond to the grievant’s

January 11, 2008 Reply Brief.

The agency submitted its surreply on February 20, 2008 and {Grievant} submitted his response to the Department's surreply on February 29, 2008.

III. POSITIONS OF THE PARTIES

The Grievant

{Grievant} argues that Sections 1102, 1104 and 1101 of the Foreign Service Act of 1980, as amended, make clear that a former member of the Service may file a grievance concerning the denial of an allowance, premium pay or other financial benefit to which he claims entitlement under applicable laws or regulations so long as that grievance is filed within two years after the occurrence giving rise to the grievance.

As a former member of the Service who is grieving the denial of premium pay to which he is entitled under the Department's Language Incentive Program, {Grievant} contends, his case fits the definition of a grievance.

As to the occurrence giving rise to his grievance, {Grievant} identifies January 4, 2007, when he received his final communication from the agency. From July 2004 until that date, far from "sleeping on his rights", he was pursuing internal remedies with the agency and receiving assurances that the matter was still under consideration. Citing FSGB Case No. 91-33 (September 13, 1991), he declares that his repeated attempts to resolve his issue through internal channels meet the standard of reasonable diligence. No fewer than nine agency employees promised on at least 11 occasions to address the grievant's eligibility for incentive pay. During that period, he had no reason to file a grievance. The Department's position that it provided its final decision in July 2004 is

negated by its immediate undertaking of another review of the matter and the subsequent three years of mutual correspondence.

Grievant also asserts that his grievance is timely under the legal principle of “equitable tolling.” Citing *Mondy v. Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170 (9th Cir. 1986); *Brown v. Marsh*, 777 F.2d 8 (D.C. Cir. 1985); and *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972), he explained that certain statutes of limitation can be subject to equitable modification in favor of a party who failed to file within the time period. The Supreme Court has held that situations that justify an equitable tolling of a statute of limitations include cases in which a plaintiff was misled by the defendant, and where defendant’s affirmative actions lulled the plaintiff into inaction. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).¹

In addition, the grievant maintained that the Department never challenged his timely filing when his grievance was being decided at the agency level and the agency decided his grievance on substantive grounds. According to grievant, the agency waived its right to challenge timeliness and is estopped from objecting to his filing on technical grounds.

As for the Department’s remark that it “seems inconceivable that a member of the Foreign Service was unaware of a program that could boost his pay by up to 15%,” the grievant submits that no one in Human Resources ever informed him of his entitlement to the pay. Moreover, the grievant was assigned to {post} when it was still considered extremely unstable and politically tenuous. {Grievant} was assigned to the team to

¹ Grievant also advanced an argument that his grievance was timely under the theory of “continuing violation.” In view of the basis of our decision, we see no need to review this argument.

reopen the U.S. Embassy there, entailing a heavy workload, including oversight for \$1 billion in U.S. investment. The USFCS had no office infrastructure (let alone internet) and did not even have permanent housing. The grievant focused on coping with the work and maintaining his own personal safety – not spending his time researching benefits.

The Agency

The Department maintains that the grievant's claim regarding language incentive pay is time-barred because he failed to grieve within two years of his assignment to {post}. If he were eligible for such pay, which the agency does not concede, he would have been eligible on assignment. As a result, his grievance should have been filed within two years of that date, *i.e.*, by June 2003, and he missed the deadline by nearly four years.

Assuming *arguendo* that the two year period began when the grievant claimed he first became aware of his alleged entitlement, the grievance is still untimely. He asserts he became aware of the language incentive pay program in June 2004, just before his retirement. He would have had until June 2006 to grieve the allegedly improper failure to pay the language incentive pay. Moreover, the agency told {Grievant} plainly in July 2004 that he was not eligible for any incentive pay. At no later point did the agency ever indicate it was changing its decision. The absolute latest the grievant could have filed a grievance was July 2006. None of the parties' correspondence after July 2004 belies the agency's position. The grievant cannot extend the statutorily established time frame for filing grievances merely by requesting that the agency change its mind.

The grievant's apparent argument that a "breakdown in communication" in January 2007 is the occurrence that led to the grievance cites no authority. Indeed, there

were previous “breakdowns,” in December 2004 and December 2005. If a communications breakdown were really the triggering event for an occurrence within the meaning of 22 U.S.C. Section 4134(a)(1), then the triggering event would have been December 2004, the date of the first communications breakdown. Even under the grievant’s theory of jurisdiction, he would have had to file by December 2006.

The grievant has not cited any legal authority in support of his claim that the agency may not challenge the timeliness of his grievance in response to the Board’s November 21, 2007 Order. Furthermore, the agency could not have waived its right to challenge the timeliness of the grievance because this is the first opportunity in front of a third party for the agency to challenge the grievance’s timeliness. The agency is not estopped.

With respect to the grievant’s equitable tolling theory of jurisdiction, the agency argues that equitable tolling applies only when a grievant is unaware of the grounds for the grievance and could not have discovered the grounds through due diligence. Clearly, {Grievant} knew the grounds for his grievance as early as July 2004 and equitable tolling does not apply.

The agency requests that the Board dismiss the grievance as untimely filed.

IV. ANALYSIS AND FINDINGS

Section 1104(a) of the Foreign Service Act of 1980, as amended, establishes the time limitations within which a grievance must be filed. It provides that:

A grievance is forever barred under this subchapter unless it is filed with the Department not later than two years after the occurrence giving rise to the grievance or, in the case of a grievance with respect to the grievant’s rater or reviewer, one year after the date on which the grievant ceased to be subject to rating or review by that person, but in no case more than three years after the occurrence giving rise to the grievance. There shall

be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware of the grounds for the grievance and could not have discovered such grounds through reasonable diligence.

Section 1102 of the Act, as amended, establishes the time limitations within which a former member of the Service must file a grievance. It provides that:

Within the time limitations of section 1104 of this title, a former member of the Service or the surviving spouse (or, if none, another member of the family) of a deceased member or former member of the Service may file a grievance under this chapter only with respect to allegations described in section 1101 (a)(1)(G) of this title.

According to Section 1101(a)(1)(G) of the Act, the “term” grievance means the “alleged denial of an allowance, premium pay, or other financial benefit to which the member claims entitlement under applicable laws or regulations.”

The Department does not dispute that the grievant is a former member of the Service or that the pay he seeks is encompassed in Section 1101(a)(1)(G) of the Act. The sole disagreement relevant to this ruling is over the timeliness of the grievance filing. First, we reject grievant’s argument that the agency has waived its right to challenge timeliness because it decided the grievance at the agency level based on a substantive rejection of grievant’s claim. Grievant cites no authority for such a proposition and we refuse to adopt a position that an agency *per se* or *ipso facto* waives timeliness if it rejects an agency level grievance on the substantive grounds.

Second, we do not find support for the proposal advanced by the agency that the two year filing time limit began with the grievant’s assignment to {post} on June 26, 2001. Section 1104(a) contains a built-in equitable tolling provision. It provides that “There shall be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware

of the grounds for the grievance and could not have discovered such grounds through reasonable diligence.” “Reasonable diligence” has been defined by this Board in FSGB Case No. 91-033 (September 13, 1991) as: “the degree of care and prudence which should be reasonably expected from anyone in grievant’s circumstances.” We accordingly must review the grievant’s “circumstances” while assigned to {post}.

The current state of the record leaves uncontroverted the following: (1) the ambiguity in the grievant’s situation (in that he spoke {language 1} while he worked in the {post} capitol); (2) his asserted ignorance of the incentive program prior to his July 2004 application for incentive pay and the failure by anyone in Human Resources to inform grievant of his entitlement to the pay; (3) the lack of clarity concerning the procedures and responsibilities for designating language incentive payment recipients; (4) the reality that grievant was assigned to {post} when it was still considered extremely unstable and politically tenuous and reopening the U.S. Embassy there entailed a heavy workload including overseeing \$1 billion in U.S. investment; (5) the USFCS had no office infrastructure (let alone internet) and did not even have permanent housing; and (6) the result was grievant focused on coping with the work and maintaining his own personal safety – not spending his time researching benefits.

Based on the record as currently developed, we are persuaded (1) that {Grievant} was unaware of the grounds for the grievance while he was assigned to {post} and (2) that by exercising “the degree of care and prudence which should be reasonably expected from anyone in [{Grievant’s}] circumstances” {Grievant} could not have discovered such grounds.

Accordingly, we find that the request for benefits in 2004 was timely. The July 1, 2004 e-mail from Dorothy Collins (in response to a phone call) was unambiguous. She declared, “I checked with Shirley Porter regarding your eligibility for language incentive pay in {post}. The language designation there is {post}. Your language is {language 1}. Based on that, you are not eligible for language incentive pay in that assignment.” Collins’ e-mail would have constituted an adverse action, and had {Grievant} chosen to grieve at that point his grievance would have been timely.

The remaining question is whether this initial denial of benefits in July 2004 is to be considered now as the “occurrence giving rise to the grievance” and, as the agency argues, must be deemed the date when the two-year statute of limitations began to run for the grievance that was not filed until June, 2007. The agency urges that we accept this view because, it argues, the only equitable tolling applicable to section 1104(a) is the section’s own built-in tolling provision applicable when a grievant is unaware of the grounds for the grievance and could not have discovered the grounds through reasonable diligence. Clearly, {Grievant} knew the grounds for his grievance as early as July 2004.

We reject the agency’s cramped view of the equitable bases for tolling the running of the time limitations in section 1104(a). The consistent view of the Board has been that “[r]esolution of grievances arising in the employment relationship should be undertaken in an environment of cooperation and fairness insofar as possible, and without favoring literal adherence to procedural requirements over the substance and purpose of the process.” FSGB Case No. 89-060 (March 7, 1990). *Accord* FSGB Case No. 2005-055 (February 15, 2006) (finding that “[e]mployees are entitled to equitable treatment in

all areas of personnel management.”) *See also* 3 FAM 4420 (“These regulations establish procedures to provide U.S. citizen members and former members of the Service [and their survivors] a fair and effective system for the resolution of individual grievances that will ensure the fullest measure of due process.”) Consistent with these remedial, equitable underpinnings of the Foreign Service Act, the Board’s policy, since at least 1990, has been that

The [section 1104(a)] filing requirement was not intended to be jurisdictional but was a statute of limitations setting a time period subject to modification under recognized equitable principles. . . . From our analysis of the statutory provision in question and of the decisions of the Supreme Court, and from our consideration of the overall remedial purpose of the grievance system established by the Act, we are persuaded that the [two]-year time period prescribed by section 1104(a) is . . . subject to waiver, estoppel and equitable tolling. This interpretation of the statute is consistent with the guidance found in the opinions of the Supreme Court which dictate that the time limitation should be construed in a manner that honors the statutory purpose. Zipes v. Trans World Airlines, Inc., 455 U.S. at 398, and Baldwin County Welcome Center v. Brown, 466 U.S. at 151.

FSGB Case No. 89-060 (March 7, 1990).

Agency action that misleads a grievant or lulls a grievant into inaction can be the basis for equitable tolling even if the agency has not engaged in any intentional misconduct. *See, e.g.*, FSGB Case No. 89-060 (March 7, 1990) (even if the agency regulation extending time for filing grievance was invalid because it was inconsistent with provisions of section 1104(a), the regulation was a basis for equitable tolling when it misled grievant and lulled grievant into inaction and the fact that the agency acted in good faith does not require a contrary result). *See also Leake v. University of Cincinnati*, 605 F2d 255 (6th Cir. 1979) (employer’s request for additional time to resolve an employment dispute and work out a satisfactory solution is a basis for equitable tolling of

time limitation to file a federal discrimination suit where, under all the circumstances of employer's representations, plaintiff was reasonable in delaying filing and employer's good faith in causing the delay as it attempted to find solution is not a basis for refusal to apply principles of equitable tolling).

Here, the record amply supports the conclusion that grievant was lulled into inaction by the agency's repeated assurances that it was working on the problem and would get back to grievant with a definitive answer. The undisputed facts show that immediately after the initial denial of benefits {Grievant} submitted additional information and asked the agency to review the question once more. The information submitted was substantive and material to the claim, throwing significant additional light on his request. The submission was clearly treated by both {Grievant} and the agency as reopening the issue. Collins' reply was, "Shirley is on vacation this week. When she returns next week, we will revisit this, and get back to you, hopefully, with a definitive answer." Her response can only be read as an undertaking to reconsider {Grievant}' application and respond anew, taking into account his new arguments. At that point the agency's actions would lull {Grievant} reasonably into inaction, concluding that there now was no final agency action upon which to file a grievance but a "definitive answer" would be forthcoming.

For the next two and a half years, {Grievant} persisted in engaging the agency on the question of his eligibility and the agency continued to indicate that it was reviewing the matter. Although, as the agency notes, there were breaks between contacts, we do not find any basis for the agency's assertion that {Grievant} should have grieved while the agency's own officials were leading him to believe that it was still considering his appeal.

During this period, it was the Agency's own affirmative actions that tolled the running of the statute of limitations. During this period, it continued to be reasonable for {Grievant} to conclude that the Agency had not made a definitive decision regarding his request for pay.

Finally, on October 29, 2006, McGann notified grievant that Elerbe had completed staffing the action and with McGann's approval the action memorandum was being sent to Kripner. For the first time since July, 2004, grievant was given reason to believe that the agency decision was being actively advanced and a definitive decision would be forthcoming. However, on January 4, 2007, McGann informed {Grievant} by e-mail that the matter was still pending, and no further communication followed.

In this case, the agency's failure to act on grievant's application for over three years, after assuring him that it would review his new information and despite his repeated requests, can only be considered affirmative actions that misled grievant and lulled him into inaction. Repeatedly assured by agency representatives that action was underway, grievant showed great patience in relying on these assurances over many months. However, he was certainly well justified in concluding early in 2007 that agency inertia constituted a willful failure to act, after being informed in October 2006 that staffing was completed and a decision was in train, only to be told again in January that nothing had eventuated.

We find it entirely appropriate to consider that the agency's representations of pending action and resulting inaction here tolled the running of the statute of limitations at least until the January 4, 2007 e-mail. The cumulative promise of action and consistent failure to take action, with reasonable and required diligence and dispatch, is calculated

to mislead and lull into inaction any reasonable potential grievant. We find such cumulative behavior sufficient to have tolled the running of the statute of limitations and have no occasion to inquire whether this behavior constituted intentional misbehavior on the part of those who engaged in it. It is sufficient to conclude that the Act's policy to create an "environment of cooperation and fairness" and "equitable treatment" compels the conclusion that this grievance was timely filed when filed on June 13, 2007.

V. ORDER

1. The grievance of June 13, 2007 was timely filed with the agency. The agency's September 14, 2007 response to the grievance is the final decision of the agency with respect to all matters alleged in the grievance. The grievant's appeal of the agency's September 14, 2007 decision was timely filed with the Board and is properly within the Board's jurisdiction.

2. The Grievance Time Guidelines, including Discovery, are reinstated as of the date of this Order.