

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

{Grievant}  
Grievant

Record of Proceeding

and

FSGB 2007-047

September 9, 2009

Department of Commerce  
United States Foreign and Commercial  
Service,  
Department

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**DECISION**

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

**Ira F. Jaffe**

Board Members:

James E. Blanford

John H. Rouse

Special Assistant:

Margaret C. Sula

Representative for the Grievant:

Pro Se

Representative for Department:

Adam Chandler  
Agency Representative  
Office of General Counsel

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** Grievant is owed language incentive pay for the period of his {year 1}-{year 4} assignment to {post}. His {year 4} request for incentive pay was erroneously denied by the Department of Commerce.

### OVERVIEW

Grievant was denied language incentive pay during the three years he was stationed in Embassy {post} {years 1-4} and grieves that denial. The dispute centers on whether grievant's language proficiency certification in {language 1} qualified him for language incentive pay when the designated incentive language for {post} is {language 2}-{language 1}. The Agency argues that grievant is not so qualified because the "primary language" at the post ({post}) is {language 2} and only certification in that language qualifies for language incentive pay for those posted to {post}.

The Board agreed that grievant is entitled to the back language incentive pay he seeks. While agreeing with the Agency that, since the events in this case, it has in practice designated {language 2} as the incentive language for those posted to {post}, there are several reasons why the Agency is equitably estopped from insisting that the grievant have been certified in {language 2} or {language 2}-{language 1} as a condition to his receipt of language incentive pay.

The grievance was sustained and the Board ordered the Agency to pay the grievant language incentive pay from June 21, {year 1} through July 16, {year 4} .

## DECISION

### I. THE GRIEVANCE

Grievant was denied language incentive pay during the three years he was stationed in Embassy {post} and grieves that denial. He claims he is owed back pay at the rate of 5% of his base salary for partial year {year 1}, full years {years 2 and 3}, and partial year {year 4} because he was proficiency certified in {language 1} and that certification qualified him for language incentive pay in the years he was posted to {post} pursuant to an Agency regulation that designates “{language 2}-{language 1}” as the incentive language.

### II. BACKGROUND

Grievant (grievant) is a former Foreign Service Officer employed by the U.S. Department of \_\_\_\_ (Department, Agency). On June 26, {year 1}, the Agency assigned the grievant to {post}. In June {year 4}, grievant called Agency employee {name} to ask about his eligibility for language incentive pay while he was in {post}. {Name} stated in a July 1, {year 4} e-mail that she had checked and he was not eligible, as “the language designation there is {language 2}.” On July 2, {year 4}, the grievant replied to the e-mail with additional information and asked the Agency to review the question once more. {name} responded on July 9, {year 4}, saying Agency staff would revisit the issue and get back to grievant.

{Grievant} resigned from the Agency effective July 16, {year 4}. Over the course of nearly three years, grievant contacted the Agency repeatedly, raising the question of language incentive pay, but received no definitive answer. After his many failed attempts to obtain a final answer, 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 because {language 2}- {language 1} was the designated incentive language and grievant was language proficiency certified in {language 1}, “which is not an incentive language designated” by the Agency. {Grievant} appealed to this Board on November 13, 2007.

At the Board’s request, the parties filed briefs on the issue of whether the grievance was timely filed and grievant had exhausted his agency-level remedies. By order dated June 5, 2008, the Board ruled that

[t]he grievance of June 13, 2007 was timely filed with the Agency. The Agency’s September 14, 2007 response to the grievance is the final Agency decision with respect to all matters alleged in the grievance. Accordingly, 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.

Following contested discovery initiated by grievant, grievant submitted his supplemental pleading on January 15, 2009. Following contested discovery initiated by the Agency, the Agency filed its Response to Grievant’s Supplemental Pleading on May 8, 2009. Grievant filed his Rebuttal on May 22, 2009. The Record of Proceedings was closed on July 24, 2009.

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

#### **Grievant**

Subchapter 800-1 of the Agency’s Foreign Service Personnel Manual establishes the Language Incentive Program (LIP). It provides language incentive pay if an employee meets all of the following criteria:

- a. The recipient of the incentive pay is a member of the Foreign Service; and
- b. The recipient has a tested proficiency “in an incentive language” at one of

three levels, with a rating of S-2/R-2 (grievant's rated level) earning an incentive payment of "5 percent of base salary;" and

c. The recipient "is serving at a post where the primary language is one designated in [LIP] policy;" and

d. The proficiency test score was "achieved within one year prior to arrival at the incentive language post or during the assignment" at that post.

The LIP designates {language 2}-{language 1} as an "Incentive Language" and does not designate either {language 2} or {language 1} as an "incentive language."

Grievant argues that he tested and received an S-2/R-2 in {language 1} and argues that this proficiency certification in {language 1} qualified him for language incentive pay while he was stationed in {post}. (1) He was a Foreign Service Officer while stationed in {post}; (2) he qualified for the proficiency in {language 1} within a year prior to his assignment to {post}; (3) the primary language of the country served by Embassy {post} was {language 2}-{language 1}, which is designated in the LIP as an incentive language; and (4) the intent of the regulation is to provide language incentive pay for one who is proficiency certified in {language 1} because {language 2} and {language 1} are "virtually identical languages."

The sole issue in the case is whether during the period of {year 1}-{year 4} the intent of the LIP regulation, which designated {language 2}-{language 1} as the incentive language, was to authorize language incentive pay to those posted to {post} who had earned proficiency certification in {language 1}. Grievant argues that his proficiency certification in {language 1} is proficiency certification in {language 2}-{language 1} for purposes of the LIP because:

1. {language 1} and {language 2} are virtually identical languages with one or two quirks in grammar or vocabulary which distinguish the two.
2. The Agency was informed, in an email exchange between Agency officials and James E. North of the Department of State, that the “linguistic reality” is that the regional variants of this language ({language 2}-{language 1}) . . . {language 1}, {language 2}, and {language 3} . . . are essentially the same {language group} language they were when it was called {language 2}-{language 1}.
3. The Agency by internal memorandum was informed that DLS (Diplomatic Language School), another of its language schools, also confirmed (in regard to {language 1}, {language 2} and {language 2}-{language 1}) that these languages were essentially the same language.
4. While the Department asserts that {language 1} uses the Latinic script while {language 2} uses the Cyrillic script, “{language 2} actually uses both Cyrillic and Latinic scripts” with “officially published {language 2} documents . . . typically in Cyrillic [and] Latinic script . . . used predominantly in business . . . .” Thus, any difference in script used does not render the languages different.
5. Since at least {year 1}, when grievant was assigned to {post}, the Agency has never required certification in {language 2}-{language 1} as a precondition for language incentive pay as evidenced by the Agency paying language incentive pay to others stationed in {post}, beginning in {year 4} after grievant left the Post, who were certified in {language 2}.
6. The Agency’s Assignment Office “recognized that {language 1} and {language 2} were identical and accepted [grievant’s] {language 1} language

[proficiency] as fulfilling the language requirement and qualifying [grievant] to bid on a {language 2}-language designated post ({post}).”

7. In the current “Career Development and Assignments Intranet Bidding and Interactive Data System,” the printout for the Internal Processing for Bid Submission System for the SCO position in {post} lists “SR” (presumably {language 2}) as the language requirement for {post} and lists grievant (who is not certified proficient in {language 2}) in the assignment History. None of those listed in the Assignment History are certified as proficient in {language 2}-{language 1}.

8. Since November 18, 1999, it has been impossible to become certified as proficient in {language 2}-{language 1} because certification by the Foreign Service Institute (FSI) is the only certification accepted for incentive pay and since November 1999 FSI has not tested for certification in {language 2}-{language 1}.

9. The Department of State in its language incentive program has concluded that {language 3}, {language 1}, {language 2}-{language 1}, and {language 2} shall be grouped together and treated as a single language for the purpose of establishing eligibility for language incentive pay.

10. {language 2}-{language 1} technically does not exist anymore and has not existed since the late 1990s after the former {country} disintegrated.

11. When grievant was posted to {post} from {year 1}-{year 4}, the country to which he was posted was the {country} and at all times material to grievant’s claim, the official language of {country} was {language 2}-{language 1} and the

{country} constitution recognized either {language 1} or {language 2}-{language 1} and [either] the Cyrillic alphabet or the Latinic alphabet. The {country} constitution during this period, grievant argues, stated that, “the official language of the {country} was ‘the {language 2} language of the {languages} variants.’ The {languages} or eastern variant encompasses {language 2}; the {languages} or western variant encompasses {language 1}. This phrasing is tantamount to ‘{language 2}-{language 1}.’”

12. While assigned to {post}, grievant signed up to be tested at post in {language 2}, expecting a score equivalent to his recent test scores in {language 1}. He states that the Department informed him that he should have sought prior authorization for testing through it, since costs to the Agency would be incurred, and therefore he withdrew from the test. The Department did not inform him that without tested proficiency in {language 2} it would consider him ineligible for LIP.

### **Agency**

In its response to the agency-level grievance, the Agency denied grievant’s request for language incentive pay because grievant was not proficiency certified in “{language 2}-{language 1}.” Before the Board, the Agency’s position is that grievant was denied language incentive pay because he was not proficiency certified in {language 2}. The Agency points out that the original denial of language incentive pay in {year 4} stated that the incentive pay was denied because grievant was not language proficiency certified in {language 2} and, therefore, before the Board the Agency may rely on that as the basis for its argument that grievant properly was denied language incentive pay.

The Agency argues that it properly denied grievant language incentive pay based on his failure to be certified proficient in {language 2} because:

1. {language 2} is the official language of {post}, where the {post} Embassy is located.
2. {language 2} and {language 1} are different languages because, *inter alia*, they use different alphabets (scripts).
3. The Agency has never awarded language proficiency pay to any employee posted to {post} who is certified proficient in {language 1}.
4. All those posted to {post} since {year 1} who have been awarded language incentive pay have been certified proficient in {language 2}, not {language 1}.
5. The burden is on grievant to show that the Agency has violated, misinterpreted, or misapplied applicable laws, regulations, or published policy and grievant cannot carry that burden here because the Agency has uniformly applied the LIP to permit language incentive pay to those posted in {post} only when certified proficient in {language 2}; concluding that {language 2}, not {language 1}, is the “primary language” in {post} is a reasonable interpretation of the LIP regulations and neither plainly erroneous nor inconsistent with regulations.
6. Once the Agency interprets its LIP regulation as meaning that a Foreign Service Officer must be certified proficient in {language 2} to receive language incentive pay when assigned to {post}, the Agency should prevail whether or not the Agency is “actually correct” or whether “{language 2} and {language 1} are actually different languages.” The Board must defer to this Agency judgment

particularly when the issue is what the “primary language” of a country is because the determination of a country’s “primary language” is as much a diplomatic and political question as it is a linguistic question, and the Board lacks the expertise and institutional qualifications to challenge that determination, especially when the two countries themselves, {posts}, have concluded that {language 2} and {language 1} are two different languages using two different alphabets.

7. Further evidence of the reasonableness of the Agency’s judgment that {language 2} and {language 1} are different languages is that the language experts at the State Department’s FSI and DLS apparently recognize the existence of two separate languages because they have tested and continue to test in both {language 1} and {language 2} to ascertain testers’ proficiencies.

8. In sum, the Board may not rewrite Agency regulations but may “reverse” an Agency decision only when it is “arbitrary, capricious or contrary to laws or regulations” and the decision that {language 2} proficiency is what the LIP requires for language incentive pay for those posted to {post} is not arbitrary, capricious, or contrary to laws or regulations. Thus, grievant’s appeal must be denied.

#### **IV. DISCUSSION**

There was no dispute that the regulation in effect during the time period that the grievant worked in {post} provided that employees who were proficiency certified in {language 2}-{language 1} at grievant’s level would be eligible for a 5% Language Incentive Payment. The record was also clear that certification in {language 2} was treated by the Agency, notwithstanding the language of its LIP regulations, as sufficient

to qualify for LIP pay in {post}. It appears that the question of whether proficiency in {language 1} qualified an employee for LIP in {post} had not been decided before grievant's LIP application.

Grievant introduced significant evidence indicating that: 1) he was certified as proficient in {language 1} and sought to be tested to be deemed certified in {language 2} after his assignment to {post}, but was denied the ability to so test based upon a failure by the

Agency to approve that testing;<sup>1</sup> 2) since 1999, the FSI – the only certification accepted for entitlement to receive LIP – has not tested for proficiency in {language 2}-{language 1}; and 3) given the significant similarities between {language 1} and {language 2} (and each with {language 2}-{language 1}), there is no reason to believe that the grievant would not have been certified as proficient in {language 2} by the FSI if he had been allowed to take the testing that he requested. Additionally, the Agency treated the grievant's proficiency in {language 1} as sufficient to satisfy the language competency requirement that was a condition for his assignment at {post}. Viewing those facts together, the Board is persuaded that the Agency is precluded from insisting in this case, as a condition to the grievant's receipt of LIP, that he have satisfied a condition – certification as proficient in {language 2}-{language 1} by the FSI – that was impossible to have satisfied after November 1999 (when the FSI stopped testing and certifying proficiency in {language 2}-{language 1}).

Nor may the Agency insist that the grievant's failure to become certified as proficient in {language 2} provided grounds for denying him LIP. The grievant took steps to obtain FSI certification as proficient in {language 2}, only to have those efforts stymied by the Agency's failure to pay for that testing. The Agency cannot, on the one hand, rely upon a substitute surrogate for certification in {language 2}-{language 1} fluency, and then on the other hand, block the grievant's efforts to become certified as proficient in {language 2}, particularly where the record evidence revealed that, given the virtual identity of {language 2} and {language 1}, the grievant would probably have been

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<sup>1</sup> Grievant's evidence does not firmly establish whether the Department expressly denied grievant's application to be tested in {language 2} or simply raised substantial objections, causing grievant to withdraw his application. In either event, the agency obstruction, coupled with its failure to inform grievant that without the test it would not certify him for LIP, equitably precludes it from now denying him that pay on the grounds that he was not so tested.

certified as proficient in {language 2} as well if he had been administered the testing by FSI.<sup>2</sup>

In light of these facts and the holding in this case, it is not necessary to comment upon the remaining contentions of the Parties.

## **V. DECISION**

The Board holds that the Department violated its own regulations when, because he was not proficiency certified in {language 2}, it denied grievant language incentive pay for the period he was posted to {post} during the years {year 1}-{year 4}. The Agency is directed to provide grievant back language incentive pay for the period of his {year 1}-{year 4} assignment to {post} in the amount to which he would have been entitled when he originally applied for it in {year 4} had the Agency interpreted its Language Incentive Program as authorizing language incentive pay to those posted in {post} who are proficiency certified in {language 1}. The amount due shall be computed in accordance with the Back Pay Act, 5 USCA 5596.

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<sup>2</sup> Grievant's evidence, not controverted by the Department, is overwhelming that {language 2}-{language 1} are effectively identical languages, two dialects or variants of the language designated as {language 2}-{language 1}. Grievant has introduced extensive academic literature supporting this conclusion. James E. North of the Department of State advised the Agency that the "linguistic reality" is that "the regional variants of this language {language 2}-{language 1} and {language 3} . . . are essentially the same {language group} language they were when it was called {language 2}-{language 1}. The Agency was informed that "DLS [Diplomatic Language School], another of our language schools, also confirms [in regard to {language 2}-{language 1}] that these languages are essentially the same language." The Department of State has concluded that {language 2}-{language 1} are variants of a single language.