

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

[Grievant]

Record of Proceedings  
FSGB No. 2009-004

And

September 10, 2009

Department

**DECISION**

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For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Alfred O. Haynes

Nancy M. Serpa

Special Assistant

Margaret C. Sula

Representative for the Grievant:

*Pro se*

Representative for the Agency:

Nancy Kripner  
Human Resources Manager  
USFCS/OFSHR

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** The Board found nothing to support the agency's claim of a "long-standing" policy to deny Residence Transition Allowance (RTA) to Commercial Officers, when one of the qualifying U.S. duty locations was a training assignment. The Board sustained grievant's claim that the agency wrongfully denied his request for RTA.

## OVERVIEW

In [Year #1], grievant was assigned to a one-year language training assignment at the National Foreign Affairs Training Center in Virginia. During that time, he purchased and resided in a home in Virginia and commuted from that home to the Training Center in Virginia. Upon completion of that assignment, grievant was assigned abroad. In early [Year #2], grievant returned to the U.S. and was assigned to a position in Connecticut. Shortly thereafter, he sold his home in Virginia and purchased one in Connecticut.

In October [Year #2], grievant had a conversation with a transportation specialist in Commerce about receiving RTA. He was told that Commerce had a policy not to grant RTA to employees who purchase or sell their home while in a training complement. Notwithstanding this conversation, in February [Year #3], grievant filed a request for RTA. That request was denied on the same basis of the policy cited above.

At the time grievant filed his request, the operative regulations defined a "duty station" as "the station to which an employee is officially assigned" and did not expressly exclude training assignments from this definition. On July 2, 2007, well after grievant had filed his application, the operative regulations were changed to provide: "**For Commerce and BBG, only:** The definition of a domestic duty station for the purpose of Residence Transaction Allowance does not include assignments to long term training." (Emphasis in original.)

The Board found no evidence to support the agency's claim that it had a long-standing policy and practice of denying RTA to officers assigned to long-term training, in contradiction of the plain language of the regulation, prior to the time it incorporated this restriction into the regulation itself. The Board therefore found that the agency improperly denied grievant's request for RTA.

The grievance was sustained. The agency was directed to process grievant's request for RTA, consistent with the findings of this decision.

## **DECISION**

### **I. THE GRIEVANCE**

[Grievant], an FO-02 Commercial Officer with the Foreign Commercial Service, (FCS, Commerce, the agency), filed a grievance on September 25, [Year #4] in which he claimed that the agency wrongfully denied his application for Residence Transaction Allowance (RTA). For relief, he sought:

- (1) Payment of his RTA claim in the amount of \$25,631.50 and
- (2) All other relief deemed just and proper.

On December 22, the FCS denied the grievance and on February 18, [Year #5], grievant appealed that decision to the Foreign Service Grievance Board (FSGB). On appeal, he seeks the same relief, with interest, from the date the RTA should have been awarded to him.

### **II. BACKGROUND**

In August [Year #1], grievant was assigned to language training at the National Foreign Affairs Training Center (NFATC) in Virginia. During that time, he purchased, owned, and resided in a home in [Named City], Virginia and commuted from that residence to the training center. In August [Year #6], upon completion of his training, [Grievant] was assigned abroad, first to [Named Post #1], then to [Named Post #2]. In February [Year #2], grievant returned to the U.S. and was assigned to the U.S. Export Assistance Center in Middletown, Connecticut. On March 24, [Year #2], grievant purchased a home in [Named city], Connecticut and in the same month, he sold his home in [Named City], Virginia. On approximately October 13, [Year #2], grievant had a conversation with a Travel and Transportation Specialist at Commerce about receiving RTA as reimbursement for certain

costs associated with the purchase and sale of the home he bought in Connecticut and the one he sold in Virginia. On the next day, October 14, [year #2], the Specialist responded to grievant's inquiry by stating in part:

I checked your personnel file and found that in March of [Year #6], when you said you bought your house in Washington D.C. [sic], you were assigned to the training complement. Therefore your request for a residence transaction allowance is denied. It has been OFSHR's [Office of Foreign Services Human Resources] policy not to grant residence transaction allowances to officers who purchase or sell homes while in training complement.

Despite receiving this information, on February 9, [Year #3], [Grievant] filed an application for RTA. At that time, the applicable regulation<sup>1</sup> stated, in part:

The items covered and the amount allowed for this allowance is found in the Federal Travel Regulations (FTR), chapter 302-11. However, employees who transfer from a domestic duty station to a location abroad, and who, after completing one or more assignments abroad, are assigned from a location abroad to another domestic duty station in a different city that is at least 50 miles away from the previous domestic duty station [sic]. Allowable expenses for the sale and/or purchase of a residence may be claimed only if the employee meets the five criteria as set forth below:

- (1) Owned a residence at the former domestic duty station; and
- (2) Occupied such residence when assigned to the former domestic duty station; and
- (3) Commuted to and from work on a daily basis from such residence; and
- (4) Retained ownership of such residence while assigned abroad until receipt of a permanent change-of-station travel authorization for travel to the domestic duty station; and
- (5) Signed a continued service agreement prior to authorization of this allowance.

14 FAM 631.3-5 is part of a set of uniform regulations applicable to the Department of State, the Broadcasting Board of Governors (BBG), the U.S. Agency for International Development (USAID), and the Departments of Commerce and

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<sup>1</sup> See, 14 FAM 631.3-5 (a).

Agriculture. The regulations have been in effect at least since May 27, 2005. The applicable regulation at the time grievant filed his request for RTA defined a “duty station” as “the station to which an employee is officially assigned”<sup>2</sup> and did not expressly exclude training assignments from this definition. 14 FAM 631.3-5 was amended, however, on July 2, 2007, well after grievant’s RTA application was submitted. The amendment changed the number of the regulation (14 FAM 631.3-5 became 14 FAM 632.2) and a new section “c” was added, specifying that training assignments are not included in the definition of a domestic duty station when applications for RTA are submitted by employees of Commerce and BBG.<sup>3</sup>

Prior to the 2007 amendment, however, on September 26, [Year #3], the Office of Foreign Service Human Resources (OFSHR) at Commerce informed grievant that his request for reimbursement was denied. The denial notice contained the following statement: “OFSHR’s policy is not to award residence transaction allowances to officers who purchase homes while in training assignments of one year or less. You purchased your home in [Named City], Virginia while you were in long-term language training. Therefore, you are not eligible for reimbursement of home purchase expenses.”

On September 25, [Year #4], [Grievant] filed a grievance with the agency which was denied on December 22. On February 18, [Year #5], [Grievant] appealed that decision to the Foreign Service Grievance Board (FSGB, the Board).

On March 9, the grievant advised this Board that he would not seek discovery nor file a supplemental submission. On April 8, the Agency filed its response to the

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<sup>2</sup> 14 FAM 511.3, Definitions.

<sup>3</sup> This new section states: “**For Commerce and BBG only:** The definition of a domestic duty station for the purpose of Residence Transaction Allowance does not include assignments to long-term training. (Emphasis in original).”

grievance and on April 21, grievant submitted a reply. The Record of Proceedings (ROP) was closed on June 10, [Year #6].

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

#### **Grievant**

Grievant's position is that he is entitled to RTA because he meets the stated regulatory criteria. He challenges the agency's claim that it has followed a long-standing practice of disallowing RTA to officers who purchased homes while on a training assignment lasting one year or less. Grievant disputes the value of a spreadsheet of names of employees who have received RTA that was submitted by Commerce as evidence that it has consistently applied its interpretation of the regulations over a period of years.<sup>4</sup> Grievant contends that since the spreadsheet only shows the names and assignments of officers whose RTA applications were approved, there is no way to tell from the spreadsheet the precise question at issue here – whether the agency has consistently *denied* RTA to employees because they purchased homes while on training assignments. Indeed, grievant notes, one of the persons identified on the agency spreadsheet was apparently in a training assignment when he nonetheless received RTA approval. Thus, grievant argues, the agency did not provide any documentation to support its policy interpretation, nor did it produce any evidence to show that such a policy ever existed.

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<sup>4</sup> Grievant claims in his grievance appeal that in October [Year #2], the American Foreign Service Association (AFSA) submitted a request to OFSHR for documentation to show which of its officers had requested RTA since [Year #7]; which officers received it; which were denied; and the reasons for the denials. In response to this request, OFSHR prepared a spreadsheet showing the names of those officers whose RTA requests had been approved and where they were assigned at the time of the approvals. There was no indication on the spreadsheet to show how many officers made RTA requests that were denied. The agency provided no other response to the request for information.

Grievant relies, then, on the regulation that was in effect at the time he applied for RTA in February [Year #3] which did not exclude training assignments from its definition of domestic duty station. Grievant argues that since he met all of the express criteria of the regulations, he is entitled to have his application for RTA approved. He further argues that the subsequent amendment of the regulation cannot be applied to his case retroactively and is not evidence of a long-standing practice or policy.

### **The Agency**

The agency contends that grievant is not eligible for RTA because he purchased his home in [Named City], Virginia when he was assigned to language training. The agency argues that its policy is “to not grant the residence transaction allowance to Commercial Officers when one of their qualifying U.S. duty locations is for a training assignment” because “training assignments are relatively short in duration and are really meant to be postings ‘in transit’ rather than true posts of assignment.”

The agency claims that it has consistently applied this policy of excluding training assignments from the definition of “domestic duty stations.” The agency offers several e-mails that purportedly demonstrate that it has consistently defined “domestic duty station,” for purposes of determining eligibility for RTA, as excluding training assignments. The agency further relies on a spreadsheet listing the names of employees who received RTA from [Year #7] to [Year #3]. The agency admits that the spreadsheet shows that it once approved RTA for an officer who was in long-term training when he purchased a home, but insists that this case was contrary to existing policy. As to this one case, the agency argues that the recipient in question was first assigned to a headquarters position before being assigned to training and was “not [in] a typical long-

term language Training Complement Assignment.” The officer who received RTA while in a training assignment was detailed to another assignment both in advance and after the training assignment. The agency argues further that despite this erroneous RTA approval, grievant cannot identify any authority that would permit the agency to repeat the same error in his case and award him RTA, despite regulations and policy to the contrary.

Finally, the agency rejects grievant’s claim that it “tacitly admitted” to a prior practice of including long-term training in the definition of domestic duty station when it subsequently revised 14 FAM 631.3-5. The agency contends that the 2007 amendment to the regulation merely codifies what had been long-standing agency policy regarding RTA eligibility criteria.

#### **IV. DISCUSSION AND FINDINGS**

The instant claim fits the definition of a grievance inasmuch as it alleges a denial of an “allowance, premium pay or other financial benefit” to which grievant “is entitled.” 22 CFR 901.18(a)(7). Specifically, grievant argues that he has been wrongfully denied RTA benefits despite meeting all of the requirements outlined in applicable regulations. In all grievances, other than those involving disciplinary actions, the grievant has the burden to show, by a preponderance of the evidence, that his claim is meritorious.<sup>5</sup>

There is no dispute between the parties that the applicable regulation at the time grievant filed his request for RTA was 14 FAM 631.3-5. Pursuant to this regulation and assuming for the moment that a training assignment is properly considered a domestic duty station, we note that grievant otherwise met all five criteria for receiving RTA in connection with the purchase and sale of his homes in Connecticut and Virginia. That is,

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<sup>5</sup> 22 CFR 905.1 (a)

he was stationed in two different domestic duty stations; the two domestic duty stations are more than fifty miles apart; the domestic duty stations were separated by an overseas assignment; and grievant bought a residence that he both occupied and commuted from daily during his first duty assignment.

Thus, the only question is whether grievant's assignment to long-term training in Virginia is properly considered a domestic duty assignment for the purposes of RTA. At the time grievant applied for RTA, the regulation defining a duty station provided simply that it was "the station to which an employee is officially assigned." 14 FAM 511.3. Neither that regulation nor 14 FAM 631.3-5 as enacted either expressly or impliedly excluded official assignments for training from the definition of duty station, either generally or for the purposes of RTA. Therefore, since there is no dispute that grievant was officially assigned to the language training complement, it follows that on the face of the regulations he was in an official duty station when he was so assigned and thus entitled to RTA.

The question remaining, then, is whether, prior to the 2007 amendment to the definition of duty station for the purposes of RTA, the agency had interpreted the regulation in a manner different from its stated language and under circumstances that this Board must recognize. The Department of Commerce, like any federal agency, may establish interpretive rules and general statements of policy, procedure or practice that interpret the language of a regulation. These policies and practices are respected only insofar as they are consistent with the plain meaning of the regulation, and are of long-standing; are consistently applied; and are made clear to the employees whom they cover. 2 Am Jur 2d Administrative Law § 150; Dunnell Minn. Digest Statutes § 5.05 (4<sup>th</sup> ed.);

*Reynolds Metals Co. v. Combs*, 2009 Tex. App. LEXIS 2466 (Tex. App., Apr. 8, 2009); *GE Solid State v. Director, Division of Taxation*, 132 N.J. 298 (N.J. 1993). To the extent that the FAM regulations represent collectively bargained terms between the agencies and the employees' union, past practices can also be significant tools of contract interpretation because they represent proof, through conduct, of mutual intent that a particular interpretation is appropriate. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Cruz-Martinez v. Department of Homeland Security*, 410 F.3d 1366 (Fed. Cir. 2005).

In the instant case, it does not appear that the agency's stated policy is consistent with the plain meaning of the regulation. The plain meaning of the regulation includes all official assignments in the definition of duty stations without exception. Thus, an official assignment to language training would qualify as a duty station. In addition, a duty station is distinguishable from a temporary duty station. As grievant argues in his reply submission, "[a]n employee must either be in a duty station . . . or . . . on temporary duty and receiving per diem and subsistence expenses." The agency does not dispute this contention. The parties also agree that when grievant was assigned to long-term language training for one year in Virginia, he received neither per diem payments nor subsistence expenses. He was, therefore, in a non-temporary domestic duty station. The agency's alleged policy of interpreting the term "duty station" to exclude long-term training assignments, therefore, is inconsistent with the ordinary meaning of the term.

Moreover, there is no evidence presented that the agency's policy of excluding long-term training from RTA eligibility has been consistently applied, or is long-standing or was clearly publicized to the affected employees. In support of its claim that the

policy was long-standing, the agency submitted a spreadsheet of employees who received RTA between [Year #7] and [Year #3]. It is unclear from this record, however, how many requests for RTA were denied specifically because the requesting officers were assigned to long-term training when they purchased a home while in a domestic duty station. The spreadsheet establishes nothing other than the fact that one officer in [Year #1] was approved for RTA while at OIO (Overseas Investment Office) Training Complement. Again, as grievant argues and the agency concedes, this tends to undermine the agency claim of consistent application of its policy interpretation.

The e-mails submitted by the agency are equally unavailing. In redacted e-mails from the years [Year #6] and [Year #8], the agency reportedly denied RTA requests from individuals who were assigned to language training. It is unclear what the recipients' responses were to these e-mails – whether, for example, grievances were filed and, if so, what the results were. Moreover, for the entire span of years from [Year #7] to the present, there appear to have been only three, possibly four, employees whose requested RTA applications were denied. And in all but one instance, the RTA was denied not because of a long-term training assignment, but because the employee purportedly did not anticipate returning to his former domestic duty station.<sup>6</sup> However, this reason has nothing to do with the agency's claimed policy concerning long-term training. To the extent that the e-mails prove anything, they seem to establish only that the agency's

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<sup>6</sup> The agency does not argue that this grievance should be denied because grievant did not have an expectation of returning to the Washington, D. C. area. In any event, grievant argues in his reply that he has every expectation of returning to that area in future assignments. Specifically, he claims that his language training was “already my third Washington [area] assignment.” Also, he states: “I submit I had a ‘reasonable’ expectation of returning to an assignment in U.S. Commercial Service Headquarters or NFATC in the Washington, D. C. area.” Finally, grievant argues that in 2004, another regulation applicable to RTA – FTR § 302.11-1 – was revised to exclude a “reasonable expectation of returning to the former official station.” Thus, the e-mails that cite the lack of an expectation of returning to the former official station appear to be irrelevant to this grievance.

purported RTA policy was not well known among the employees because in each instance the employee submitted the request asserting that he was entitled to be reimbursed.

We also find unpersuasive the agency's claim that the amendment to 14 FAM 631.3-5 as now found at 14 FAM 632.3 is a codification of its long-standing policy of excluding training assignments from the definition of domestic duty stations. As grievant argues, it appears that the original regulation was modified on two occasions from its first enactment to its amendment in 2007. In both May 2005 and September 2006, the relevant regulations were amended. However, the purported policy was not codified into the regulation on either occasion. Indeed, even after this grievance was filed in February [Year #3], the agency did not attempt to clarify its purported long-standing policy when in September of the same year, it engaged in the process of amending RTA-related regulations. The agency fails now to explain why it waited until 2007 to modify the regulation at issue. We think that the failure of the agency to clarify its RTA practice during either the 2005 or 2006 amendment processes is telling, and undercuts the agency's claim.

Having thoroughly examined the regulations, the e-mails and the spreadsheet submitted by the parties, this Board finds nothing to support the agency's claims of a long-standing policy. Thus, absent any other evidence to show a written or otherwise documented policy, we find no basis to conclude that such a policy ever existed or that it can properly modify the plain language of the regulation in question. Accordingly, this Board concludes that the agency used an invalid criterion to improperly deny grievant's request for RTA.

## **V. DECISION**

The grievance is sustained. The agency is directed to grant grievant's request for a residence transaction allowance retroactive to September 26, [Year #3], such payment to be made in accordance with the Back Pay Act, 5 U.S.C.A. § 5596.