

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

and

Record of Proceeding
FSGB No. 2009-040

April 21, 2010

U.S. Agency for International Development
Agency

ORDER
EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Harriet Davidson

Board Members:

Lois E. Hartman
Richard J. Shinnick

Special Assistant:

Margaret C. Sula

Representative for the Grievants:

Pro Se

Representative for the Department:

Agnes D'Alessandro
HR/ELR

Employee Exclusive Representative:

American Foreign Service Association

ORDER: TIMELINESS

I. Issue

██████████, grievant, filed a grievance with the U.S. Agency for International Development (USAID or Agency) on August 27 2009, concerning the setting of his salary in the personnel action which promoted him from FS-1 to FE-OC in the Senior Foreign Service (SFS). The Agency did not issue a decision within the required 90 days and the grievant filed an appeal with this Board on December 7, 2009. In the letter acknowledging the appeal the Board noted that there were questions of jurisdiction (timeliness) and invited the parties to file briefs by December 21, 2009. Both parties requested extensions, which were granted by the Board. The response from grievant was received on January 11, 2010 and from the Agency on January 15, 2010. This order addresses the timeliness issue.

II. Background

Grievant was promoted to the SFS on April 2, 2006 and received an increase in salary from \$132,237 to \$136,800 (a 3.45% increase). Grievant believed the increase should have been a two pay - step equivalent or a 6% increase as required by Agency regulations (ADS 470.3.9.3). He contacted a member of the Human Resources (HR) staff and told him that he believed his SFS salary had been set incorrectly. Grievant was told that the Agency had set an upper limit on salary adjustments and that he was not entitled to a two-step or 6% increase.

Noting that timeliness was at issue, the Board requested the parties to file briefs on this subject.

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III. Positions of the Parties

The Grievant

Grievant argues that his claim is not barred by the statute of limitations because although the salary setting error occurred in April of 2006, his annual salary increases in 2007, 2008, and 2009 are incorrect because of the initial error made in 2006. Therefore, all subsequent salary increases are continuing violations.

Further, when grievant raised the issue of his salary adjustment level with the Agency's Human Resources Office, he was told that the Agency had decided that 3.45 % would be the amount for the salary increase for FS-1 officers promoted into the SFS. It was not until the Agency's General Notice dated February 1, 2008 was issued that grievant learned that Agency policy for promoting employees from FS-1 to SFS included a 6% salary increase. This was the first Agency-wide official notice relating to the salary setting policy since the error occurred in setting his salary in April 2006. He filed his Agency level grievance in August 2009, well within the two year time period ending on February 1, 2010.

The Agency

The Agency argues that the regulations, specifically 3 FAM 4427(a), provide that a grievance is forever barred unless it is presented to the Agency within two years of the occurrence of the action/event giving rise to the grievance. Grievant claims that his salary level was incorrectly set when he was promoted into the SFS in April 2006. He did not file a grievance concerning this action until August 2009 – way beyond the two year time frame specified in the regulations.

Grievant argues that it is a continuing violation every year that his pay is adjusted incorrectly as a result of the initial error made in 2006. This argument was not raised in his Agency level grievance and is without merit. The Agency cites to *Ledbetter v. Goodyear Tire &*

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Rubber Co., 550 US 618 (2007) wherein the Supreme Court upheld the Court of Appeals ruling that a pay setting decision is a discrete act that occurs at a particular point in time. The Agency states “As in *Ledbetter*, the setting of grievant’s pay on April 6, 2006 was a discrete act and does not constitute a continuing violation.”

Further, the Agency points out that the grievant would have been late in filing his grievance even, assuming arguendo, that grievant did not become aware of the pay issue until October 2006. This is when grievant contacted HR and was told that his pay adjustment was based on his 2005 FS-1 salary, not his 2006 FS-1 salary.¹ If that had been the case, he would have needed to file his grievance by October 2008.

IV. Discussion and Findings

22 U.S.C Section 4134 sets forth the time limits for filing a grievance and provides:

A grievance is forever barred under this chapter, 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

¹ There are a series of e-mails in the ROP that explain the basis for the setting of grievant’s salary level. A November 30, 2007 e-mail states “... [grievant] 2005 FS-01, step 8, base pay plus locality salary was \$127,841. A 6% increase (\$7670) of that would come to \$135,511. He actually received, based on the Acting Administrator’s decision (March 29, 2006) quoted below, the higher salary of \$136,800 (90% of EX-III) upon promotion.” The quote referenced above is also in the November 30, 2007 e-mail as follows: “...Officers promoted into the SFS will receive either a six percent increase to their 2005 FS-01 base pay, with locality pay factored in for all Officers, or \$136,800 (90 percent of EX-III), whichever amount is higher. For this year, any Officer promoted from FS-01, step 8, or lower will have initial SFS pay set at \$136,800.” At the time of promotion into the SFS, grievant was an FS-01, step 8.

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.

To decide whether this grievance is timely, we must first determine the date of the occurrence giving rise to the grievance. Grievant was promoted into the SFS on April 2, 2006. Grievant's argument that he was not aware of the 6% pay increase for promotion into the SFS until the agency notice issued in February 2008 is belied by the record.

Grievant first would have become aware of the level of his salary either when he received his first paycheck after the promotion or when he received a copy of the Notification of Personnel Action (SF-50) dated April 2, 2006 effecting the promotion. In an email message to Darren Shanks in the Office of Human Resources (HR) dated October 10, 2006, grievant stated that he believed his salary was set incorrectly because the agency policy set forth in the Automated Directives Systems (ADS) was that promotions into the SFS would be equivalent to a 6% increase and his salary only reflected a 3.45% increase. Shanks informed grievant on October 12, 2006 that the chapter of the ADS cited by grievant in his email message predated the Agency's pay for performance system and "The Performance Management and Pay Administrative Plan approved by the Administrator contained the policy and calculation for how promotions in to the SFS would be derived." In a previous email message Shanks explained that the increase to grievant's pay was based on the base pay he earned as an FS-01 in 2005, not his 2006 salary (therefore resulting in only a 3.45% increase as it did not include the 2006 cost of living adjustment). Thus, we find that grievant was aware of the grounds for the grievance in 2006 yet did not bring the grievance until almost three years later.

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Grievant argues that the salary setting as a part of the promotion action was the starting point of the problem and resulted in a continuing violation over the years. The initial pay decision was a discrete act that grievant challenged in October 2006.² He does not allege any improper act on the part of the Agency that occurred within the limitations period. Accordingly, we dismiss his appeal on the grounds that [REDACTED] original grievance was not timely.

V. Decision

The grievance appeal is dismissed with prejudice because it was not timely filed.

² This is not affected by the Lilly Ledbetter Fair Pay Act of 2009 as that act applies to discriminatory compensation decisions, which is not alleged here.

For the Foreign Service Grievance Board:

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Member

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