

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

Grievant

And

Agency

Record of Proceedings  
FSGB No. 2010-003  
July 6, 2010

**DECISION  
EXCISION**

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For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Lois E. Hartman  
Jeanne Schulz

Senior Advisor

Margaret Sula

Representative for the Grievant:

American Foreign Service Association

Representative for the Agency:

Agnes D'Alessandro  
Chief  
Labor & Employee Relations Division

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** Grievant failed to carry his burden to prove that equitable estoppel applied when the agency erroneously hired him at a higher grade and step level than advertised in its vacancy announcement.

## OVERVIEW

In response to an agency vacancy announcement, grievant, a retired Army Lt. Colonel, applied for one of 16 positions available for an FS-03 executive officer, with a posted salary range of \$64,447 - \$94,643 (FS-03 step 1 – FS-03 step 14). After providing his salary and work history, he received notice that he was being considered for an appointment to the FS-03 position with a proposed salary of \$100,753 (FS-02, step 9). He was asked to confirm that he wished to be considered, which he did. He received a letter of employment at that grade level and was sworn in at that level. Eleven days later he was advised that his grade level was improper and would be corrected to FS-03 step 14, retroactive to his date of appointment.

The grievant filed a grievance challenging this action, to which the agency did not respond within the time specified by regulation. He then appealed to this Board, alleging that his case presents all the elements of equitable estoppel and that there is no legal impediment to requiring the agency to pay him at the higher level offered. The agency responded that the vacancy announcement clearly identified the position as having a maximum salary of \$94,643 per year, denied that its agents had authority to offer more, and averred that to do so would violate merit system promotion principles and give grievant an unfair advantage with a salary that had not been subject to open and fair competition.

The Board found – as it did in a companion case designated FSGB Case No. 2010-004 -- that grievant applied for an FS-03 position knowing that its top salary was \$94,643. His tentative offer of employment specified that “This proposed salary is based on your current salary and the announced highest available for this position.” The \$100,753 offer clearly did not comport with the highest available for the FS-03 position previously posted. Grievant noticed the difference, but did not ask for clarification or point out the discrepancy to agency officials, instead claiming that the agency decided to raise his salary upon considering his salary history.

The Board held that the elements governing equitable estoppel were not present in this case. Grievant’s reliance on the erroneous salary offer was not reasonable under the circumstances; his claim that the agency had discretion to set the salary at a higher level is inapposite to the facts of this case; there is no evidence that the HR personnel had actual authority to deviate from the top salary posted for the position, and to find otherwise would violate Merit System promotion principles regarding fair and open competition. Moreover, the record contains no documentation supporting his claim that in detrimental reliance on the offer he spent “upwards of \$10,000” by moving to the U.S. from abroad.

## **DECISION**

### **I. THE GRIEVANCE**

Grievant is an Executive Officer with the Agency. He filed a grievance with the agency on October 27, {year} regarding his starting salary and, having received no response within 90 days, pursuant to 22 CFR § 903.1(b), filed a grievance appeal with this Board. Grievant states that the agency offered him a BS-03 position at the FS-02, step 9 level with a basic salary of \$100,753, which he accepted. He was sworn into the agency on September 14, {year} at that grade, step and salary, but on September 25 was orally notified that this was in error, as the position he had applied for was an FS-03 with a maximum salary of \$94,643. That notification was followed up by a letter dated September 28, 2009, from the agency's Chief of Foreign Service Personnel, Office of Human Resources, informing grievant that the agency would correct the oversight, retroactive to his date of appointment. For relief, grievant essentially argues the principles of equitable estoppel, requesting that the agency's original offer and his acceptance be enforced by the Board. The issues and arguments raised in this grievance appeal are essentially the same as those presented in a companion case designated as FSGB Case No. 2010-004.

### **II. BACKGROUND**

Grievant retired from the Marine Corps as a Lieutenant Colonel on September 1, {year}. His salary history indicates that for six years from September 1, {year} until his military retirement, grievant was paid \$88,464 per annum. From October 1, {year} to April 1, {year} (six months), he worked as a Senior Member of Technical Staff at Sandia National Laboratories in {city}, {state}. He states (but has provided no record evidence) that the annual salary for that position was \$100,600. In response to an agency vacancy announcement, on December 29, {year} he applied for an FS-03 executive officer position. The salary range for the position was

set at \$64,447 - \$94,643. The record indicates that grievant submitted his salary/work history to the agency on January 13, {year}.

On April 9, {year}, grievant received an e-mail message from {name} (Agency, Human Resources) who confirmed that grievant was being considered for an appointment in agency's Foreign Service (FS). The proposed salary was listed at \$100,753, grade 2, step 9 and the position title was listed as Mid-level, BS-03,<sup>1</sup> Executive Officer. The e-mail noted that the proposed salary was "based on your current salary and the announced highest available for this position." Grievant was asked to indicate his acceptance of the conditional salary offer by signing and returning the attached form to {name} by e-mail or fax on or before April 14, {year}. Grievant accepted the salary offer on the same date he received Ms. Parker's e-mail, April 9,{year}.

Grievant was informed in a letter dated July 10, {year} from {name}, agency's Special Projects Officer, that his appointment to the agency would be effective on September 14, {year}.

The following information was included:

|                        |                                      |
|------------------------|--------------------------------------|
| Type of Appointment:   | Career Candidate (Mid-level Officer) |
| Foreign Service Class: | FPL-02/09                            |
| Annual Salary:         | \$100,753                            |
| With Locality:         | \$124,027                            |
| Position Title:        | Mid-level Executive Officer (BS-03)  |

On September 25, {year}, eleven days after having been sworn in, grievant was orally notified that his salary level was in error. In a letter dated September 28 from the agency's Chief of Foreign Service Personnel, grievant was advised:

As you are aware, your employment candidacy was based on the application you made in response to the vacancy announcement for "Executive Officer (Backstop 03), FS-3." Our salary offer should have corresponded to the grade level advertised. Unfortunately,

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<sup>1</sup>BS: Back Stops are occupational categories. For example, BS-04 jobs are Financial Officer positions; BS-02 jobs are Program Officer positions.

you were mistakenly brought on Board at the FS-2 level and corresponding salary instead of the correct FS-3 level.

In order to correct this oversight, we will adjust your beginning salary to reflect the correct grade/step level of FS 3/14 and the corresponding salary level on the date of your appointment.

Grievant filed a grievance challenging this action on October 27, {year}, to which the agency did not respond. In accordance with 22 CFR § 903.1(b), grievant then appealed to this Board on January 26, {year}. The agency filed its responsive submission on March 5, {year}, to which grievant replied on March 9. The ROP was closed on June 22, {year}.

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

#### **GRIEVANT**

Grievant alleges that his case presents all of the elements of equitable estoppel as articulated by this Board in FSGB Case No. 2007-034 (July 30, 2008):

- Misrepresentation by the agency's Office of Human Resources employing specialist;
- Reasonable and good faith reliance on the representation by grievant;
- Financial detriment to grievant from such reliance.

Grievant contends that the agency's vacancy announcement specified that it was seeking to hire mid-level employees at the FS-03 level and that salary and grade would be based on the applicant's salary history. The salary history grievant provided upon the agency's request was above the pay set for an FS-03, step 14.

Grievant distinguishes his appeal from *OPM v. Richmond*,<sup>2</sup> arguing that contrary to the facts in that case, there is no legal impediment to requiring USAID to pay him at the FS-02 grade level it offered, he accepted and thereafter should have received after having been sworn in. He claims that being paid at the higher salary level would not constitute improper disbursements

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<sup>2</sup> *OPM v. Richmond*, 496 U.S. 414 (1990).

from the federal treasury without statutory authorization, because Congress appropriated funds for his pay in general, and OPM approved use of those funds for salary purposes. He contends that there are no legislative restrictions to setting his salary at the higher rate. He cites H.R. 1105, effective March 12, {year}, as authority for the agency to hire above the FS-04 level:

(m) HIRING AUTHORITY – Notwithstanding section 307 of the Foreign Service Act of 1980, the agency Administrator may hire up to 30 individuals under the Development Leadership Initiative: Provided, That the authority contained in this subsection shall expire on September 30, {year}.<sup>3</sup>

Grievant quotes this Board’s discussion of equitable estoppel in FSGB Case No. 2007-034, at page 12, as follows:

As the Board previously has noted,<sup>4</sup> quoting *Hertzberg v. Veneman*, 273 F. Supp. 2d 67 (D.D.C. 2003), *OPM v. Richmond* does not stand for “the proposition that the representations of a government employee can never create a duty in the employee’s agency . . . .” Indeed, “it is clear to this Court that there may be circumstances in which an agency may be bound by the representations of its employees . . . .” The Court stated that it would apply the doctrine of estoppel where there was a showing that “(1) there was a ‘definite’ representation to the party claiming estoppel; (2) the party relied on its adversary’s conduct to his detriment; and, (3) the reliance on the representation was reasonable.” Of course, “it is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority<sup>5</sup> -- which authority “may be conferred either expressly or by necessary implication.”<sup>6</sup>

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<sup>3</sup> Citing Division H, Title II.

<sup>4</sup> FSGB Case No. 2005-069 (April 27, 2007) at 10-11. *See also* FSGB Case No. 2003-018 (September 17, 2004), at 20.

<sup>5</sup> *U.S. v. Walcott*, 972 F.2d 323, 327-28 (11<sup>th</sup> Cir. 1992), *citing Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Dresser Industries v. U.S.*, 596 F.2d 1231, 1236 (5<sup>th</sup> Cir. 1979).

<sup>6</sup> *Carr v. Runyon*, 89 F.3d 327, 331 (7<sup>th</sup> Cir. 1996); *U.S. v. Greene*, 995 F.2d 793, 800 (8<sup>th</sup> Cir. 1993).

Grievant disputes the agency's position that he had demonstrated a willingness to accept an appointment at the FS-03 level by countering that the argument is speculative – anyone can apply for a job, but no one has to accept a job offer. He argues that when the agency's representative made a formal offer of employment to him at the FS-02 step 9 level, the representative was acting within the scope of his actual authority. Grievant further asserts that he reasonably relied on that offer and accepted it to his detriment. He claims expenses of over \$10,000 in moving to Washington from abroad to enter on duty. He claims that he reasonably believed that the agency had considered his salary history and work experience as warranting the FS-02/9 salary level and had no reason or obligation to question it, and that the agency lured him to Washington under "false premises" and is now engaging in "blame the victim arguments." Grievant claims that nowhere does the agency state that employing him at the FS-02 level is illegal or beyond Congressional appropriations.

### **THE AGENCY**

The agency points to the vacancy announcement, which clearly identified the position as being at the FS-03 level only. The salary range for the position was clearly identified as \$64,447 through \$94,643 per year. Upon its discovery of the error in hiring grievant at the FS-02/9 level, the agency promptly notified him that his salary would be corrected to FS-03/14. Grievant specifically applied for the FS-03 position, knowing that at most he would earn \$94,643.

The April 9, {year} e-mail to grievant confirming that he was being considered for appointment to the agency at the FS-2/9 grade level, with a basic salary of \$100,753, also contained a "disclaimer" advising that: "This proposed salary is based on your current salary and the announced highest available for this position." The error was obvious in that the salary offered did not correspond to the highest salary available for the position advertised. Grievant

knew or should have known that this was a mistake. The agency acknowledges that its appointment letter repeated the error. However, it notes that the Board in FSGB Case No. 2007-034 also stated: “[I]t is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority.”

The agency avers that “neither {name} nor {name} had the authority to extend a job offer to a position that had not been announced or was not based on the applicant’s qualifications for that particular position.” It contends that the government cannot be bound by an agent acting outside his or her scope of authority.

The agency cites 22 U.S.C. § 3964, providing that the agency has the right to assign all FS personnel to appropriate salary classes. It avers that management has the right to make selections based on its determinations of an individual applicant’s qualifications, skills and abilities, and to fill vacant positions at the indentified FS-03 level. To require the agency to appoint grievant at the FS-02 level would interfere with management rights.

The agency further argues that the Foreign Service “shall be administered to the extent practicable in conformity with general policies and regulations of the Government.”<sup>7</sup> Merit system principles, as set forth in 5 U.S.C. § 2301, require that recruitment be from qualified individuals from appropriate sources, with selection determined solely on the basis of relative ability, knowledge, and skills after fair and open competition to assure that all receive equal opportunity. It would violate merit system promotion principles and give grievant an unfair advantage to require the agency to appoint him to a position (presumably salary level) that had not been subject to open and fair competition.

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<sup>7</sup> 22 U.S.C. § 3925.

Grievant chose to apply for an FS-03 position, knowing that its maximum salary was \$94,643. To imply that he would not have accepted an offer of employment at that salary is not credible. Had the vacancy been announced at the FS-02 level, there is no guarantee that grievant would have been among the best qualified or that he would have met the basic qualifications for the position. The agency rhetorically questions if grievant had erroneously been offered a position in the Senior Foreign Service, whether the agency would then be bound by that offer.

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

Under the provisions of 22 CFR § 905.1 (a), grievant has the burden of establishing by a preponderance of the evidence that his grievance is meritorious. Based on our discussion below, we find that he has not met that burden.

On December 29, 2008, grievant applied for one of 16 vacant Executive Officer FS-03 positions advertised as open on September 11, 2008. The salary range listed on the announcement was from \$64,447 (FS-03 step 1) through \$94,643 (FS-03 step 14). On April 9, 2009, he received an e-mail from {year} indicating that he was being considered for an appointment with the agency with a “Basic Annual Salary of \$100,753.\*” and “Foreign Service Grade/Step: FPL-02/09.\*” The asterisks were explained as follows: “This proposed salary is based on your current salary and the announced highest available for this position.” The grade and step listed in {name}’s April 9 e-mail clearly did not comport with the grade level and highest available salary for the posted position. Because grievant’s employment was contingent upon the availability of funds for hiring, he was asked to indicate his acceptance of the conditional salary offer by signing and returning a copy on or before April 14, {year}, if he wished to remain under consideration for one of the posted positions. He was cautioned, however, that the offer of future employment was conditional and could be revoked prior to his

entry on duty. Bruce accepted the conditional offer on April 9, the same day that he received {name}'s e-mail.

A letter dated July 10, {year}, from {name}, Special Projects Officer, informed grievant of his appointment, effective September 14, {year}, as a Mid-Level Executive Officer (BS-03) with a Foreign Service Class of FPL-02/9 and an annual salary of \$100,753. Grievant noticed the difference in salary between the advertised high range for the position in the vacancy announcement (\$94, 643) and the \$100,753 specified in his offer, but did not ask for clarification or point out the discrepancy to agency officials at any time between April 9 and his swearing-in on September 14, {year}. Instead, he now seeks to explain away the discrepancy by suggesting that the agency just decided to raise his salary offer upon considering his salary history.

We do not find his speculation concerning the basis for the salary differential “reasonable” so as to justify invocation of equitable estoppel. We note that grievant has never asserted that he would have refused the position if it had been offered at the stated maximum, \$94,643. There was no showing, therefore, of any detrimental reliance by the grievant on the mistaken information he was given regarding his initial salary. Moreover, even if he had relied upon that information, any such reliance was not reasonable. Not only was he clearly on notice that the maximum salary for the position announced was \$94,643, but his previous annual salary for a six-month period at Sandia National Laboratories was only about \$5000 higher than the maximum salary posted for the agency position for which he applied, and his annual salary in the U.S. Marine Corps for the six years prior to that was about \$6,000 less. With locality pay factored in, grievant would have been paid more than \$25,000 above his previous salary at Sandia and more than \$30,000 more than his salary in the Marine Corps according to the April 9 offer he received from {name}. Moreover, grievant had been unemployed for over a year

between his separation from Sandia following his six months of service there and his receipt of the agency's conditional offer in April {year}. Under the circumstances, we conclude that there was no reasonable basis for grievant to rely upon the validity of the higher salary offer to his detriment.

At the very least, these circumstances should have prompted an inquiry. If grievant had, given the error that the agency asserts was made by its HR personnel, all doubt would have been removed from his mind about the accuracy of the salary level he was being offered, and there would have been no basis even to claim that he was misled to his detriment. Rather, he would have had the option to accept the offered position and salary for which he applied or to reject them. A timely inquiry also would have avoided any moving expenses that grievant claims he incurred as a result of accepting the agency's higher employment offer, assuming that he would have rejected the position and lower salary maximum for which he applied. We note, however, that the record in this case contains no evidence other than grievant's assertion that he incurred \$10,000 of moving expenses upon accepting the position on April 9, {year}, and relocating to Washington to be sworn in on September 14.

Having found that reasonable detrimental reliance - an essential basis for applying the doctrine of equitable estoppel as articulated in FSGB Case No. 2007-034 - is absent, we conclude that the instant grievance appeal must be dismissed on that ground alone. However, there are even more significant reasons to deny the claim herein, and we wish to address them rather than risk leaving false impressions as to how *OPM v. Richmond* applies to monetary claims against the Federal government.

Grievant's claim that the agency has the discretion to set grade levels for mid-level hires under H.R. 1105 is inapposite to the facts of this appeal. Grievant apparently was hired under

the “Development Leadership Initiative,” but to fill an FS-03 position, not an FS-02 position.

The pertinent sections of that Act are as follows:

(l) RECRUITMENT STRATEGY.—Not later than December 31, {year}, the agency Administrator, after consultation [with other Agencies and Departments] shall submit to the Committees on Appropriations a recruitment strategy for current and former employees from such departments and agencies who possess skills and/or overseas experience which would enhance the agency’s capacity to carry out its mission: Provided, That funds made available under the heading “Operating Expenses” in Title II of this Act may be made available to implement the strategy described in the previous proviso, subject to the regular notification procedures of the Committees on Appropriations.

(m) HIRING AUTHORITY.—Notwithstanding section 307 of the Foreign Service Act of 1980, the agency Administrator may hire up to 30 individuals under the Development Leadership Initiative: Provided, That the authority contained in this subsection shall expire on September 30, {year}.

Section 307 ENTRY LEVELS FOR FOREIGN SERVICE OFFICER CANDIDATES provides:

A career candidate for appointment as a Foreign Service officer may not be initially assigned . . . to a salary class higher than class 4 in the Foreign Service Schedule unless--

(1) The Secretary determines in an individual case that assignment to a higher class is warranted because of the qualifications (including foreign language competence) and experience of the candidate and the needs of the Service [.]

While it is true that the agency had the discretion under the foregoing law to hire candidates to a salary class higher than class 4 in the Foreign Service Schedule if the Secretary (agency head) were to make a determination in an individual case that assignment to a higher class is warranted because of a candidate’s qualifications and experience as well as the needs of the Service, that discretion was exercised when the 16 vacant positions were advertised at the FS-03 level. There is no evidence in this record that the agency head delegated actual authority to the HR personnel herein to deviate from the determination to offer the posted positions at the FS-03 level. Absent

such evidence, which grievant had the burden to prove, USAID had no obligation to honor the administrative error of its employees even if the agency head lawfully could have exercised the discretion to offer higher grades and pay higher salaries to those who applied for the posted positions.

Moreover, as the agency has argued, we find that if grievant *were* to succeed in obtaining the salary of an FS-02 step 9 while filling the advertised FS-03 position, it would violate Merit System principles:<sup>8</sup>

(b) Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, *after fair and open competition* which assures that all receive equal opportunity. (Emphasis added)

There is the possibility that others who applied for one of the 16 Mid-level FS-03 Executive Officer positions had credentials equal to or better than grievant's, but they either did not receive the erroneous salary offer or pointed out the discrepancy. Moreover, if the job were advertised at the FS-02 level, others may well have applied who may have been selected prior to the grievant having been selected. Either way, it would be unfair to allow grievant to fill a grade and step for which he had not competed.

To be sure, as grievant stated, anyone can apply for a job, but no one has to accept it. We believe however, that he applied for and was prepared to accept the FS-03 position at its highest advertised salary. Be that as it may, beyond the fact that there was a definite representation, grievant has failed to establish that he meets the standards set forth in *Richmond* and this Board's

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<sup>8</sup> 22 USC, Title 5, Part III, Subpart A, Chapter 23, § 2301.

decision in Case No. 2007-034 for equitable estoppel to attach. He has provided nothing more than his assertions that the agency's Human Resources personnel were acting within the scope of their actual authority in passing along the erroneous salary offer; any reliance was not reasonable, as the position for which he applied had a salary ceiling of \$94,643; and the ROP contains no documentation demonstrating that he spent "upwards of \$10,000" by moving to the U.S. from abroad in detrimental reliance on the salary proffered.

## **V. DECISION**

The grievance appeal is denied.