

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

  
Grievant

Record of Proceedings  
FSGB No. 2010-023

And

To July 6, 2010

Agency for International Development

**ORDER: INTERIM RELIEF**

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Jeanne Schulz  
Nancy M. Serpa

Senior Advisor

Joseph Pastic

Representative for the Grievant:

Bridget R. Mugane

Representative for the Agency:

Harmony Wade  
Labor & Employee Relations Division

Employee Exclusive Representative:

American Foreign Service Association

## **ORDER: INTERIM RELIEF**

### **I. THE ISSUE**

This Order addresses the request of FS-04 Foreign Service Career Candidate [REDACTED] [REDACTED] for interim relief to stay her scheduled separation from the Agency for International Development (USAID, agency) pending resolution of her grievance before this Board. She grieves that the agency's 2009 decision to deny her tenure was based on an erroneous, falsely prejudicial and otherwise flawed Annual Evaluation Form (AEF) covering the period April 1, 2008 - March 31, 2009. In addition, she grieves an alleged breach of her February 22, 2008 Settlement Agreement with the agency, which, she asserts, allows her to reopen her prior grievance of the agency's delay until 2006 in placing her in her first overseas assignment in her specialty as a Health Officer.

USAID did not respond to the 2009 grievance within the time specified by regulation, whereupon [REDACTED] appealed to this Board on June 8, 2010, asserting that the agency has abdicated its grievance-processing responsibility and forfeited its right of rebuttal, thereby entitling her to interim relief while the Board "proceeds to a decision on the existing record." In its acknowledgment letter dated June 14, 2010, the Board requested that the parties submit their arguments concerning the matter of interim relief by June 21, 2010. The agency timely filed its opposition to the request for interim relief; the Board granted grievant's motion for leave to file a rebuttal, which she submitted on June 29, 2010.

### **II. BACKGROUND**

As a medical doctor with international health and development experience, grievant entered the USAID Foreign Service on August 10, 2003, as a New Entry

Professional (NEP) in the Health Officer field, Backstop (BS) 50. She was assigned to NEP training for BS 50 positions and to rotations in [REDACTED] from August 10, 2003 – March 29, 2006. The Information Sheet for the NEP Program at that time stated that each NEP would participate in training tailored to his/her needs for 6 – 18 months before being assigned overseas. To be offered tenure, a candidate must, *inter alia*, have been a career candidate for at least three years and have served overseas for at least 24 months.

Grievant was assigned as a Project Development Officer to USAID/[REDACTED] [REDACTED] from April 1, 2006 to March 31, 2007, with a position titled Health and Population Officer, Backstop 50. In a letter dated July 20, 2007, the Foreign Service Tenure Board advised [REDACTED] that despite her rating officer's assessment to the contrary, she was meeting the performance skills standards for the FS-04 class. It expressed concern, however, that she had taken a position in the Program Office despite her training as a medical doctor. It appeared to the Tenure Board that grievant required "additional training and experience in the program backstop to succeed in your current job." The Tenure Board noted that grievant's career candidate status would expire in August 2008, and that she would get two tenure reviews, the first of which would be by the February 2008 Tenure Board.

Grievant was next assigned as a Health Officer, Backstop 50, to USAID/[REDACTED] [REDACTED]. Her functional title was HIV/AIDS Officer. Although her Annual Evaluation Form lists an evaluation period of April 1, 2008 to March 31, 2009, her rating officer stated that grievant arrived in [REDACTED] in August (2008). On May 9, 2008, in settlement of a grievance filed by the American Foreign Service Association (AFSA) on grievant's

behalf, USAID agreed inter alia to: “assign as Ms. [REDACTED]’ supervisor an experienced career Foreign Service officer in the Health field who is chief of the Health Office in [REDACTED].” The settlement agreement became effective on July 22, 2008.

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

#### **The Grievant**

Grievant argues that her 2009 AEF and Tenure Evaluation Form (TEF) are invalid because she was supervised in [REDACTED] by a newly tenured officer, grievant’s peer ([REDACTED]), in violation of the 2008 Settlement Agreement she entered into with the agency. Based on her 2009 AEF, the Performance Board low-ranked grievant and referred her file to the Tenure Board, which did not recommend tenure. The Performance Standards Board (PSB) thereafter recommended that grievant be selected out. Grievant contends that she was only supervised by the Chief of the Health Office for the last three weeks of her evaluation period, and that lack of experienced supervision was a substantial factor in the AEF criticisms that led to the recommendation for her separation.<sup>1</sup>

#### **The Agency**

The agency opposes grievant’s request for interim relief. It asserts that grievant was assigned to [REDACTED] in August 2008 and was only supervised by a Health Office Team Leader for approximately three months, after which her supervisor was the Chief of the Health Office. The progress review for grievant’s 2008-2009 AEF was completed by the Team Leader, but the AEF was completed by the Chief of the Health Office. Her Tenure Evaluation Form (TEF) was completed by the Acting Mission Director and forwarded to the Tenure Review Board (TRB), which determined that [REDACTED]

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<sup>1</sup> Grievant further argues that the agency improperly changed her agreed-upon performance plan without her knowledge or consent; failed to counsel her concerning alleged performance deficiencies as required by USAID regulations; and that her AEF and TEF are both invalid and biased and must be rescinded.

should not be granted tenure because her performance did not meet the standards of her class and she had not demonstrated potential to serve effectively across a normal career span. Either of these grounds, standing alone, would warrant grievant's separation. Neither is a grievable matter without a finding that there has been a violation of law, regulation or published policy. To overcome that burden, grievant must demonstrate that both determinations were faulty.

The June 10, 2009 TEF was based on grievant's demonstrated potential. The standard is individualized rather than comparative. It was completed approximately six months after grievant had been under the supervision of the Chief of the Health Office. The comments therein clearly reflect efforts of the prior Mission Director, Acting Mission Director and the Health Office Director to counsel grievant. Their efforts were unsuccessful. Whether or not the Team Leader should have had a role in grievant's supervision, the TEF demonstrates the level of Mission management's involvement in working with grievant, and her three months of supervision would not outweigh the Acting Director's recommendation that she not be tenured.

The agency notes that grievant expressed no concern about having been supervised by the Team Leader until after she received her separation letter in July 2009. The agency asserts that she bears some responsibility for ensuring that the terms of her settlement agreement were being carried out properly. Any determination by the FSGB that the AEF is invalid based on the alleged breach of agreement would have no bearing on the TRB's decision to deny her tenure.

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

This Board previously has set forth and hereby reiterates the standard it follows when addressing requests for interim relief from involuntary separation that are filed by untenured employees:<sup>2</sup>

[T]o justify an interim stay of separation of an untenured grievant, [the Board] must perceive, in a preliminary assessment of the merits, that the grievant has a reasonable prospect of attaining relief that will result in his or her being retained in the Service. In stating that standard, the Board noted that untenured employees are subject to termination at any time and that termination itself is not grievable by such employees, only an alleged violation of law, regulation, or public policy that would vitiate the termination. Underlying this distinction is recognition that the legal rights and protected interests of untenured government employees are not as extensive [as] those of tenured employees.

The Board has reviewed the record of grievant's assertions and the agency's responses related to breach of the parties' 2008 settlement agreement, as well as grievant's allegations and the agency's responses thereto, concerning claimed procedural and substantive violations in the April 1, 2008 – March 31, 2009 AEF. The Board has determined, in a preliminary assessment of the merits, and based solely on the evidence placed to date in the Record of Proceedings, that grievant has a reasonable prospect of attaining relief that will result in her retention in the Service. This does not, of course, imply that this Board's "preliminary assessment of the merits" indicates an initial propensity to find for grievant.

#### **V. ORDER**

Interim relief is to be extended until such time as the Board issues its final decision on the merits of this grievance or for one year from the date of this directive,

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<sup>2</sup> See, e.g., FSGB Case Nos. 95-68 and 96-54 (October 4, 1996).

whichever is shorter. Grievant's request that the Board close the Record of Proceedings at this time and proceed directly to a decision on the merits is denied.