BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]

Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2010-026

June 22, 2011

INTERIM DECISION
EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	John M. Vittone
Board Members:	Gail M. Lecce Richard J. Shinnick
Special Assistant	Joseph Pastic
Representative for the Grievant:	*Pro se*
Representative for the Department/Agency:	Melinda Chandler Director Grievance Staff
Employee Exclusive Representative:	American Foreign Service Association

CASE SUMMARY

HELD: Grievant filed for home leave benefits for two separate assignments to [redacted]. The grievance filed for the 2003 – 2005 assignment was barred by the statue of limitations contained in the Foreign Service act of 1980. The request for relief for the 2007 – 2009 assignment was granted in part and denied in part. The case was remanded to determine if any home leave days should be substituted for annual leave days, and whether grievant should be reimbursed for any travel expenses to his home address of record when his 2007 – 2009 assignment was ended.

OVERVIEW

In this case grievant asserted that h e was entitled to home leave benefits for two assignments to [redacted] from 2003 to 2005 and from 2007 to 2009. He based his claim on the United States Code (5 U.S.C sections 6301 and 6305), the Code of Federal Regulations, and the Foreign Service Act of 1980 (the Act). Prior to this claim, the Department did not consider [redacted] to qualify for home leave benefits. Grievant requested that he be credited with home leave days, financial payments for both assignments.

In response to the grievant's claims, the Department denied the grievance and proposed remedies for the 2003 – 2005 assignment on the basis that the claim was barred by the two year statute of limitations contained in the Foreign Service Act. However, the Department agreed with grievant that he was entitled for home leave benefits for his 2007 - 2009 assignment and granted him the appropriate number of home leave days to be added to his home leave account and used in the future. The Department denied the requested financial compensation on the basis that grievant was provided with a house hunting trip when the second assignment ended. In the Department's view, to grant grievant's request for compensation would be equivalent to paying him twice for the same travel. Even though the Department granted the grievance in part, grievant argued that the proposed remedy was "hollow" and that he was entitled to the compensation requested.

The Board affirmed the denial of the relief requested for the 2003 – 2005 assignment as being barred by the Act's requirement that a grievance be filed not later than two years after the occurrence giving rise to the grievance. With respect to the second [redacted] assignment, the Board found that the Department was not required to provide grievant with the same benefits under both home leave and a house hunting trip. However, we found that the Department's remedy did not make grievant whole in this situation. The Board found that if any annual leave was used within six months after his assignment ended, such annual leave should be restored and replaced with home leave. In addition, the Department was required to reimburse grievant for travel, if any, to his home of

record for himself and eligible family members at the conclusion of his assignment, as set forth in the decision. The case was remanded to carry out the Board's order.

INTERIM DECISION

I. THE GRIEVANCE

Grievant filed a grievance asserting that under the Code of Federal Regulations and the Foreign Service Act of 1980 he and all Foreign Service officers serving at a duty station in the [redacted] were entitled to earn and take home leave in accordance with the agency regulations governing home leave. Grievant, a resident of [redacted] was assigned to the [redacted] in [redacted] from 2003 to 2005 and from 2007 to 2009. He was not credited with any home leave for this service and was not provided with the opportunity to take home leave in connection with his assignments to [redacted].

II. BACKGROUND

Grievant is a Foreign Service Officer Specialist, grade 3, who is currently assigned as a Supervisory Special Agent in the Diplomatic Security Service (DSS) in a domestic location. His previous assignments included two tours in [redacted]. From 2007 to 2009, he was the Resident Agent in Charge of Diplomatic Security in the [redacted]. In 2003 to 2005, he was assigned as a Special Agent to the DSS office in [redacted]. During both assignments to [redacted], grievant's home address of record was [redacted].

On March 17, 2010, grievant submitted his grievance to M/DGHR Linda Taglialatela asserting that he was entitled to home leave for his two assignments to [redacted] under the provisions of the United States Code, the Code of Federal Regulations and the Foreign Service Act of 1980 (the Act). In his submission, grievant relies on 5 USC

Sections 6301 and 6305. Section 6301 defines the United States as the several states and the District of Columbia and an employee is defined as any Foreign Service Officer. Section 6305 provides that after 24 months of continuous service outside the United States, an employee may be granted a leave of absence. 5 CFR Section 630.601 provides that service in [redacted] is deemed service abroad unless [redacted] is the employee's residence of record. Section 630.201 excludes [redacted] from the definition of the United States. The Foreign Service Act Section 901.2, states that: "The Secretary may pay the travel and related expenses of members of the service and their families, including costs or expenses incurred for ... (b) authorized or required home leave...."

Grievant argued that assignment to [redacted] is the only assignment abroad for which no home leave credit is given. He compared a [redacted] assignment to Canada for which home leave is provided. He further noted that the SJRO is referred to as a domestic assignment, and that entitlement to home leave is not listed in any description of that office or on travel authorizations. Grievant stated that he became aware of the grounds for this grievance in 2009 after he did research in support of an incentive package memorandum as a means to attract employees to bid on an SJRO assignment. Grievant is a licensed attorney.

As relief for the 2003 – 2005 assignment, grievant requested that he be granted retroactive credit with 24 home leave days, and a payment of $2174.00 to equal the travel expenses that would have been provided by the agency for his family members and grievant. For the 2007-2009 assignment, he is seeking a payment of $3624.00 to approximate the travel expenses that would have been provided by the agency for his family members and grievant to [redacted]. Also he requested that he be given

retroactive credit for 20 annual leave days that he took since home leave was not available for his 2007 – 2009 assignment. In addition, he requests that the Department take various administrative actions to inform all employees (past, present and future) about the change in [redacted]'s status as being eligible for home leave.

The agency did not provide a decision within 90 days of the March 17, 2010 grievance. As a result, grievant submitted his appeal to the Board without an agency decision on June 18, 2011. Grievant requested the Board to decide the issue presented and reaffirmed his prior request for relief. On the same day, he submitted a supplemental memorandum that discussed cases from the Comptroller General and the Department of Agriculture that he argued were relevant to his grievance. In addition, grievant amended his requested relief concerning the 2007-2009 assignment. As amended, the requested relief was for four annual leave days and 20 home leave days and not 20 annual leave days.

The grievant submitted his request for discovery on August 30, 2010. The Department's response to the discovery request was filed on October 21, 2010. Also on October 21, 2010, the Department submitted its decision in the grievance filed on March 17, 2010. On December 3, 2010, grievant filed his response to the agency's decision of October 21. On January 18, 2011, the Department filed a response to grievant's supplemental submission. On February 10, 2011, grievant filed his rebuttal to the Department's response of January 18. The ROP was closed on March 29, 2011.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

The Department's position is contained primarily in its decision on the grievance dated October 21, 2010. The Department denied the claim filed for the 2003 - 2005 assignment on jurisdictional grounds, since the incident giving rise to the grievance fell outside the two year limitation to file a grievance under the Foreign Service Act. (22 U.S.C. 4134(a)).

Without stating that it had changed its policy, the Department agreed with grievant that he was entitled to home leave for his service in [redacted], but only for the 2007 - 2009 assignment. It stated that it reviewed the statutory and regulatory provisions governing home leave, and agreed with grievant that service in [redacted] constitutes service outside the United States. The Department ordered that grievant be credited with 24 home leave days to be used in a manner consistent with the agency's policy.

With respect to the 2007- 2009 assignment to [redacted], the Department denied that grievant was entitled to a cash payment that would equal the cost of travel expenses normally provided at the agency's expense. The denial was based on the Department's conclusion that if the request was granted the grievant would have been paid twice for the same travel after the completion of his [redacted] assignment. Prior to the grievant's transfer from [redacted] to [redacted], as a domestic transfer he was authorized a house hunting trip, which was granted at the agency's discretion. The house hunting trip would not have been authorized if he had been permitted to take home leave with the travel costs being paid by the agency. The Department noted that a house hunting trip provides more generous benefits than does a home leave trip. Accordingly, the

Department credited grievant only with 24 days of home leave for the 2007-2009 assignment.

On January 18, 2011, the Department filed a response to grievant's supplemental submission. In essence, the agency repeats its argument that the 2003-2005 grievance is barred by the Act, and that grievant through "reasonable diligence" could have discovered the grounds for his claim that matured in 2005 in the same manner he did in 2009. He did not do so, and is forever barred from pursuing his claim. With regard to the 2007-2009 assignment, the crediting of 24 home leave days, including payment of travel expenses when such leave is taken, is all that grievant is entitled under the regulations. The agency refuses to pay any cash amount as grievant requests as this would be the equivalent of paying travel benefits twice for the same leave.

B. GRIEVANT

Grievant believes that he is entitled to home leave benefits for both of his assignments to [redacted]. He argues that his first claim is not barred by the Act since neither he nor the Department was aware until 2009 that home leave benefits may apply to [redacted] assignments. Grievant did not discover the grounds for entitlement until June 2009 when he was doing research for the incentive package memorandum. Since the Department did not believe [redacted] assignments qualified for home leave until this proceeding, there existed no circumstance for grievant or anyone else to discover the Department's erroneous position. Grievant argues that the Board should find the grievance to be timely filed under the Act which excludes from the filing period any time during which the grievant is unaware of the grounds for the grievance which could not have been discovered through reasonable diligence.

With respect to the 2007-2009 assignment, grievant describes the Department's remedy of 24 home days as "hollow." He asserts that a house hunting trip and home leave benefits are two different allowances authorized for two separate purposes. There is nothing in the Department's regulations or the Federal Travel Regulations that indicate that a house hunting trip and home leave travel are mutually exclusive. The Department's remedy of granting him 24 home leave days is inadequate since he would not be able to use the home leave days until he completes an assignment abroad. However, if he is assigned abroad he will receive home leave credit and travel expenses for that specific assignment abroad. In his view, this will negate the opportunity to ever use the proposed remedy in this case. As a practical matter, employees generally cannot take more days than the amount they accrue during one tour, and the travel expenses will be paid as a result of that tour. Grievant believes that the Department should fulfill its obligations and compensate him for withholding the home leave benefits in both assignments.

On February 10, 2011, grievant filed his rebuttal to the Department's response of January 18. In his rebuttal, grievant reargues his claim that the grievance is not barred by the Act, and that he should not be penalized for the Department's failure in this situation. In addition, he corrects the record by noting that only his spouse received full reimbursement for the house hunting trip and that he paid for the full cost of his portion of the house hunting trip.

IV. DISCUSSION AND FINDINGS

It is not disputed that the Department did not recognize assignments to [redacted] as qualifying for home leave accrual until this grievance was filed. It was not until

October 21, 2010 that the Department changed its prior practice when it filed its decision in response to grievant's petition. The Department's decision leaves this Board with two issues to decide concerning grievant's request for relief. First, is his claim for the [redacted] tour from 2003 to 2005 barred by Section 1104(a) of the Act. Second, concerning the [redacted] assignment from 2007 to 2009, is grievant entitled to any remedy beyond that provided by the Department in its decision.

Section 1104 of the Act provides as follows, in part:

> A grievance is forever barred under this subchapter unless it is filed with the Department not later than two 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 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.

The Department argues that grievant's claim is barred by the two year limitation in the Act. In the Department's view, grievant failed to exert "reasonable diligence" to discover in 2005 what he discovered in 2009. If he had, then he would have known that he was entitled to home leave with little effort. Grievant responds that the two year limitation should not apply in this situation since the grounds for home leave accrual were never acknowledged by anyone within the Department for several years as even existing. In his view, he exercised the same attention and care as everyone else in the same situation. In essence, he argues that there was no opportunity to exercise "reasonable diligence" and that he should not be penalized for the Department's failure.

Limitations on filing claims or grievances are contained in numerous statutory provisions throughout the federal code. These limits are required in order for agencies and courts to deal with issues in a timely manner and to avoid adjudicating cases that may

become stale as a result of age. Here the Congress has prescribed a two year limit on the filing of grievances unless the Board finds the grievant was unaware of the grounds for his claim and could not have found the grounds for his claim through reasonable diligence.

It is clear that until the grievant raised the issue the Department did not classify assignments to [redacted] as eligible for home leave benefits. According to the agency's response to discovery, no employee assigned to [redacted] ever requested travel in support of home leave. Twelve individuals, including grievant, were assigned to the [redacted] since it was established. According to the Department, none of these individuals was informed of the availability of home leave, requested home leave or travel support, or received home leave and travel support. Thus the Department followed a consistent pattern of not providing home leave accrual for [redacted] assignments. In this proceeding, the Department has acknowledged that its practice prior to this grievance was mistaken.

While it was mistaken, there is no evidence that the agency intentionally misled employees assigned to [redacted]. After considering this grievance, the Department agreed with the grievant's point of law. If grievant had exercised the diligence he demonstrated in 2009 at an earlier time, his claim may not have been time barred. The exception to the two year limit contains two parts. The grievant must have been unaware of the grounds and he could not have discovered those grounds through reasonable diligence. The grievant, as everyone else, was unaware of the grounds for his grievance before 2009. However, the same laws and regulations governing home leave that grievant discovered in 2009 were on the books in 2003-2005. We thus find that grievant

could have exercised reasonable diligence at an earlier time and preserved his claim for relief. If he had, the grievance for the 2007 - 2009 assignment may not have been necessary. We deny the request for relief for the 2003 - 2005 assignment.

With respect to the second [redacted] assignment, the Department agreed that home leave accrual was appropriate and credited grievant with 24 home leave days, to be used in the future, and which would include payment of travel expenses when the leave was used. It declined to provide cash compensation as requested by grievant since the agency paid for a house hunting trip when the second [redacted] assignment ended in 2007. The Department states that a house hunting trip is authorized at an agency's discretion. It would not have authorized both a house hunting trip with paid expenses and a home leave assignment with related travel costs at the end of his assignment. In short, the Department states that providing grievant with the requested compensation would be equivalent to paying travel benefits twice for the same travel.

The Department also states that it has never authorized home leave and a house hunting trip for the same assignment. Now that employees assigned to [redacted] can accrue home leave, the Department is discontinuing house hunting trips for the same employees. Further, the Department notes that grievant's house hunting trip provided him with more generous benefits than he would have received under home leave.

Grievant argues that the agency's remedy is "nominal at best and non-existent at worst." Grievant argues that the Department's regulations and Federal Travel Regulations do not provide or indicate that a house hunting trip and home leave travel are mutually exclusive. If that had been the intent, then the regulations would have stated that intent clearly.

We agree with the Department that it is not required to provide the grievant with the same benefits under both home leave and a house hunting trip in this case. The regulations do not require the Department to provide both benefits. By law, the Department is only required to allow employees assigned outside the United States to accrue home leave days. (5 U.S.C. 6305(a)). In the instant case, to grant the full relief in the form of a cash payment for the full estimated transportation expenses for home leave as requested by the grievant could amount to providing some travel benefits for the same trip. We find that the Department is not required to do so. Nor do we find that the Department is required to reimburse grievant for transportation expenses to [redacted] if no such trip was made by grievant and his family at the time of his transfer from [redacted] to [redacted].[1] Although there is a certain inequity to grievant in this finding, since grievant could not plan a trip that at the time he was told would not be funded by the Department, it is simply impossible to reconstruct retroactively all the benefits grievant would have been granted at that time.

However, we also find that the Department's remedy falls short of what is required to make the grievant whole, given the Department's error. Although a house hunting trip may in some respects provide greater benefits than home leave, in other respects it provides less. The house hunting trip was to [redacted]. Home leave would have been to [redacted]. Home leave would have provided for the transportation expenses of the entire family, including children. Grievant claims, and the Department does not dispute, that only his wife's expenses were paid by the Department for the house hunting trip. The benefits for the two different types of travel are simply

[1] There is no indication in the record whether grievant and his family traveled to [redacted] at the time of his transfer or whether grievant was granted any additional leave specifically for the house hunting trip.

different. Additionally, we agree with grievant's argument that credit for home leave days added to his next assignment is a hollow remedy, since, practically speaking, it is unlikely he would to be able to use all those additional days, and the expenses for the next home leave would have been paid anyway.

In order to make the grievant whole to the extent possible, we find that at least some of the home leave benefits he should have been granted for the 2007-2009 assignment should be applied retroactively. With respect to leave days, the record is not clear whether grievant used any annual leave days when he was transferred to the [redacted] area in 2009. Since the Department has agreed to grant 24 home leave days to the grievant, we believe that if grievant used any annual leave days within the United States within six months after his assignment to [redacted] or at the time of the house hunting trip, those days should be charged to the home leave granted to him by the Department, and the annual leave should be restored to grievant.[2] If any additional home leave remains after that substitution, those days should be added to grievant's current home leave account. However, if grievant was granted additional leave of any kind for the house hunting trip, that leave amount should be deducted from the home leave being granted to grievant before it is either substituted for annual leave or added to his home leave account, in order not to provide grievant a double benefit. If the grievant expended any personal funds for travel to [redacted] for himself and eligible family members within six months after the conclusion of his tour in [redacted] or at the time of the house hunting trip, he should be reimbursed, unless such transportation to [redacted]

[2] Home leave normally entails a requirement that the officer travel to his place of residence, but home leave days need only be spent in the United States, not at the home leave place of residence. Since grievant cannot retroactively visit [redacted] if he did not do so at the time, the remedy provided is more flexible.

for his spouse, or a portion of such transportation, was already covered by the house hunting trip.[3] Grievant should not be required to meet the minimum days required for home leave in order to receive these benefits, since it is obviously impossible for him to do so retroactively. We will remand the case to determine how many, if any, days of home leave should be substituted for annual leave days, and whether any reimbursement should be made to grievant for any transportation expenses for him and his dependents to visit [redacted] after his assignment to [redacted].

V. DECISION

The Board finds that the request for relief for home leave benefits filed by the grievant for the two assignments to [redacted] are not sustained in full. We find that the grievance filed for the 2003 - 2005 assignment is barred by the statute of limitations contained in the Foreign Service Act of 1980. The request for relief related to the 2007 - 2009 assignment is partially denied and partially granted, as discussed in this decision. We will remand the case to determine if any home leave days should be substituted for annual leave days, and whether grievant should be reimbursed for any travel expenses he and his dependents incurred for any trips to [redacted] at the time of the house hunting trip or when his assignment ended.

VI. ORDER

The case is remanded to the Department for the Department and grievant to mutually agree on the substitution of home leave for annual leave days taken at the end of grievant's 2007 - 2009 assignment to [redacted] and to determine if grievant is entitled

[3] Since home leave may be taken within six months after the conclusion of an overseas assignment, we are providing for a six month window for grievant to have visited New Orleans in the remedy in order to receive transportation expenses.

for payment of any additional travel expenses consistent with this decision. The Board retains jurisdiction over the grievance appeal pending the completion of this inquiry and submission of documents to it for review, which should occur no later than 30 days after receipt of this interim decision.