

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2011-005

And

January 9, 2012

Department of State

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Alfred O. Haynes
Kevin F. Herbert

Special Assistant

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda Chandler
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant's request for additional relief, beyond that which had been provided by the Department in its Final Agency Decision, was denied.

OVERVIEW

Grievant, a member of the Foreign Service with the Department of State, contracted a tropical disease, which resulted in her having to use significant amounts of leave. She had requested and had been denied participation in the Voluntary Leave Transfer Program (VLTP).

Grievant initially decided to pursue her complaint through the EEO Complaint process and began with an ADR mediation session. Upon completion of that session, grievant decided to file a formal EEO complaint. Shortly thereafter, grievant withdrew that complaint and filed a grievance.

The Department initially denied the grievance on the grounds that grievant had an on-going EEO complaint being processed and she was barred from pursuing the case through the grievance process. Shortly after her appeal to the FSGB, the Department discovered that grievant had withdrawn her EEO complaint prior to her filing the grievance and requested that the matter be remanded to it for processing as a grievance. Grievant opposed the Department's remand request. However, the Board issued an Order remanding the matter to the Department.

In its decision, the Department acknowledged that it had wrongfully denied grievant's request for participation in the VLTP and provided extensive relief that would make her whole, as if her initial application for VLTP had been approved.

Grievant rejected the Department's offer and appealed to the FSGB asking for adequate and equitable relief. The Board rejected the grievance, finding that the Department's remedy was reasonable and just. The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

██████████, a member of the Foreign Service with the Department of State (Department/Agency), filed a grievance with the Department on September 2, 2010. She claimed that the Department misinterpreted and misapplied numerous provisions of 3 FAM 3340, 5 CFR 630.900 and 5 USC 6330 when it denied her participation in the Voluntary Leave Transfer Program (VLTP). For relief, she asked for the following:

- 1) The FAM and all SOPs and other guidelines be revised to address the issues she has cited in her grievance, and;
- 2) That 500 hours of annual leave be granted to her.

On September 10, the Department issued its decision, denying the grievance on the basis that the grievance was barred under 1109(a)(1), as the issues in her grievance involve matters that were currently the subject of a previously filed EEO Complaint.

On February 7, 2011, grievant appealed that decision to the Foreign Service Grievance Board (FSGB) claiming that she had formally withdrawn her EEO Complaint on August 3, 2010, before it was resolved and prior to the September 2, 2010 date when she filed her grievance.

On February 28, the Department requested that the matter be remanded to it for consideration of the merits of the grievance as the EEO complaint had been withdrawn prior to the filing of the grievance. Grievant opposed the Department's request and on March 9, the FSGB issued an Order, remanding the matter to the Department for appropriate processing and requiring that its decision be issued within 60-days.

On May 9, the Department issued its decision, finding that it had erred in denying [REDACTED] grievance and offered significant remedial relief. Grievant contends that the remedial relief is insufficient to make her whole. On May 23, she appealed that decision to the FSGB.

II. BACKGROUND

Ms. [REDACTED] (grievant) has had medical issues beginning in 1988 when she was serving on her first Foreign Service assignment in [REDACTED]. There she contracted a tropical fever, which resulted in a case of Chronic Fatigue Syndrome. She has, and continues to have, ongoing medical issues and refers in her various memos to having received 500 hours of donated leave through the Department's VLTP in 2005, an additional 80 hours in 2009 and more in the summer of 2011, the latter due to a life threatening malady unrelated to her chronic illness.

On November 9, 2009, grievant filed a request for participation in the VLTP and a request for 80 hours of advanced sick leave. To qualify for the VLTP an applicant must identify a medical emergency that can be of long-term duration. In the November 2009 application, grievant identified her medical emergency as an "ongoing chronic illness." She subsequently filed a separate and distinct VLTP application and a request for 80 hours of advanced sick leave on December 18, 2009 stating her medical emergency was "bronchitis." On March 10, 2010, the Executive Director in the Bureau of Administration informed grievant that the application for participation in the November 2009 VLTP and for advanced sick leave was denied. On March 25, grievant decided to pursue her complaint through the EEO complaint process. She notified the Department's

Office of Civil Rights (S/OCR) and elected to pursue her claim under the Alternate Disputes Resolution (ADR) Process.

On June 9, an ADR mediation session was held regarding grievant's claims. Following that session, grievant decided to file a formal EEO complaint and did so on June 23. On August 3, 2010 grievant informed A/OCR that she was withdrawing her EEO complaint and on the same date S/OCR acknowledged receipt of grievant's withdrawal letter and officially closed the EEO case.

On September 2, 2010, [REDACTED] filed her grievance with the Department complaining of the denial of her November 2009 request for VLTP and request for advanced sick leave. In that filing grievant also charged that her December 2009 separate and distinct request for participation in the VLTP and advanced sick leave were never acted upon and she included that matter in her grievance submission. She also requested that 500 hours of annual leave be provided her as compensation for what she believed she would have received had her November 2009 request been approved.

The Department issued its decision on December 10, 2010, denying the grievance on the basis that the Department did not have jurisdiction because an EEO complaint was still active. On Feb 7, 2011, grievant appealed the decision to the FSGB.

On February 28, 2011, the Department notified the FSGB by e-mail that it understood that the grievant had withdrawn her EEO complaint and that consequently the Department did have jurisdiction over her complaint. The Department requested the grievance be remanded to it for further investigation. On March 9, grievant filed a motion objecting to the Department's request for remand, and on the same date, the

FSGB issued an Order remanding the case to the Department giving it 60 days to reach a decision.

On May 9, 2011 the Department issued its final decision finding some merit in grievant's claims. The Department acknowledged that the denial of grievant's November 2009 application to participate in the VLTP was improper and acknowledged that she had met the burden of proof by demonstrating that at the time of her application in November 2009 she had satisfied each of the prerequisites for participation in the VLTP.

The Department's remedy was to offer grievant the opportunity to enroll in the VLTP. Any leave transferred to the grievant could be substituted retroactively for any leave previously taken without pay and could be used to liquidate any indebtedness for advance annual or sick leave she had previously taken. This leave could only be used for the purpose of the medical emergency for which it was approved and any accrued annual or sick leave available at the time she applied had to be used before the use of transferred leave.

Another condition on the use of grievant's donated leave that the Department imposed was to require that she first submit a list of all dates on which she took advanced sick or annual leave or LWOP due to the medical condition identified in her November 2009 VLTP request. The Department expressed the belief that use of the VLTP would remedy the problems resulting from the denial of the November 2009 request through the donation of sufficient leave to cover the grievant's leave deficit and the amount of unpaid leave taken.

The Department also recognized the possibility that insufficient leave might be made available through this new participation in the VLTP. It stated that it would consider further remedial action should any indebtedness for advanced annual leave or any unpaid leave taken for grievant's medical emergency remain after she exhausted the donated leave.

The Department did not find merit in grievant's December 2009 request for advanced sick leave due to the lack of medical documentation supporting an ongoing need presented by the grievant in conjunction with the illness, identified at the time as bronchitis.

On May 23, 2011, the grievant appealed the Department's decision to the FSGB. She rejected the relief offered by the Department and asked the FSGB to order the Department to provide adequate and appropriate relief. Grievant stated she was not willing to accept the Department's remedy of allowing her to participate in the VLTP. She stated that such proposed relief would not suffice as a remedy for previous harm done. Grievant also asked for protection against future errors. Ms. [REDACTED] requested as an appropriate part of the relief expected from the Department that the FAM and SOPs and other guidance relating to the use of the VLTP be revised so she and others would not in the future encounter problems similar to those she had encountered.

The Department responded to the grievant's appeal. It found that grievant's contentions lacked merit, except for her contention that denial of her 2009 VLTP application was improper. It ordered that 16 hours of annual leave and eight hours of sick leave be restored to her.

On September 7, grievant filed her Final Submission in which she reiterated her rejection of the offer of relief as presented by the Department. She continued to request that 500 hours of retroactive leave be granted her by the Department without recourse to the VLTP. This leave would replace the quantity of leave she estimates she was not able to request through the VLTP when her application was denied in November 2009. She also requested 500 hours of advanced prospective leave to cover future medical emergencies that she anticipated and to protect her from having to go through the grievance process again, which she believes would be necessary because the Department is not applying or interpreting the laws and regulations on the VLTP program properly.

III. POSITIONS OF THE PARTIES

GRIEVANT

In her Final Submission, grievant rejected the relief offered by the Department. Grievant believes the Department's offer to allow her to use donated leave to substitute retroactively for leave without pay (LWOP) is not in accord with law and regulations. Grievant finds the Department's requirement that she prepare a list of absences related to her medical emergency signed by the various parties involved to be onerous and unnecessary.

Grievant also rejects the use of the term "hybrid leave" put forward by the Department in its May 9 response and considers all donated leave to be "hybrid leave." She contends that there is no legitimate distinction that would prevent the Department from agreeing to her continuing request for 500-1,000 hours of combined retroactive and prospective leave.

Grievant does not accept the Department's contention that the offer to allow her to use the VLTP to retroactively address previous and admitted errors in denying her application to participate in VLTP in 2009 addresses the "harm at issue." She believes there were other consequences of the Department's error that should be addressed.

Grievant also does not accept the Department's contention that the remedy offered of participation in the VLTP now would most likely resolve her problem by the donation of sufficient leave to cover her past shortages. She does not share the Department's "optimism." Nor does she accept the Department's stated offer to consider potential additional remedies should the grievant still have remaining indebtedness for leave or any unpaid leave as of January 2012. She states the Department has no legal authority to effect such a solution through the creation of additional hours of leave should there remain a deficit in her account and she is not aware of what other remedy the Department might consider at that time. Grievant also believes that the Department will repeat errors in the future should she continue to require donated leave to address her ongoing medical issue unless the SOPs and regulations are rewritten.

Grievant believes her request for redress is fair and reasonable and would provide her with what she would have received had the Department not been in error in denying her 2009 request for participation in the VLTP. She denies there would be a "windfall" as indicated by the Department, but rather her request would restore her to where she would have been had no error been made and would provide her with leave in hand to deal with her next medical emergency.

Grievant states she would accept compensation in lieu of the retroactive and prospective leave hours she has requested should that request not be approved.

THE DEPARTMENT

The Department believes the sole issue to be considered is the appropriate relief due the grievant as a result of the erroneous denial of her November 2009 request to participate in the Department's VLTP. The Department has offered relief to the grievant in the form of allowing her to participate in the VLTP using leave so obtained to substitute for leave without pay and annual and sick leave taken for the medical emergency that was at issue.

The Department finds no merit in grievant's request for approximately 500 hours of additional prospective leave, which the Department believes would result in an accumulation of leave well beyond what the original request, if approved, would have provided. The Department also states it has no authority to create such leave.

The Department has requested, as a condition for the retroactive relief provided, to permit grievant to participate now in the VLTP, that the grievant document the periods of time she took advanced sick leave, advanced annual leave or LWOP because of the medical emergency identified in the grievant's November 2009 VLTP application. Grievant is also expected to obtain signatures of her supervisor and the VLTP coordinator reflecting their agreement with the dates and hours of absence relating to her medical emergency.

The Department believes these are reasonable requirements necessary for a proper accounting for the amount of donated leave the grievant may substitute for LWOP she has taken. The Department does not accept her "estimate" of 500 hours that she believes would have been donated in 2009 as sufficient evidence to base relief on.

The Department did agree that the grievant's objection to the loss of 16 hours of annual leave and 6 hours of sick leave that resulted from the initial decision to deny her LWOP was reasonable and offered to award her those hours.

The Department also offered as part of its remedy to consider potential additional remedies, which were not specified, should participation in the VLTP not produce sufficient hours to cover the deficit that resulted from the erroneous denial of participation in the VLTP in November 2009.

IV. DISCUSSION AND FINDINGS

In all grievances, other than those involving disciplinary actions, the grievant has the burden to show, by a preponderance of the evidence, that the grievance is meritorious.¹ In order for grievant to prevail, she must produce preponderant evidence to show that the remedy she is seeking is supported by the facts in the case.

In its initial consideration of this case, the Department held that it lacked jurisdiction as grievant had previously elected to pursue this matter through the EEO Complaint process that was then ongoing. Later the Department learned that grievant had withdrawn her EEO complaint prior to her having filed this grievance and requested that the grievance be remanded to it for processing in accordance with the regulations. On remand, the Department found merit in grievant's claims and directed significant relief designed to make grievant whole.²

Grievant has rejected the Department's offer to enroll her in the VLTP and has instead requested additional remedies. She has requested the granting of 500 hours of leave to cover what she believes would have been donated but for the Department's error

¹ 22 CFR 905.1 (a)

² Pages six and seven of this decision identify all of the relief directed by the Department in this case.

in rejecting her November 2009 VLTP application. She also requests 500 hours of prospective leave to cover what she believes will be future medically based needs and which she believes the Department will likely deny as it continues to apply what she believes are erroneous rules and regulations. The Department does not support either of those requests. Grievant has also requested the Department to rewrite FAMS and SOPS to reflect what she has presented as erroneous or unclear interpretations of rules and regulations regarding the VLTP.

The Board has reviewed the numerous submissions presented in connection with the erroneous denial of grievant's application for participation in the VLTP in November of 2009. The Department has acknowledged that grievant was wrongfully denied the opportunity to participate in the VLTP and is attempting to remedy this harm through the enrollment of Ms. [REDACTED] in the VLTP with the goal of providing her sufficient donated leave to cover those periods of annual leave, sick leave, and LWOP that she used when her request was denied. The Department has further offered to revisit the issue in 2012 with a view to resolving it should insufficient VLTP hours be donated to the grievant.

The Board finds that the Department's proffered remedy is reasonable and just. It would make the grievant whole in terms of the harm done her in November 2009. The Board notes that the Department appears to remain committed to assisting grievant if the necessary hours to make her whole are not donated via the VLTP.

There were a number of issues raised by the grievant relating to interpretations of law and regulations and assumptions, including what might have happened had her request for participation in the VLTP in 2009 been approved or what may happen in the future. The Board is not persuaded by the speculative nature of grievant's arguments.

We find that the remedy offered by the Department properly addresses and corrects the original error and provides reasonable relief for the harm caused.

The Board agrees with the Department that creating a fund of 500 hours for relief for past errors and another 500 for proscriptive relief are not justified. We find no basis for offering 500 hours of prospective leave based on an assumption that such leave may be necessary on the assumption that the Department will err when considering a future request submitted in accordance with regulations. The Board believes it is reasonable and in accordance with regulations to document the need for the hours taken so that proper accounting procedures may be followed.

The Board cannot grant grievant's request that the Department be ordered to rewrite its regulations and SOPs concerning the VLTP so that, in grievant's opinion, the program is correctly explained and administered in the future. The Board deals with allegations of specific harm to a grievant and actions to remedy that harm. If grievant believes that the VLTP regulations need revision, she must pursue this action through other channels. Grievant's request is not within the Board's authority.

The Board also finds no merit in the grievants offer to accept financial compensation in lieu of favorable action on the elements of her grievance and instead of accepting enrollment in the VLTP. The Department's offer of relief through participation in the VLTP is the appropriate remedy.

V. DECISION

The grievance appeal is denied.