

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[REDACTED]
Grievant

Record of Proceedings
FSGB Case No. 2011-021

And

June 15, 2012

Department of State

**ORDER: MOTION TO STAY
EXCISED**

For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Lois E. Hartman
Jeanne L. Schulz

Senior Advisor

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda Chandler
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO STAY

I. THE MOTION

On May 18, 2012, grievant filed a second “Motion to Stay Proceedings” in this appeal, pending the outcome of the Department’s March 9, 2012 proposal to separate him for cause under Section 610 of the Foreign Service Act, as amended (22 U.S.C. 4010), and implementing regulations at 3 FAM 4364.

II. BACKGROUND AND ISSUES

On August 5, 2011 grievant filed his first Motion to Stay Proceedings pending the outcome of a separate grievance he had recently filed against the Department (FSGB Case No. 2011-058). The Department opposed the stay and on September 29, 2011, this Board found good cause to stay the proceedings, having determined that resolution of the new grievance might result in rendering the current discipline grievance moot and obviate the necessity for a hearing with no prejudice to the Department.

On March 21, 2012, the Board issued its Order on Timeliness in FSGB Case No. 2011-058, finding that the second grievance was time barred. The grievance was dismissed and on March 29 the parties were notified that the current grievance was reactivated as of that date for the Department to respond to grievant’s first discovery requests.

On May 18, 2012 grievant filed a second Motion to Stay these proceedings, pending a final decision on the Department’s March 9, 2012 proposal to separate him for cause under Section 610 of the Foreign Service Act, as amended and implementing regulations at 3 FAM 4364.

Grievant submitted a response to the proposal on May 15 and is scheduled for an oral response to the Director General (DG) on June 12, 2012. He avers that regardless of the outcome of the separation case, he intends to retire from the Foreign Service “no later than September 28, 2012, thus, he will “either be separated from the Foreign Service between now and September 28th or [he] will retire.” He claims that his request for a stay is justified because the disciplinary issue in the current case will become moot if the DG decides to uphold the proposal for separation. Grievant also claims that a stay will save both parties valuable time and resources in the discovery process and preparations for a hearing. In a May 31, 2012 submission requesting an extension of interim relief,¹ grievant argues that if the disciplinary letter at issue is allowed to enter his Official Performance Folder (OPF) now, it will be viewed and potentially play a role in the DG’s final decision regarding grievant’s continued employment with the Department.

The Department opposes the stay for lack of good cause shown. It notes that while the Board’s rules and regulations do not specifically address requirements for postponing a hearing, they do indicate a custom of processing a case in an expeditious manner and that the MSPB² requires the moving party to show good cause for postponement of a hearing. Based on the unique circumstances of each case, the administrative judge has the discretion to determine whether such cause exists.³

Contrary to grievant’s claims, the Department believes it will be prejudiced by another stay: the two specifications forming the basis of the charge of Improper Personal Conduct occurred over two years ago. Over ten witnesses are expected to testify at the hearing. Another postponement risks faded memories by witnesses that could prejudice

¹ Interim relief in this case expired on May 23, 2012.

² Merit Systems Protection Board, to which the Board refers from time to time for guidance.

³ Thomas v. Department of Veterans Affairs, 51 MSPR 218, 221, (1991)

the Department's case. Grievant's "concern" about the time and expense involved in a hearing that he has requested can be resolved by his waiving the hearing and allowing the Board to render a decision based on his appeal, supplemental brief and the Record of Proceedings. Further, grievant's argument that he may be separated or that he intends to retire should not determine whether a letter of reprimand is inserted into his OPF.

Contrary to his assertion, grievant is enrolled in the Department's Job Search Program, which begins on October 1 and ends on November 30, 2012. His retirement application indicates a retirement date of November 30, not September 28, 2012.

III. DISCUSSION AND FINDINGS

Grievant argues, as he did in his first Motion to stay in this case, that his interest lies in saving the Department time and money by avoiding the necessity of a hearing with witnesses and its attendant costs. The events at issue in this grievance occurred in November 2009 and it is now early June 2012. Had the Board not granted the first motion to stay, it is entirely possible that the hearing grievant requested in this case would already have taken place. We do not believe that the interests of justice would be served by a further stay in these proceedings. A stay pending a final decision on the proposal to separate grievant may cause substantial additional delay in completing discovery and then the hearing in this case. The Department's concern about the effect such delay may have on witnesses' recollections is legitimate, and the Board's policy of processing cases expeditiously would be compromised. Further, contrary to grievant's assertion, should the Department issue a final decision to the effect that it should go forward to the Board with a recommendation that grievant be separated, that would not render the instant grievance moot. In the event this grievance over the letter of reprimand is ultimately

denied by the Board the letter will go into his OPF at that time and, pursuant to 3 FAM 4345(d), remain in the file for one year. During that time period, the inclusion of the letter in the OPF may have consequences, including, for example, if grievant should reapply for employment with the US government.

For the foregoing reasons, grievant's Motion to Stay will be denied.

IV. DECISION

The Motion to Stay is denied.