

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2011-022

March 6, 2012

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

James E. Blanford
Jeanne L. Schulz

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Melinda P. Chandler
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Assoc.

CASE SUMMARY

HELD: In a claim by grievant that the agency had not given him sufficient credit for his prior work experience in establishing his entry-level salary, the Board finds the grievance appeal timely and concurs with the agency in providing grievant with a one-step salary increase; it denies grievant's request for an additional step.

OVERVIEW

Grievant, a Diplomatic Security (DS) Special Agent Career Candidate with the Department of State, asserted that the agency had incorrectly evaluated his prior work experience in establishing his initial salary and that he was entitled to several additional steps.

Guidance for setting the salary levels of DS agents upon their initial appointment as FS career candidates is found in Standard Operating Procedure (SOP) Notice No. 115A (October 25, 2006) and in the particular vacancy announcement (VA) to which the applicant responded. The agency's determination of entry level salary reflects its review and analysis of an applicant's employment application and supporting documentation in accordance with 22 U.S.C. § 3964 and SOP No. 115A.

Citing a previous Board case, the agency argued that the grievance was time-barred because grievant's salary was established on June 26, 2008, and he filed his grievance more than two years later on July 16, 2010. In the alternative, the agency declared that although it was under no obligation to review documentation not previously provided and despite having reservations about some of grievant's submitted work experience, it proposed granting him a single retroactive step increase for the sole purpose of achieving a resolution to the grievance.

Grievant contended that his grievance was timely because the occurrence giving rise to it was his July 18, 2008 entry into the Foreign Service, at the disputed salary level. Before that, he was unaware of the grievance process and could not have grieved in any event. He maintained that he had creditable prior work experience that the agency failed to recognize.

In finding the grievance timely, the Board held that the opinion in the previous case cited by the agency was dicta and that other Board decisions supported using the grievant's date of entry to calculate the two-year limitations period. On the merits, the Board analyzed grievant's claimed prior work experience and agreed with the agency that he should be credited with one additional salary step. Noting that the agency proposed to provide the one extra step, albeit with the proviso that this would not be considered a concession for purposes of any other grievance, the Board directed a retroactive one-step pay increase. It rejected grievant's claimed entitlement to any additional step increase.

The grievance appeal was granted in part.

DECISION

I. THE GRIEVANCE

Grievant is a Diplomatic Security (DS) Special Agent Career Candidate with the Department of State (agency, Department). He challenges the Department's denial of his grievance wherein he asserts that in establishing his initial salary at FP-6 step 5, the agency incorrectly evaluated his prior work experience.

For relief, grievant requests¹ that his entry level salary be revised to FP-06 step 7, retroactive to his date of entry into the Foreign Service on July 18, 2008, with interest.

II. BACKGROUND

In response to the applicable vacancy announcement (VA),² grievant submitted an employment application to the Department. The agency, in its June 26, 2008 letter presenting grievant an offer of appointment into the Foreign Service as a DS Officer, informed him that his initial salary level was established as FP-06 step 5 – two steps above the basic starting salary for DS agents (i.e., FP-06 step 3). On July 8, grievant requested that the Department review its decision regarding his initial salary level to assess additional education completed, additional military experience, and experience he claimed was directly related to the duties of a DS special agent. On July 14, the Salary Review Committee (SRC) determined that grievant's salary offer was calculated incorrectly and should have been lower, at FP-06 step 3. In accordance with its policy, however, the SRC allowed the higher allegedly incorrect offer to stand. Grievant entered the Foreign Service on July 18, 2008, at the FP-06 step 5 level.

¹ Grievant's October 30, 2011 Reply to Agency's Response dated September 30, 2011.

² Vacancy Announcement No. SA-08-01 for a Foreign Service Diplomatic Security Special Agent opened on January 25, 2008 and closed on February 1, 2008.

On July 16, 2010, grievant filed an agency level grievance asserting that the agency had failed to take into account his specialized experience as a Counter-intelligence and Human Intelligence (CI/HUMINT) officer in the United States Marine Corps when establishing his entry level salary. He supplemented his grievance by memorandum on August 20, 2010. The Department denied the grievance on March 28, 2011. The agency acknowledged that the material attached to the grievance supported one additional step increase but argued that grievant already had received that step, albeit erroneously. After filing an appeal with this Board on May 27, 2011, grievant engaged in discovery and presented supplemental submissions. The Department responded to his second supplemental submission on September 30, 2011, arguing that grievant's claim was time-barred, but also offering grievant a retroactive step increase to FP-06 step 6 subject to the proviso that this offer would not be considered a concession for purposes of any other grievance, if his appeal were found not to be time-barred. Grievant submitted a rebuttal on October 30, 2011.

The Record of Proceedings (ROP) was closed on December 7, 2011.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant observes that the agency accepted his grievance, rendered a decision and provided a response to his appeal without raising any question concerning timeliness. He further notes that FSGB Case No. 2006-050 (May 10, 2007), the decision cited by the Department in support of its contention that grievant's claim is time-barred, quotes Section 1104(a) of the Foreign Service Act of 1980, as follows:

A grievance is forever barred under this subchapter unless it is filed with the Department within a period of 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.

He argues that despite the Department's allegation that the grievance filing is time-barred, it was timely since it was filed less than two years after July 18, 2008, the date grievant entered on duty at FP-06 step 5. Prior to that date, grievant states that he was not aware of the existence of the grievance procedure and would not have had standing to file a grievance in any event.

While the agency maintains that certain periods of grievant's military service should only be credited at 20% because of a lack of evaluations, grievant argues it is clear from his final DD-214 that he completed 3 years and 6 months as a CI/HUMINT officer. A true assessment of his creditable service would be 4 years and 9.1 months. The Board should direct that grievant's entry level grade and step be reassessed as FP-06 step 7, retroactive to July 18, 2008, with interest.

THE AGENCY

The agency notes that in FSGB Case No. 2006-050, also involving the SRC's reconsideration of an entry-level salary, the Board ruled that "[t]he occurrence giving rise to [grievant's] grievance was the establishment of his entry-level salary." It argues that grievant's salary was established on June 26, 2008, and that the grievance he filed on July 16, 2010 was thus time-barred under 22 U.S.C. § 4134(a).

In the event the Board finds that the claim is not time-barred, the Department emphasizes that it was not obligated to entertain grievant's second request to review his

entry-level salary. However, the agency has considered the documentation not previously presented to the SRC in order to provide all possible fairness to the grievant. The agency has serious reservations about the documentation; for example, in the 1997 to 2004 timeframe, grievant claimed 20% credit for both active and inactive reserve duty. It is not the Department's practice to give any credit for time spent on inactive reserve duty. Nonetheless, for the sole purpose of achieving resolution and with the Board's concurrence and one proviso,³ the agency proposes to direct a one-step increase to FP-06 step 6, retroactive to grievant's service entry date, with interest.

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious. (See 22 CFR 905.1(a)) For the reasons discussed below, the Board holds that grievant has met this burden, in part.

Timeliness

We address first the issue of timeliness raised by the Department. Grievant is correct in stating that the Department has raised this argument late in the day, after first treating the case on its merits. Grievant filed his agency level grievance on July 16, 2010; the agency's first objection with respect to timeliness came on September 30, 2011. The Department now cites FSGB Case No. 2006-050 to support its claim that grievant failed to meet the two-year deadline for filing a grievance specified in 22 U.S.C. § 4134(a). We do not agree.

³ The proviso is that no analysis contained in the Department's September 30, 2011 submission to this Board should be considered as a concession for any future grievance.

Since timeliness was not an issue in the case cited above, we view the statement therein that expressed that establishment of the entry level salary as “the occurrence giving rise to the grievance” as an observation in the form of dicta and thus not binding precedent. In the present case, there appear to be at least four possibilities for what that occurrence might be:

- 1) the date on which an employment offer containing a specific initial salary was made to the grievant;
- 2) the date on which grievant requested a review of that initial salary offer;
- 3) the date on which grievant was advised of the results of that review; or
- 4) the date on which grievant entered on duty and began receiving the salary.

The applicable law states:

22 U.S.C. § 4134. Time Limits

(a) Limitations Period

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 or, in the case of a grievance with respect to the grievant’s rater or reviewer, one year after the date on which the grievant ceased to be subject to rating or review by that person, but in no case more than three 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.

We find that, under the above statute, grievant had two years to file a grievance from July 18, 2008, the date on which he entered on duty and began receiving the FP-06

step 5 salary. We note that in previous salary review cases,⁴ the Department and the Board agreed that an employee's entry-on-duty date is the "occurrence giving rise to the grievance." There is no evidence in the ROP indicating that grievant was aware of the existence of an agency grievance procedure prior to his entry date. Indeed, the SRC letter issued on July 14, 2008, omits any reference to an appeal procedure and flatly states, "[t]he decisions of the Salary Review Committee are final." Moreover, it is inarguable that grievant could not have submitted a grievance before he joined the Foreign Service. For these reasons, we hold that the two-year period during which grievant had to demonstrate "reasonable diligence" in pursuing his claim did not begin prior to July 18, 2008, and that his grievance filed on July 16, 2010 is, therefore, timely.⁵

Entry Level Salary

While the Department has reservations about some of the information grievant submitted, and does not wish to establish a precedent, it proposes to provide grievant with a retroactive step increase to FP-06 step 6, based on its analysis that grievant should be credited with 3 years 4.9 months' experience. As discussed below, the Board finds such action to be appropriate in the circumstances of this case.

The parties began with widely separated positions. On July 16, 2010, when he filed his agency level grievance, grievant asserted that his salary level should have been FP-06, step 9, while the Department found that he qualified for step 3. By the end of the appeal process, the difference had narrowed considerably. In its September 30, 2011

⁴ See FSGB Case No. 1989-067; FSGB Case No. 1994-21 (June 6, 1994).

⁵ Although the Board finds that the date of grievant's entry on duty was the "occurrence" giving rise to the grievance in the circumstances of this case, different facts in another case might render more appropriate the use of an alternative date in calculating the timeliness of such a grievance. For example, where a requested salary review results in the issuance of a decision by the Salary Review Committee after the employee has entered on duty, the date of the SRC decision might be appropriate for calculating timeliness.

submission, the agency calculated grievant's service credit as 3 years 4.9 months and concluded that he should receive a step 6. Meanwhile, grievant calculated a service credit of 4 years 9.1 months and claimed step 7 in his October 30, 2011 rebuttal.

The difference between the parties' results is found in two time periods: 07/10/04-01/05/06 and 11/01/07-01/15/08. For these periods, grievant did not supply Fitness Reports⁶, and the agency granted him the 20% credit it awards for military service that is not established to be specialized experience directly related to the work of a DS agent. For the intervening time (01/06/06-10/31/07), the Department determined that grievant's evaluations supported his claim that he performed duties that were directly related to those of a DS agent and gave him 100% credit. Grievant maintains that he should receive 100% for the periods without evaluations because his DD-214 (Certificate of Release or Discharge from Active Duty) states that his "primary specialty" was that of Counterintelligence/Human Intelligence officer for 3 years 6 months, ending on 01/15/08.

Vacancy Announcement SA-08-01 informed applicants that they might gain additional salary steps based on "directly related specialized experience." SOP 115A further clarified:

Candidates having closely related progressive work experience beyond the required minimum qualification requirements needed to qualify for the occupation and grade level in question will be given one additional step for each full year of this extra experience. Progressive experience is that which clearly shows the candidate has acquired increasing levels of responsibility, knowledge, skills and abilities while performing the closely related work experience. Part-time experience or employment will be prorated. In no case will more than one year's experience be credited for any one twelve month period, regardless of the type of work performed, the number of

⁶ The Department described them as "USMC Fitness Reports which are the military equivalent of the Department's Employee Evaluation Report."

jobs held, the hours worked or the employment status (self-employed or other).

Specific examples of work experience that qualifies as being closely related to the work of the Foreign Service specialties covered by this SOP are outlined, but not limited to, the information in the relevant Vacancy Announcement.

Additional steps within the entry grade, up to the 14th step, may be granted for work experience of particular relevance and importance to the Foreign Service as determined by the Registrars.

In its March 28, 2011 agency level decision, the Department objected that grievant should have submitted his Fitness Reports at the time of his application or at his initial salary review. Nonetheless, the agency made a detailed comparison of grievant's military duties as shown in the reports to the seven functions of a DS agent listed on page two of the vacancy announcement. The agency found that the Fitness Reports demonstrated experience that was directly related to that of a DS agent.

It is apparent from the vacancy announcement and the SOP that only "directly related specialized experience" can justify additional salary steps. In FSGB Case No. 2007-042 (September 8, 2009), this Board held that the Department's rules prohibited the agency from categorizing experience solely based on job title.⁷ The Board held that the agency must consider the full extent of the employee's experience as set forth in all application materials. The Board reached a similar conclusion in FSGB Case No. 2008-032 (September 9, 2009), also involving a former MSG. In both cases, the Board found that the agency is charged with conducting a "valid, non-arbitrary, non-capricious qualification standards review of grievant's claimed prior employment experience." In the instant case, we find that it is grievant, not the Department, who attempts to sustain

⁷ The employee was a former Marine Security Guard (MSG).

his claim with a generalization based on his military specialty rather than his actual work experience.

Grievant supplemented his original application by furnishing Fitness Reports that described the actual duties he performed during some of the time periods for which he claims 100% credit. The Department duly awarded him 100% credit for those periods of time. Grievant offers no explanation for failing to provide Fitness Report evaluations for the rest of the time he claims to have spent in the CI/HUMINT specialty. Significantly, he fails to demonstrate that his assigned duties during those periods aligned with his specialty. Nothing in the ROP indicates that grievant's primary specialty prohibited him from being assigned to duties, such as training, that might not qualify as "directly related specialized experience." In claiming that "the lack of evaluations for the periods 07/10/04 to 01/05/06 and 11/01/07 to 01/25/08 does not indicate that my primary duties involved some other field of activity," grievant mistakes his burden. In order to meet the requirements of the vacancy announcement and the SOP, he must affirmatively show that the primary duties he performed during those periods met the Department's requirements for 100% credit. He had ample opportunity to do so. The agency fairly applied its criteria to the Fitness Reports grievant supplied on August 20, 2010 and concluded that his initial salary should have been higher than step 5. We find, however, that grievant has failed to show by a preponderance of the evidence that his claim to any step higher than step 6 is meritorious.

Grievant has met his burden to demonstrate by a preponderance of the evidence that he should be accorded a retroactive entry grade of FP-06 step 6.

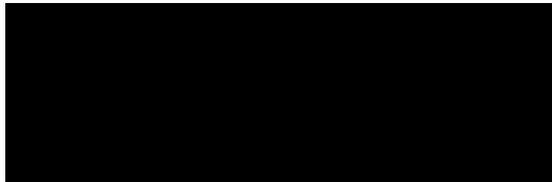
V. DECISION

The grievance is found to be timely. On the merits, the Board concurs with the agency's proposed resolution that grievant be given a one-step increase. Accordingly, the agency is directed to provide grievant with a one-step salary increase to FP-06 step 6, retroactive to his service entry date, with interest. The grievance is granted in part and denied in part.

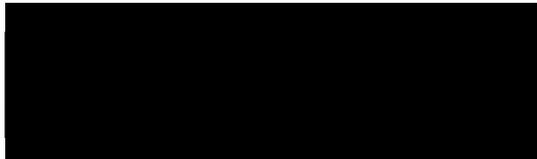
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