

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceeding
FSGB No. 2011-030

And

April 30, 2012

Department of State

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Lois E. Hartman
Nancy M. Serpa

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda P. Chandler
Director, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to establish by a preponderance of the evidence that his Foreign Service entry salary was set incorrectly.

OVERVIEW

Grievant [REDACTED] who joined the Foreign Service as a Diplomatic Security (DS) Special Agent in 2009, was hired at grade FP-6, Step 4. He claimed that his relevant military service was not correctly credited in the calculation of his initial salary. He questioned his salary before he entered on duty, but nonetheless accepted the terms and conditions, including salary, of the Department's employment offer. A Salary Review Committee examined his request for reconsideration of his salary, along with additional documentation he submitted, and concluded that grievant's entry salary was correct.

Grievant argued, but failed to convince the Board, that his seven years of military experience, in which he performed assignments relevant to the duties of a DS Special Agent, should qualify him for additional steps in Grade FP-6. Grievant contended that those assignments (training of foreign military personnel in executive protection, investigations, work with Embassy narcotics assistance units) were his primary duties, and thus entitled him to one additional salary step for each year of his military service. As evidence of his performance of these duties, and in support of his grievance, he presented documentation such as awards citations, letters of commendation, and annual performance reports, as well as affidavits from supervisors in DS who praised the relevance of his military experience to DS work.

The Department's salary-setting policy for DS Special Agents is set out in Standard Operating Procedure (SOP) 134C. The Board found that the SOP clearly describes the kinds of experience the Department will consider in determining whether to award additional steps in Grade 6 for "directly related experience." In that regard, grievant was not assigned to any military investigative unit named in the SOP; nor was he assigned to a military organization equivalent to the named units, as the SOP requires. Grievant's argument that there are many military organizations that can be considered equivalent, even if they do not have embedded criminal investigative units fails, because, in the Board's view, the SOP's plain and specific language limits qualifying experience to service in criminal investigative units.

Grievant did indeed perform functions in the military that were closely related to the duties of a DS Special agent, and he did so with distinction. But he failed to carry his burden of proving by a preponderance of the evidence that these functions were his primary duties for the twelve-month period required by SOP 134C in order to qualify for an additional salary step, or, as noted above, that he was assigned to the equivalent of a criminal investigative unit.

The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

Grievant, [REDACTED] appeals to this Board the denial of his grievance by the Department of State (the Department, the Agency), in which he is seeking an increase in his entry salary. Grievant was hired at grade FS-6, step 4¹ as a Diplomatic Security (DS) Special Agent, and claims that his prior military service was not correctly credited in the calculation of his initial salary. For relief, he seeks adjustment of his entry salary to the level of FP-6, step 12, or, alternatively, to the appropriate step above step 4, made retroactive to his date of hire in October 2009, and any other relief deemed just and proper.

II. BACKGROUND

Grievant accepted the Department's offer of employment in September, 2009, and entered on duty as a DS Special Agent in October, 2009. Prior to his entry on duty, he told the hiring specialist in the Bureau of Human Resources, Office of Recruitment, Examination and Employment (HR/REE) in an email dated September 16, 2009 that he did not believe "the salary I was offered fairly reflects my work experience history," and requested a salary review. On September 22, 2009, he submitted an email to the Staff Director of the Board of Examiners, including information for a salary review. The Salary Review Committee determined that grievant's entry salary had been correctly set at the FP-6, step 4 level. It based this conclusion on the fact that grievant only met the minimal requirements for the FP-6, step 4 position specified in the Vacancy Announcement to which he had responded, because he did not have a graduate degree in

¹ Throughout the documents filed in this grievance, both parties refer to grievant's entry grade as "FP"-04, step 4, a designation we understand to be the equivalent of "FS"-6, step 4. We use the two terms interchangeably in this decision.

a related field or “work experience directly related to the functions of a Special Agent as described in the Vacancy Announcement.”

Grievant filed an agency-level grievance contesting this determination in a memorandum dated October 28, 2010, received by the Department on November 18, 2010. The Department denied that grievance by letter dated May 9, 2011. In ruling on the grievance, the Department considered additional information that grievant submitted in support of his claim that his work experiences, training, and deployments were all directly related to the position of DS Special Agent. The grievant filed his appeal with this Board on July 6, 2011, and, after discovery, a supplemental submission on September 15, 2011. The Department filed its response to that Supplemental Submission on October 12, 2011, and the grievant replied to the Agency response on November 17, 2011. The Record of Proceedings was closed on February 23, 2012.

III. POSITIONS OF THE PARTIES

The Grievant

The Grievant contends that his entry salary upon joining the Foreign Service in October 2009 was incorrectly calculated, in that it failed to take into account, or give him credit for, his prior military experience and qualifications. He avers that HR/REE, the office that processed his employment and determined his salary, “had no way of deciding” whether his seven years of experience as a member of the US Army Special Forces was “closely related” to the duties of a DS Agent. According to grievant, that office admitted in discovery that it did not know whether his experience was closely related, failed to ask him for clarification, and made no effort to find out whether the duties of a Special Forces soldier in the US Army were closely related to those of a DS

Agent. He argues that analyzing such information should certainly be the responsibility of the agency's hiring office. However, even if HR/REE is deemed not to have that responsibility, or was unable to carry it out, the letters of support he has provided from his supervisors in the Diplomatic Security Service make it clear that the qualities, knowledge, and experience he carried over from his time as a Special Forces Soldier and Non-Commissioned officer were of direct value to DS and to the Department.

Grievant argues that Standard Operating Procedure (SOP) 134C, the document setting forth the policy upon which the Department bases its decisions regarding entry salary for DS Special Agents, in addition to mentioning "specialized military service as a Special Agent," also clearly "opens the door for extra steps to be awarded for time where functions are directly related to the duties of a DS Special Agent."

Grievant strenuously disagrees with the Department's contention that, while he might have performed some duties directly related to those of a DS Special Agent, he did not provide evidence that such duties were his primary duties. Grievant claims that the Army trains soldiers to perform their primary duties, and confers awards for superior performance of those duties. He compares the training courses he took in the Army to several courses required for DS Special Agents, and cites several of his accomplishments and expertise gained while he was a soldier that compare directly to the duties and areas of expertise required for a DS Special Agent. He concludes his argument by stating that his seven years as a Special Forces soldier and Non-Commissioned Officer should entitle him to an entry grade of FS-6, Step 12.²

² We presume, in this calculation, that grievant is seeking one additional step in salary for every year of his service in the US Army.

The Department

The Department contends that grievant's entry salary was set correctly, that he was given appropriate credit for prior military service, that he did not demonstrate that his duties that were directly related to those of a DS Special Agent were his **primary** duties, and that therefore his grievance should be denied.

The Department argues that while grievant has maintained since before he was hired that his salary was incorrectly set, he nevertheless accepted the Department's offer of employment, including all terms, conditions, and salary at the level of FP-6, step 4 in a communication on September 9, 2009. His appeal to the Salary Review Committee (SRC) resulted in that body's determination that his salary had been correctly set.

Moreover, the Department argues, none of the documents grievant provided in support of his grievance to the agency or this Board were submitted to the SRC, and should therefore not be considered in the grievance process. The Department cites the Board's decision in FSGB Case No. 2006-050 (May 10, 2007), stating that "there was no obligation for the Department" to have an SRC review grievant's salary, because grievant "had clearly been advised that entry level salaries would not be reconsidered once an employee had entered on duty." Considering evidence not submitted to the SRC would, in effect, give the grievant another review to which he is not entitled.

Although the Department was not required to consider the documents presented in the grievance process, the grievance staff reviewed and assessed them as they related to the criteria outlined in Vacancy Announcement SA-09-01 and in SOP 134C, and came to the same conclusion about his grievance as that reached by the SRC: that his initial

salary was correctly set. In reaching that conclusion, the Department cited the following paragraph from the agency's decision letter:

In evaluating your [Mr. ██████████] military experience, it is worth noting that you do not have, nor do you claim to have had, specialized experience as a Special Agent in CID or any other military investigative unit. Therefore, you are not entitled to the one step increase which would have flowed from each year of such specialized experience. The next question is whether you have specialized experience in military organizations equivalent to a military criminal investigation unit in which the primary duties are directly related to the functions of a DS Special Agent. Based on the documents you have provided to support your grievance, the answer is "no."

The Department goes on to cite the following example:

While you have highlighted experience, such as your role in "advising the Salvadoran Special Forces on the personal protection of a foreign dignitary," which may be directly related to the work of a DS Agent, I found no documentary support that it was your primary duty. Not only did you not show that the other experiences you listed were directly related to the work of a DS Agent, I found no evidence that they were your primary assignments at any stretch of time equal to the required 12 month period.

IV. DISCUSSION AND FINDINGS

In all grievances other than those involving discipline, the grievant must show, by preponderant evidence, that his grievance is meritorious.³ In order to prevail in this appeal, grievant must show that the Department did not follow, or misapplied, its regulations and procedures in his case, or must prove that the Department failed to exercise reasonable discretion when it set his entry level salary grade and step. We find that grievant has failed to make that case.

As an initial matter, the parties disputed whether certain documents that grievant produced for the first time in the grievance process should be considered. The Department contends that, since none of the documents were submitted to the SRC, they

³ 22CFR 905

should not be considered in the grievance process. The grievant disagrees, and cites a June 25, 2005 letter from the Department's Chief Labor Management Negotiator, which makes clear that entry-level salaries are grievable, whether or not the SRC had considered an appeal. Thus, he contends, the fact that the SRC did not see some of the material grievant presented in support of his grievance "does not preclude it being presented subsequently at any stage."

We find that we do not need to reach a finding on the admissibility of the documents presented for the first time in grievant's agency-level or FSGB grievance appeal because the Department, notwithstanding its claim that these documents were inadmissible, considered them in ruling on the grievance. Moreover, we have concluded that they do not change the Board's decision.

Entry salary for DS Agents is determined by the provisions of SOP Notice No. 134C, effective September 22, 2008, the purpose of which is "to provide procedures for determining Diplomatic Security Special Agent Candidates salary level at the time of appointment in accordance with 3 FAM 3121.1-2." For purpose of clarity and reference, we cite the entire SOP below:

Following are the revised procedures for determining the step of all new special agents entering on duty, with the exception of current USG employees, who enter at the step that is nearest to, but not less than current base pay up to a maximum of FS-6/14. All new special agents enter on duty at the FP-6 Step 4 level, with additional steps awarded for certain education and/or experience factors as identified below. All service/employment is based upon a one year minimum. One step will be added for each 12 months of total creditable experience, rounded down. Part-time experience or employment will be pro-rated.

(a) The minimum entry salary for all Special Agents will be set at FP-6, Step 4. The maximum will remain at FP-6, Step 14. This will allow for the possible addition of one step (above FP-6/4) for an advanced

degree in a related discipline (Master's or PhD) or JD and possible additional steps for each year of directly-related experience.

Directly-related experience will be credited only as follows:

a. Military Service

- 1 step for each year of specialized military service as a Special Agent in CID, OSI, NCIS, and/or Coast Guard Intelligence.

- 1 step for each year of specialized experience in military organizations equivalent to those named above in which the primary duties are directly related to the functions of a DS Special Agent. No credit will be given for service as a MSG watchstander, a police patrolman or a MP without investigative or protective detail responsibilities. It will be incumbent on the applicant to prove all the following supporting documentation:

- Military documents showing a Military Occupational Specialty (MOS); Skill Code or Designator which denotes a military specialty directly related to the DS Special Agent Position.
- Copy of military orders showing applicant's assignment to a unit in which the primary mission is the conduct of investigations; personal/protective security functions or management of security programs.
- Copy of a fitness/performance report from unit in question demonstrating that functions performed are directly related to those of a DS Special Agent and that the candidate performed them satisfactorily.

b. Law Enforcement

1 step for each year of specialized directly related experience as a detective, criminal investigator; personal protective specialist (e.g. Governor's/Mayor's Detail) or as a Special Agent in a state or federal law enforcement organization.

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c. Other Categories

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c. Additional salary steps are not awarded for work experience which is not directly related to the functions of the Special Agent position.

In our view, SOP 134C notes very clearly the kinds of experience it will consider in determining whether to award additional steps in grade FS-6 for “directly related experience.” For military service, the first question is whether the grievant was assigned as a “Special Agent in CID, OSI, NCIS, and/or Coast Guard Intelligence.” It is undisputed that he was not assigned to any of these organizations.

The next question is whether he possessed “specialized experience in military organizations equivalent to those named above⁴ in which the primary duties are directly related to the functions of a DS Special Agent.” As grievant points out, there are a host of military organizations that can be considered equivalent to the named organizations, and in which the primary duties are indeed directly related to those of a DS Agent, even though they may not actually have embedded Criminal Investigation Units.”⁵ However the SOP, in naming each service’s criminal investigative unit, makes clear that service in one of those units, or one “equivalent” to them, is required before additional steps can be added to entry salary. It does not mean, as grievant suggests, that there are a “host of “organizations that can be considered equivalent, even if they do not have embedded criminal investigative units. In our view, the SOP seeks to limit “directly-related” experience in the military specifically to experience in criminal investigative units. Grievant has failed to carry his burden of showing that he has such military experience in a criminal investigative unit.

⁴ Because this citation is contained the paragraph immediately following the paragraph naming four specific military criminal investigating units, we interpret “those named above” to be CID, OSI, NCIS, and/or Coast Guard Intelligence.

⁵ Grievant’s July 6, 2011 Grievance Appeal to the FSGB, at 3.

While grievant asserts that the U.S. military trains in and awards performance in a soldier's "primary duties," he does not present any evidence to support that statement. Indeed, his Military Occupational Specialty is Special Forces. His "principal duty title," on the two NCO Evaluation Reports he presented, is "Special Forces Engineer Sergeant."

Grievant has introduced evidence demonstrating that he did indeed perform functions in the military that were closely related to the duties of a DS Special Agent, and that he successfully conducted extensive training on multiple overseas deployments. But evidence is lacking on whether grievant led these courses for two days, two weeks, or two months. While many of the documents he presented reflect outstanding performance of duties relevant to those of a DS Special Agent, there is no probative documentation that he undertook these duties on a fulltime basis, and certainly none that would show that they were his primary duties for the twelve-month period required in SOP 134C for an additional step in his entry salary.

As reflected by the many affidavits provided by his colleagues and supervisors, grievant did have relevant experience that he brought to the Foreign Service. But SOP 134C does not call for adding additional steps to entry salary based on relevant experience; instead, it allows additional steps only for full-time performance of primary duties closely related to that of a DS Special Agent in a criminal investigative unit or its equivalent. Based on the record of proceedings, we find grievant did not have such experience.

V. DECISION

The grievance appeal is denied.