

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

Record of Proceedings  
FSGB Case No. 2011-032

  
Grievant

May 15, 2012

and

Department of State

**DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Nancy M. Serpa  
Lois E. Hartman

Special Assistant:

Jill E. Perry

Representative for the Grievant:

*Pro Se*

Representative for the Department:

Nathan Nagy  
Office of the Legal Advisor

Employee Exclusive Representative:

American Foreign Service Assoc.

## CASE SUMMARY

**HELD:** Grievant failed to show by a preponderance of the evidence that he is entitled to a repayment waiver for funds paid to him in 2008 in excess of his WAE (While-Actually-Employed) earnings cap.

## OVERVIEW

Grievant is a retired Foreign Service Officer who accepted reemployment with the Office of the Inspector General (OIG) as a WAE from 2005 through 2008. In 2008, his combined annuity and WAE salary exceeded by \$9,460.29 the earnings “cap” described in Section 824 of the Foreign Service Act of 1980. Section 807 of the Act allows a waiver of repayment of the excess earnings when the individual who collected them is not at fault and when recovery would be against equity and good conscience.

Grievant sought a waiver based on his having been working on an unexpectedly complex three-country Inspection to which he was assigned, and on his unwillingness to simply “down tools” and stop working in the middle of that assignment when his cap might have been exceeded. With respect to the equity and good conscience requirement, he contended that recovery would not be in good conscience on the basis that he must support his mother-in-law, he is limited in work opportunities by surgery required for an injury he sustained when on active duty, and he paid almost \$17,000 in out-of-pocket travel and lodging expenses while working for the OIG.

The Department argued that grievant failed to meet the two-pronged test outlined in Section 807, that he was not at fault for the overpayment, and that recovery of it would be against equity and good conscience. The Department contended that grievant knew or should have known he was in danger of exceeding the earnings cap, that he is under no legal requirement to support his mother-in-law, that he has not shown that the costs of his work-related injuries were paid in reliance on his 2008 overpayment, and that his out-of-pocket expenses were paid at least in part long before the overpayment occurred.

The Board found that grievant’s repeated queries to OIG officials about mechanisms by which he could avoid exceeding the “cap,” his claim that he failed, for almost one year, to note a pay raise amounting to over \$33,000 per year, and his explanation that extenuating circumstances during the inspection meant this assignment had exceeded his “conservative” estimate of how long he might have to work, all showed that he knew or should have known he was in danger of exceeding the earnings cap. Moreover, the Board was persuaded by the Department’s arguments that repayment would not be against equity and good conscience.

The grievance was denied.

## DECISION

### I. THE GRIEVANCE

Grievant [REDACTED], a retired Foreign Service Officer who worked for the Department of State (the Department, the Agency), Office of the Inspector General (OIG) as a reemployed annuitant on a while-actually-employed (WAE) basis in 2008, appeals the Department's denial of his request for a repayment waiver of an overpayment of his annuity in that year. The Department claims the grievant owes a total of \$9,460.29, due to his having exceeded the annual earnings limitation or "cap" outlined in section 824 of the Foreign Service Act of 1980, as amended.<sup>1</sup>

### II. BACKGROUND

Grievant retired from the Foreign Service in late 2003, and served intermittently from 2005 through 2008 as an Inspector for the OIG on a WAE basis. In 2008, while working on an Inspection of US Embassies in three Latin American countries, grievant exceeded his WAE earnings cap, and thus became subject to repayment of the part of his annuity that exceeded that cap. The record shows that grievant's earnings cap in 2008 was \$149,000, and that his total compensation, in annuity and WAE salary combined, was \$158,460.29 (of which \$83,772 was annuity payments, and \$74,688.29 was WAE salary).

Section 807 of the FSA provides that repayment of such overpayments may be waived under certain circumstances. It states that "recovery of overpayments under this subchapter may not be made from an individual when, in the judgment of the Secretary of State, the individual is without fault and recovery would be against equity and good conscience or administratively infeasible."

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<sup>1</sup> The Act specifies that, in any calendar year, a reemployed annuitant may not earn more, in combined salary and annuity, than the higher of his/her annual pay at retirement or the annual salary of the position in which he/she is reemployed.

Grievant received a letter notifying him of this overpayment on June 10, 2010, and requested a repayment waiver the same day by email to [REDACTED], the Deputy Assistant Secretary of Global Financial Services. One year later, on June 15, 2011, [REDACTED] sent a letter denying grievant's request for a repayment waiver. On July 10, 2011, grievant filed an appeal to this Board, claiming he was not at fault for the overpayment, and that good conscience would dictate that he should not have to repay it. The Department filed a discovery request on August 12, 2011. Due to an error in grievant's email address, which was not discovered until mid-October, the grievant did not receive the discovery requests until October 20, and he responded to them on October 30, 2011. The Department transmitted its Agency Submission on November 3, 2011. The Record of Proceedings was closed on January 26, 2012.

### **III. POSITIONS OF THE PARTIES**

#### **The Grievant**

Grievant does not dispute that he exceeded the WAE earnings cap for calendar year 2008, or that he exceeded that cap by \$9,460.29. But he asserts that he should be granted a repayment waiver of that overpayment because of several extenuating circumstances which were beyond his control, and he also contends that good conscience dictates that he should be granted the waiver.

He maintains that several factors contributed to his having exceeded the cap. One was the fact that, unbeknownst to him, the OIG raised his salary grade in that year from a GS-15, Step 1, to GS-15, Step 10. He claims that written notice of that increase reached him nearly one year after the pay raise was effective. While it was, he says, a "welcome surprise", it was a surprise nonetheless, and added to his salary total for 2008.

Grievant also argues that when he realized he might exceed his annual earnings cap, he asked the OIG to process a dual compensation waiver for him, and was told that was not

possible. He also inquired about converting to contractor status (from WAE status), but was told that, as an OIG team leader who must supervise active duty officers and write performance reports on Embassy managers, he had to be a direct-hire employee, not a contractor.

The overriding issue, however, was the nature of the Latin American inspection itself. He claims that, historically, WAE Team Leaders in the OIG, as well as WAE Charges d'affaires in working abroad for geographic bureaus, have found themselves unexpectedly up against the earnings cap in part because "extraordinary circumstances are all too ordinary in the Foreign Service." With this in mind, he claims he conservatively calculated likely work hours before embarking on a three-mission inspection of Latin American countries. However, the depth and complexity of the issues he encountered at those three missions, including four times the number of formal recommendations he had encountered in previous inspections, drove up the Inspection team's work hours dramatically, both during the inspection visits themselves, and during the Washington aftermath. He also cites specific issues which increased his hours, including a major plane crash in ██████████ which added ten hours to his work schedule, and having to spend one workday attending to getting paid and filing a travel voucher under a new automated system.

Grievant claims that some of his predecessors, having unexpectedly come up against the earnings cap, had simply "downed tools" and stopped working when the cap was reached. He claims he could have done likewise, but that doing so would have ultimately cost the Department more than his salary, and would have reflected a "poor sense of duty and patriotism – hardly the right signal to impart to Congress, the chief recipient of OIG reports."

With respect to the "against equity and good conscience" requirement of the repayment waiver provision, the grievant argues that, while his annuity allows him to support his immediate family, it is not adequate for him to support his wife's mother in ██████████ on whom he spends

an average of \$15,000 per year. Moreover, a broken neck from an airplane hijacking during active duty has necessitated that he undergo at least two surgical procedures, and has resulted in his being handicapped in his life and work opportunities. Finally, he argues, the OIG does not reimburse for travel, lodging, or M&IE while WAE Inspectors are in Washington, DC. All told such expenses have cost him about \$17,000 out-of-pocket.

In sum, he argues, without a waiver, he would in effect have worked for free, or possibly have been paying to work. This does not seem equitable in view of the fact that his primary fault was to have kept working in good faith, even after it was evident that his earnings cap would be exceeded.

### **The Department**

The Department contends that grievant has not established that he meets the requisite standards for an annuity repayment waiver (that he is without fault, and that recovery would be against equity and good conscience), and therefore his grievance should be denied.

The Department stresses that each of grievant's annual SF-50 Notices of Personnel Actions for 2005, 2006, 2007 and 2008 specifically stated: "Salary at time of retirement \$134,000. Receipt of annuity subject to limitation of Section 824 of the Foreign Service Act." The Department adds that, in order to qualify for a waiver of repayment, an individual must satisfy a two-prong test: (a) the annuitant is without fault; and (b) recovery would be against equity and good conscience.

With respect to grievant's "fault" in accepting the overpayment, the Agency found that grievant received payments he knew or should have known to be erroneous. Not only did the SF-50 Notices inform him of the earnings cap, he has admitted being aware that overpayment was a possibility. He states in his grievance that when he "realized that the cap might be

exceeded,” he made several inquiries of the OIG about contract status and a dual compensation waiver and states that he could have “downed tools and walk away from the job at hand.” He has therefore in effect admitted that he accepted a payment which he knew or should have known to be erroneous.

The Department also argues that it would not be against equity and good conscience to collect the overpayment from the grievant. Given that grievant’s financial report indicates that his gross monthly annuity income exceeds his monthly expenses, and that he has substantial liquid assets in brokerage, savings, and money market accounts, his contention that repayment of this debt would pose a significant hardship is without merit.

Grievant’s argument that he must support his wife’s mother in [REDACTED] also fails as a reason for waiving the requirement that he repay his excess annuity for 2008, because under 22 CFR 17.6, only support expenses for which the individual is “legally responsible” are considered. Grievant has indicated in his discovery responses that he has no legal obligation to support his mother-in-law.

Likewise, the Department argues, grievant’s claims that he paid for his own transportation to Washington, as well as lodging and miscellaneous expenses while in DC do not strengthen his case for a repayment waiver. Grievant noted in discovery responses that he had made nine trips to Washington from 2005 to 2010. He thus had been making these trips for a few years before the overpayment occurred, so cannot argue that these expenses were incurred in reliance upon the overpayments. Moreover, the grievant was well aware of the expenses involved when he accepted the position with the OIG in 2005, long before receipt of the overpayment.

#### IV. DISCUSSION AND FINDINGS

In all grievances other than those involving discipline, the grievant must present preponderant evidence that the grievance is meritorious.<sup>2</sup> Thus, in this case, grievant has the burden of showing that he meets both of the tests outlined in 22 CFR 17.2(a): that he is without fault in having accepted overpayment of his annuity in 2008, and that recovery of that overpayment would be against equity and good conscience. We find that he has failed to meet that burden.

##### Grievant is Not Without Fault

Under 22 C.F.R. 17.3(a) a pertinent consideration in determining fault is whether the individual “accepted a payment which he/she knew or should have known to be erroneous.” The record shows that grievant was aware, even before he had exceeded his earnings cap, that he risked doing so. He states in his grievance that “when [he] realized that the cap might be exceeded, he asked several officials about obtaining a dual compensation waiver and about converting to contractor status, but did not receive a positive response to these requests. He also claims that there is a history of some employees, who “unexpectedly” find themselves up against the cap, simply walking away from the job at hand and that, had he “downed tools,” the cost to the U.S. government would have been significant<sup>3</sup>, and would have “reflected a poor sense of duty”. Moreover, he claims that, despite his “conservative” estimates of how much time the three-country inspection would take, unforeseen and unusual circumstances arose, resulting in his having exceeded the earnings cap. As examples, he cites the complexity of the inspections undertaken, an airplane crash that closed an airport for a day, and the time he was forced to spend in Washington on payroll and travel voucher issues.

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<sup>2</sup> 22 CFR 905.1.

<sup>3</sup> Presumably he was referring to the time and salary it would have cost for another Senior Inspector to read into the Inspections and the issues raised in them..

In the Board's view, the grievant could have taken several actions to avoid exceeding the earnings cap. When he realized he was approaching his earnings cap, he could have asked to be removed from the Inspection team for all or part of the three-country trip. There is no evidence that he did so. Long before the Inspection commenced, he could have calculated more conservatively, by assuming more hours, the time the Inspections would take.<sup>4</sup> He certainly should have known, before the Inspection started, how much time he could work before exceeding his cap. Notwithstanding these considerations, he exceeded time by about 16 work days – a substantial amount. Also, we are unconvinced by grievant's argument that his salary was unexpectedly raised from GS-15, step 1 to GS-15, step 10, and that written notice of this reached him "nearly a year" after the fact. Leaving aside his rather dubious claim that he failed to notice a pay rate increase amounting to over \$33,000 per year, we note that his new pay rate was effective on February 4, 2008,<sup>5</sup> so that new rate should have been the rate he used to estimate, later in 2008, when he would reach his earnings cap. Likewise, while he argues that an airplane crash which closed ██████████ airport unexpectedly increased his work hours, as did his workday-long efforts to unravel payroll and travel voucher issues, we find this 18-hour increase to have been only a small part of his 132-hour excess of work hours.

#### Recovery Not Against Equity and Good Conscience

Grievant argues that his support of his mother-in-law (approximately \$15,000 per year), his debilitating and work-inhibiting surgeries as a result of an airline hijacking during his career, and his payment of about \$17,000 in airfare/lodging/miscellaneous expenses in order to work as a WAE Inspector, should be taken into account in making a determination that repayment would be against equity and good conscience. We do not find merit to these arguments.

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<sup>44</sup> By our estimate, grievant's "conservative" estimate of how long the Inspections would take was over 16 workdays less than he actually worked, or 132.5 hours short.

<sup>5</sup> See SF-50 Notification of Personnel Action dated 2/4/08.

Grievant's support of his wife's mother in [REDACTED] is not a legal obligation under 22 C.F.R. 17.5 that should be considered in reviewing his expenses. It also pre-dates 2008, the year in which he was overpaid, so he cannot argue that he relied on that overpayment. Likewise his more recent medical issues, even though they may limit his ability to work, have not been shown to have led to expenses for which he relied on the 2008 overpayment. Finally, as pointed out by the Department, the \$17,000 in travel costs incurred by working as a WAE for the OIG were costs he began incurring in 2005 as a known condition of his employment, long before the overpayment was made in 2008.<sup>6</sup> We also note that, in addition to his annuity, on which he admits he can support himself and his wife adequately, grievant has substantial financial assets at his disposal.

For the above reasons, we conclude that grievant has failed to establish by a preponderance of the evidence that he meets the requisite standards for waiving the requirement that he repay the overpayment.

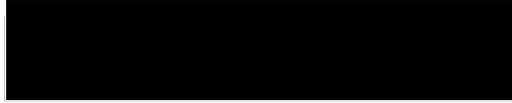
V: **DECISION**

The grievance is denied in its entirety.

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<sup>6</sup> See Department's Agency Submission dated November 3, 2011, at 10.

For the Foreign Service Grievance Board:



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Elliot H. Shaller  
Presiding Member



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Nancy M. Serpa  
Member



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Lois E. Hartman  
Member