

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

Record of Proceedings  
FSGB Case No. 2011-039

  
Grievant

January 17, 2012

and

Department of State

**DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Lois E. Hartman  
Nancy M. Serpa

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Nathan Nagy  
Attorney Advisor, L/EMP

Employee Exclusive Representative:

American Foreign Service Assoc.

## CASE SUMMARY

**HELD:** Grievant has failed to establish by a preponderance of the evidence that he was eligible for a waiver of recovery of an overpayment from the Foreign Service Retirement and Disability Fund.

## OVERVIEW

Grievant retired from the Foreign Service on January 3, 2003, and was reemployed by the Near East Bureau on annually renewed WAE (While Actually Employed) appointments from September 2004 to September 2009. Under Section 824 the Foreign Service Act, whenever an annuitant is reemployed after retirement, he or she has the option to continue receiving his/her annuity so long as, in any calendar year, his salary from that reemployment, combined with his or her annuity, do not exceed the greater of either the annual salary of the reemployed position or the base pay of the annuitant on the date of his or her retirement. This information was relayed to the grievant in a letter he signed on January 3, 2003.

Grievant was overpaid under the terms of Section 824 by a total of \$11,798.86 (\$10,945.28 in 2008 and \$853.58 in 2009), and was notified by the Department of State of its intention to collect that overpayment by letter of October 5, 2010. Grievant filed a request for a repayment waiver on October 9, 2009, and the Department denied that request on August 2, 2011. Section 807 of the Foreign Service Act authorizes the granting of such a waiver when the individual is without fault and recovery would be against equity and good conscience.

Grievant maintains that he was not at fault for having exceeded the salary "cap" in 2008 and 2009, and claims to have sought and received advice via email (which he did not produce) from officials in both the NEA bureau and the Charleston Financial Services Center (CFSC) in which he was assured that he had not exceeded his salary cap. He also implies he was advised that some reemployment income was not subject to the salary cap. Moreover, due to his financial situation, he claims that recovery of the overpayment would be against equity and good conscience.

The Agency argues that grievant knew or should have known that he had exceeded the salary limitations in 2008 and 2009, by virtue of the letter explaining the cap that he signed upon retirement, and the annual reminders of his retirement salary and Section 824 of the Foreign Service Act on his SF-50 Personnel Actions. The Agency argues that it does not matter that grievant tried to avoid exceeding the cap; the fact that he did exceed it, means that he "accepted a payment which he ...knew or should have known was erroneous." The Agency also argues that the grievant has not shown that repayment would be against equity and good conscience because, among other things, his monthly income exceeds his monthly expenses and he has the financial means to repay the debt.

The Board agreed with the Department that the grievant knew or should have known that he had exceeded the salary cap on WAE salary payments. In the absence of a finding that the grievant

was not at fault, the Board had no need to rule on the second “prong” of the waiver test, that collection of the overpayment would be against equity and good conscience.

The grievance was denied.

## DECISION

### I. THE GRIEVANCE

Grievant [REDACTED], a retired Senior Foreign Service Officer who worked for the Department as a reemployed annuitant on a while-actually-employed (WAE) basis during the 2004-2009 timeframe, appeals the Department's decision to collect from him overpayments of his annuity paid in 2008 and 2009. The Department claims that grievant owes a total of \$11,798.86 (for both years), 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 on January 3, 2003, under the Foreign Service Retirement and Disability System (FSRDS). He was first appointed as a WAE Administrative Officer by the Bureau of Near Eastern Affairs (NEA) on September 29, 2004. His appointment was renewed annually through September, 2009. Upon his retirement, grievant signed a statement acknowledging that he understood the Salary/Annuity Limitations in effect for Re-employed Foreign Service annuitants, under Section 824 of the Foreign Service Act of 1980. The SF-50 Personnel Actions he received each year extending his WAE appointment also contained a notation of his retirement salary, as well as a warning that receipt of his annuity was subject to the salary limitation of Section 824 of the Foreign Service Act. Grievant's salary caps in 2008 and 2009 were \$130,000 and \$133,543, respectively.

Grievant received \$140,945.28 in calendar year 2008 (\$82,152 in annuity payments and \$58,793.28 in salary as a WAE) and \$134,396.58 in 2009 (\$86,916 in annuity payments and

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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.

\$47,480.58 in salary as a WAE). Those amounts exceeded the maximum he was entitled to by \$10,945.28 in 2008 and by \$853.58 in 2009. He was thus overpaid a total of \$11,798.86.

On October 5, 2010, the Agency notified the grievant of its intention to collect the overpayment. Grievant filed a request for a waiver of the repayment requirement on October 9, 2010. Ten months later, the Agency denied the waiver request by letter dated August 2, 2011, and the grievant appealed that decision to this Board on August 18, 2011.

Section 807 of the Foreign Service Act of 1980 describes the conditions under which a waiver of such overpayment may be made: “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.” Implementing regulations for this section<sup>2</sup> state that the recipient of the overpayment bears the burden of proof to show both that he or she was not at fault in having received the overpayments, and that recovery would be “against equity and good conscience.” (emphasis added)

The Agency made its submission in this case by memorandum from Nathan Nagy, Esq., Attorney-Adviser in L/EMP, dated October 17, 2011. The same day, grievant sent his response to that submission to both this Board and the Agency representative, Mr. Nagy, by email. The ROP was closed on November 2, 2011.

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

#### **Grievant**

The grievant maintains he was not at fault for having received the overpayments in 2008 and 2009, and that recovery of the overpayments would constitute a financial hardship for him. He also questions why his inquiry, in 2009, about missing overtime payments while he was working

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<sup>2</sup> 22 CFR section 17.

led to the review which revealed his having exceeded the WAE salary cap, and thus the attempt to recover funds from him.

With respect to the issue of fault, grievant states that he has never overlooked either the number of hours he worked<sup>3</sup> or the salary limitations as a reemployed annuitant. He maintains that he was in frequent touch via email with the NEA Bureau and with officials at the Charleston Financial Services Center (CFSC) to ensure that he did not exceed either his salary or hours cap. Moreover, he states, the WAE regulations contain exceptions concerning what is part of salary and what is not, but that he was in touch with the people who knew the regulations, or should have known them. He followed their advice and guidance carefully, and was assured the information he received was correct. He claims that he made an “exceptional and strong effort” to ensure that he was complying with all the caps, and made a concerted effort to stay “abreast and in front of this issue.” Therefore, if indeed overpayments were made, the fault lies with those from whom he sought advice in NEA and CFSC.

Grievant states that he would be subjected to financial hardship were he to have to repay the \$11,798.86 which the Department seeks to recover. He further states that he has been working for the last several years to pay for his daughter’s post-graduate education, and she is in her last year as a surgical resident. His son is also pursuing graduate education abroad, and grievant had to pay for his daughter’s wedding in the summer of 2011.

Finally, grievant implies that his inquiry in 2010 as to why he was not paid 30 hours’ worth of overtime in 2009 was the impetus for the Department’s examination of all of his WAE salary payments. He cites that assertion, as well as the fact that it took almost one year for the Deputy

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<sup>3</sup> In addition to the salary limitation, there is also a regulatory cap on the number of hours (1040 hours) most WAE’s may work in any given year.

Assistant Secretary for Global Financial Services to respond to his waiver request, as areas that should be of concern to both the Department and this Board.

### **The Department**

The Department argues that grievant has not established that he has met the requirements to be entitled to a waiver, i.e., that he is both without fault and that recovery of the funds at issue would be against equity and good conscience.

With respect to the issue of “fault,” the Department provides copies of the statement grievant signed upon his retirement on January 3, 2003, in which grievant acknowledged he was entitled to receive “the salary of the position in which reemployed plus as much of [his] annuity which does not exceed, in any calendar year, the full-time basic pay of the reemployed position or [his] basic pay at time of retirement, whichever is greater.” (emphasis in original) Moreover, during his reemployment, grievant received every year a form SF-50 personnel action which reminded him that his annuity was subject to limitation as provided in Section 824 of the Foreign Service Act of 1980, as amended.

Grievant’s arguments do not provide “substantial evidence” that he was without fault. While the grievant refers repeatedly to emails he exchanged with NEA and CFSC personnel which allegedly show that he diligently tried to ensure he was not overpaid, grievant has not provided the Board with copies of those emails. Further, regardless of grievant’s efforts to ensure that he would not be overpaid, the issue before the Agency and this Board is not whether he attempted to avoid overpayment, but rather, once such overpayment had occurred, he “accepted a payment which he . . . knew or should have known to be erroneous.” (22 C.F.R. § 17.3(a)(3)). At a minimum, grievant’s claims indicate he knew there could be a potential issue of overpayment; it was therefore incumbent on him to verify that he was being properly paid.

Nor has grievant established that recovery of the overpayment would be against equity and good conscience. The Agency submits that grievant has sufficient assets and income to pay the overpayment, and argues that a review of his liquid assets show that he is able to make the payment, considering that his monthly income exceeds his monthly expenses and that the liquidation of a partnership would net him about \$40,000. Further, grievant's arguments concerning the education and wedding expenses of his adult children fail, as he does not contend that he is legally responsible for such expenses. Finally, given that grievant knew or should have known that he was not entitled to the overpayments, he cannot make an equitable claim of reliance on the receipt of such overpayments. Because the Agency has a duty to safeguard the public funds entrusted to it, and is obligated to "aggressively collect all debts" (31 C.F.R. § 901.1 (a)), the grievance should be denied.

#### **IV. DISCUSSION AND FINDINGS**

The grievant is appealing the Department's decision of August 2, 2011 to deny him a waiver of repayment of an \$11,798.86 salary overpayment for 2008 and 2009, when he was a re-employed annuitant (WAE) working for the Department's Near East and North Africa Bureau (NEA). Chapter 8 of the Foreign Service Act of 1980, as amended, provides authority for such action. See 22 U.S.C. § 4047(d). In addition, the Department has promulgated regulations for implementing this authority. (22 C.F.R. part 17)

Pursuant to those regulations, the Department must establish by a preponderance of the evidence that the overpayment occurred. {22 C.F.R. 17.8 (a)} The recipient of the overpayment must then establish by substantial evidence that s/he is eligible for a waiver of overpayment. Under 22 C.F.R. §17.2, recovery of overpayment may be waived by the Agency when the

individual receiving that overpayment is without fault, and recovery would be against equity and good conscience.

We find that the Department has met its burden of establishing that an overpayment occurred. Indeed, grievant does not dispute that he received \$140,945.28 in combined WAE salary and annuity in 2008, or that he received \$134,396.58 in 2009. He also does not dispute that both amounts exceed his annual salary limitation under section 824 of the Foreign Service Act. We also find that, by virtue of the acknowledgement letter that grievant signed on January 3, 2003 (quoted above), as well as the notices on his annual SF-50 personnel actions, grievant was aware, or should have been aware, that his total earnings exceeded the amount he was allowed to earn under the provisions of Section 824 of the Foreign Service Act of 1980.

The burden thus shifts to the grievant to show, by substantial evidence, that he is eligible for a waiver of the overpayment. As noted above, 22 C.F.R. § 17.2(a) states: “Recovery of an overpayment from the Foreign Service Retirement and Disability Fund under the Foreign Service Retirement and Disability System may be waived pursuant to section 4047(d), of title 22, United States Code when the individual is without fault and recovery would be against equity and good conscience or administratively infeasible.”

We are not persuaded by grievant’s arguments that he was assured by various officials in NEA and CFSC that he had not exceeded his salary cap. In this regard, grievant has presented no corroborative evidence (such as documentation of the alleged emails between him and the NEA bureau and CFSC) of the “advice” he was given in 2008 and 2009, when he allegedly sought confirmation that he was not in danger of exceeding his salary cap.

As in FSGB Case No. 2010-035 (April 18, 2011), the Board finds that the record shows that, at the beginning of grievant’s retirement process, “the Department provided clear guidance to

him as to the choices he could make if he accepted a reemployment offer. The two-page letter that appellant signed...contained all of the information required to fully explain the limitations on his ability to earn both income and annuity.”<sup>4</sup> The Board also stated in Case No. 2010-035 that the grievant’s recollection and interpretation of an alleged conversation with an Agency official that led him to believe that he would not exceed the cap, “unsupported by any corroboration, is insufficient to establish that he is without fault, in light of the other evidence in the record.”

Moreover, grievant was reminded annually, via receipt of the SF-50 personnel action, of the salary cap issue. Even though FSGB Case No. 2010-035 differs from the instant case by virtue of the fact that the grievant in the 2010 case was warned by the CFSC that he was about to exceed his cap, we find that the grievant here knew or should have known that he was in danger of exceeding his salary cap for calendar years 2008 and 2009.<sup>5</sup> Like any employee, he had online access to biweekly earnings and leave statements (which contain year-to-date earnings information).<sup>6</sup> Armed with that information, grievant knew or should have known, even before he exceeded the cap, that he was in danger of doing so.

Because we find that grievant failed to demonstrate that he is without fault, and because the regulations require that a waiver applicant must prove both that he is without fault **and** that recovery would be against equity and good conscience, it is unnecessary for the Board to address the second “prong” of the test for a waiver, that recovering the overpayment would be against equity and good conscience. We therefore make no finding on that issue.

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<sup>4</sup> FSGB case Number 2010-035, at 10.

<sup>5</sup> These caps could be easily calculated by taking either his pay at retirement (as noted on his SF-50) or the salary of his WAE position (as noted on his earnings and leave statement), whichever was greater, and subtracting from that his annual annuity. The result would be the maximum WAE salary he could earn in the current year.

<sup>6</sup> Grievant refers, in his waiver request, to his belief that certain kinds of pay may or may not be included in “salary” for purposes of calculating the WAE pay cap. The year-to-date taxable earnings listed on his earnings and leave statement was the total he should have known to be the proper amount of his WAE salary.

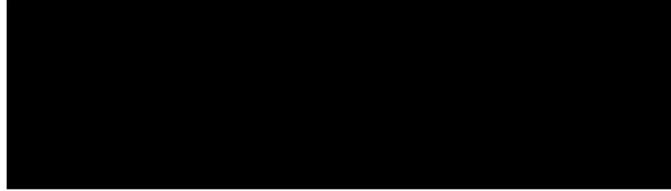
In addition, we agree with the Department's assertion that grievant's additional allegations regarding his WAE status, an unresolved travel voucher dispute, and his original inquiry about overtime are outside the scope of this grievance, which concerns the denial of a waiver of overpayment.

Finally, while the Board noted the ten-month delay between grievant's having applied for a waiver of overpayment on October 9, 2010, and its denial by Deputy Assistant Secretary Millette on August 2, 2011, we do not find that the delay harmed grievant or prejudiced his grievance; accordingly, it does not provide a basis for sustaining the grievance.

**V: DECISION**

The grievance is denied in its entirety.

For the Foreign Service Grievance Board:



Elliot H. Shaller  
Presiding Member



Lois E. Hartman  
Member



Nancy M. Serpa  
Member