

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB No. 2011-040

And

March 19, 2012

Agency for International Development

DECISION WITH DISSENT

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Frank J. Coulter

Harlan F. Rosacker

Special Assistant

Joseph Pastic

Representative for grievant:

American Foreign Service Association

Representative for the Department/Agency:

Vanessa D. Prout
Chief
Employee and Labor Relations Division
U.S. Agency for International
Development

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to prove that equitable estoppel should be applied to prevent the agency from retroactively correcting an erroneous initial salary offer she previously had received and accepted. One member dissented.

OVERVIEW

Grievant applied for a position as a Foreign Service Population/Health/Nutrition Officer, FS-6, with the US Agency for International Development (USAID) under the agency's Junior Officer (JO) program. The posted salary range for the position was \$36,762-\$53,986, plus locality pay. After grievant was identified by the agency for further hiring consideration, she received a package of materials which explained, as applicable here, that grievant's current salary information had to be provided, and that the initial salary level to be offered would be determined only based on her current salary, excluding benefits. Grievant furnished a letter from her then current employer stating that the applicant had received the salary equivalent of \$50,000 in 2008. The stated figure included both base salary and benefits without differentiating between them. The agency offered grievant a starting salary of \$62,582, including locality pay, which offer was immediately accepted. In a subsequent internal audit of starting salaries offered under the JO program, grievant submitted her 2008 W-2 tax form, which showed that her base salary in 2008 was only \$21, 850. The agency then notified grievant that an administrative error had occurred which required a downward adjustment of her starting salary and a retroactive reimbursement of all resulting overpayments. Grievant appealed, claiming the agency should be equitably estopped from reducing her salary or recouping alleged overpayments.

The Board found that grievant had failed to prove that equitable estoppel should be applied in the circumstances presented. More specifically, the Board noted that while the agency's staffing specialist erred in calculating grievant's starting salary by inadvertently including both her benefits and current base salary, grievant had not shown that she relied to her detriment in accepting the erroneous offer or that, in any event, such reliance was "reasonable" given the specific instructions grievant had received concerning the agency's process for determining initial salary levels. Accordingly, a Board majority denied grievant's appeal.

DECISION

I. GRIEVANCE

[REDACTED] (grievant) is a Foreign Service (FS) Career Candidate with the U.S. Agency for International Development (USAID, agency). On April 7, 2009, the agency proposed to set her basic salary upon entry at grade FP-6, Step 11, with a base annual salary of \$50,838. Locality pay would bring her total annual compensation while serving in Washington, D.C. to \$62,582. She accepted that offer and was appointed at that level on July 20, 2009. More than a year later, the agency notified her that an audit of salary offers made at the time she was hired revealed that an administrative error by the agency had caused her to be overpaid. Her pay should have been set instead at FS-06, step 1 – with a base salary of \$37,828 and a total salary, including locality pay, of \$46,566. The agency notified grievant that her salary would be reduced to the lower level and that she would receive a bill for the overpayment. However, it also informed her that there are agency procedures for requesting a waiver of repayment. She filed a grievance with the agency on April 7, 2011, arguing that the principles of equitable estoppel support the following remedies: restoring her salary to the level at which she was first appointed; adjusting her salary after a subsequent promotion to reflect her original pay; and providing back pay and interest pursuant to the Back Pay Act. The agency denied her grievance on June 28, 2011. On August 22, 2011, grievant appealed to the Board requesting that it order the relief sought in her agency-level grievance.

II. BACKGROUND

While grievant was employed in [REDACTED], by the [REDACTED]

[REDACTED] on a two-year [REDACTED] she submitted an

online application and a resume to the agency's Development Leadership Initiative (DLI)¹ program for junior FS officers. After reviewing her application, the agency informed her that she had been selected for the pre-employment phase of the program. According to standard practice, it sent her via e-mail a package of information with instructions on the steps she must take within thirty days in order to be given further consideration for employment. These prescribed steps included her providing salary information and forwarding forms to the agency that are needed for obtaining medical and security clearances.

Key points in the instructions on salary were as follows:

- Salary

Please see attached document for detailed information on salary calculations. In order to calculate a salary offer, please submit one of the following to DLI@usaid.gov:

- Annual or periodic statement of earnings
- SF-50 Notification of Personnel Action
- A copy of a filed IRS federal tax declaration
- An official document that shows your annual base salary.

The attached document referred to above was entitled "Salary/Step Determination and New Hire Benefits – Junior Officer Program" and explained among other things:

In setting pay, the Agency uses base pay only, as stated on the applicant's statement of earnings and leave, pay stub or any other legal official document which shows annual base salary. Per Diem, allowances, bonuses, and locality pay are not included. (emphasis in original)

Grievant had not provided information concerning her previous salaries in the spaces provided on the application form, nor did she address compensation in the resume that she attached. Her only submission on compensation was a letter from her current employer that she forwarded to the agency on April 2, 2009 – i.e., a letter dated February 11, 2009 from [REDACTED]

¹ USAID's website describes the Development Leadership Initiative as a multi-year recruitment program authorized by the Congress in 2008 with an objective of hiring 300 new Foreign Service officers per year until 2012. [<http://www.usaid.gov/careers/dli.html>]

Grievant sent another e-mail message to DLI on April 9, 2009, to which she again attached the [REDACTED] letter from [REDACTED] dated February 2, 2011 containing the statement that grievant's annual salary equivalent was approximately \$50,000. She also provided information whereby the agency could contact her if it had any questions.² On the same day, grievant signed the agency's memo proposing a grade/step and salary level and indicated that she accepted the salary offer. On June 16, 2009, a letter from [REDACTED] Chief, Special Programs Branch, Foreign Service Personnel Division at USAID, informed grievant of her appointment to the agency effective July 20, 2009, with the same grade/step and annual salary indicated in the April 7, 2009 offer.

On July 27, 2010 -- more than a year after grievant had been sworn in -- [REDACTED] in USAID's Special Programs Branch informed grievant by telephone that an agency error had resulted in her salary being set too high. Later the same day, she sent grievant an e-mail message in which, *inter alia*, she apologized for the inconvenience the error had caused. She also forwarded an undated memorandum from [REDACTED] Chief of OHR/FSP, which explained that the error had been found during an agency audit of salary offers made to DLI candidates and that the salary offer should not have been based on allowances as described in the letter from the [REDACTED]³ Pursuant to the agency's pay-setting regulations set forth in ADS 470.37.7, according to the memorandum, USAID's initial salary offer instead should have been set at FS-06, step 1 -- with a base salary of \$37,828 and a total salary, including locality

² Three minutes later, a contractor employee sent an e-mail response to grievant stating that the agency's staffing specialist already had received her current salary information and had sent her a "competitive" salary offer on April 7, 2009, two days earlier.

³ The agency's June 28, 2011 decision letter denying the grievance indicated that grievant's actual income was \$21,850. The agency provided the Board with a copy of grievant's W-2 form for 2008 from the [REDACTED] indicating that her wages were \$21,850 and that her address was in [REDACTED]. Grievant's representative explained that the copy of her W-2 form had been sent to the agency in 2010 during the audit process.

pay, of \$46,566. The memorandum further specified that grievant's salary would be changed to the corrected level effective July 19, 2009.

Ms. [REDACTED] also notified grievant that the National Finance Center would send her a bill for the amount that her salary had been overpaid. She acknowledged the administrative error by the Office of Human Resources (OHR) and said that grievant was "not at fault" for this error. She also informed grievant that the Chief Financial Officer of the agency is authorized to issue waivers that relieve employees' obligations to reimburse a salary overpayment. However, she noted that the employee bears the burden of persuasion in requesting such a waiver.

Grievant filed a grievance with USAID on April 7, 2011; and the agency denied the grievance in its entirety on June 28, 2011. In accordance with 22 CFR §903.1(b), grievant appealed that decision to this Board on August 22, 2011, and filed a Supplemental Submission on September 12, 2011, later revised on September 24, 2011. The agency responded on October 12, 2011. Grievant filed a Rebuttal Submission on October 17, 2011. The record of proceedings was closed on January 21, 2012.

III. POSITIONS OF THE PARTIES

GRIEVANT

The agency appointed grievant at the FP-6/11 level with a basic annual salary of \$50,838 and with locality pay that brought the total to \$62,582. It has mistreated her by lowering her step level to FP-6/1 with base salary and locality pay totaling \$46,566 after she had been on duty for more than a year. At the same time that the agency was reducing grievant's step level, she was promoted to FP-5. If the agency had not lowered her step level, her pay level after promotion would have been FP-5/10.

All of the elements of equitable estoppel are present in this case. Drawing on court precedents, the Board applied these elements to the Foreign Service in FSGB Case No. 2007-034 (July 30, 2008):

- misrepresentation by the agency's Office of Human Resources employing specialist;
- reasonable and good faith reliance on the misrepresentation by grievant;
- financial detriment to grievant from such reliance.

In keeping with the Board's rulings on equitable estoppel in FSGB Case No. 1990-070 (August 19, 1991) and several federal court cases that it cites, there is no legal impediment to ordering the agency to pay grievant at the grade and step level which it offered her. Paying at that level would not improperly compel disbursements from the federal Treasury without statutory authorization. Funds for grievant's pay in general have been appropriated by the Congress, and OPM has approved their use for salary purposes. The position was advertised at the FP-6 level, and there were no legislative restrictions on setting her salary at any level within that range.

The agency staffing specialist in this case had authority to offer salaries within the FP-6/1 to FP-6/11 range. Unlike FSGB Case No. 2010-003 (July 6, 2010), she did not offer a salary level above the advertised range. When the Chief of the staffing specialist's office made the agency's formal offer to grievant on June 16, 2009, she was also acting within the scope of her authority. The agency fully intended to pay grievant at the FP-6/11 level and effectively reconfirmed its offer by paying her at that level for more than a year.

The agency alleges that grievant fails the threshold test of misrepresentation by the government's agent. It claims that it is not responsible for a mere error in ignorance of the law – a fact that would prevent equitable estoppel from being applied in the federal sector.

The agency representative who first offered Step 11 had reviewed the [REDACTED] salary information provided by grievant but did not ask for additional documentation because at the time she obviously saw no reason to do so. She should have known how to exercise what the agency considers proper judgment. It was not a mere mistake. She was paid to know when there is a question as to the correct salary. This is a matter of exercising judgment, not applying a law or regulation. There were no “erroneous agency representations. They were correct representations at the time. . . . The agency has simply changed its mind.”

Grievant relied on the agency’s offer to her detriment. While she was negotiating for employment with USAID, she was also having employment discussions with the Centers for Disease Control and Prevention (CDC). On June 26, 2009, she had received confirmation of a CDC job offer with a salary of \$59,500. She would have accepted the CDC offer unequivocally if USAID had offered only \$46,566. She cannot resign now and find the CDC offer waiting for her. She was also discussing employment with Concern Worldwide, with a yearly salary in the neighborhood of \$50,000. However, because of the USAID offer, she also terminated these discussions.

Unlike the grievants in FSGB Case Nos. 2010-003 and 2010-004, she had no reason to question the level of USAID’s salary offer. She reasonably relied on it. She had no basis for suspecting administrative error in an offer that was consistent with the range stated in the job announcement.

The agency claims that mentioning agency regulations on pay-setting in ADS 470.3.7.2 – a reference buried deeply in a subordinate attachment to the formal job offer -- put grievant, an applicant from outside the federal service, on official notice that she was responsible for recognizing and reconciling any possible discrepancy between the agency’s salary/grade/step

offer to her and agency regulations. In fact, the regulations and the agency's pre-employment instructions and communications to grievant provided for her to do just what she did: submit a statement from her employer as to her income earned.

Grievant was at the time working for the [REDACTED] and stationed in [REDACTED]. She did not have her tax or payroll stubs with her. She did easily obtain a standard letter from the [REDACTED]. That is what she submitted because the agency instructions stated that an employer letter would suffice in lieu of tax records and payroll stubs.

In good faith, grievant provided the information on compensation that the agency requested. "There was nothing duplicitous in her behavior." The agency stated in its post-audit notification of the error that grievant was not blameworthy in any respect. In its submissions to the Board, however, the agency has since tried to cast some blame on her – suggesting she had provided documentation portraying her annual salary to be something that it was not.

Quoting Comptroller General (CG) decision B1-196476 (June 26, 1986, 65 Comp. Gen. 679), the agency asserts that the grievant cannot invoke the ordinary principles of contract law and thus her appeal must fail. However, grievant has not invoked such principles. The CG points out that appointed federal employees, like grievant, serve only in accordance with applicable laws and regulations. Restoring grievant to Step 11 would not violate any law or regulation.

CG decisions, like those of other federal administrative tribunals, are not binding on the Board. As noted in FSGB Case No. 2005-013 (December 14, 2005) at page 16, these tribunals' reasoning may provide useful guidance when the Board is faced with similar situations. In this case, however, the situations are not remotely comparable.

In FSGB Case No. 1990-070, the Board discussed several federal court cases that provided for equitable estoppel against the federal government. It concluded that:

. . . where the elements of private estoppel are clearly present, the representations relied on are within the agent's scope of authority, and no agency action would be required which would contravene or exceed the agency's statutory or regulatory authority, estoppel may appropriately be imposed against the government. All these elements are present in the instant grievance.

All of these elements also are present in the instant grievance.

THE AGENCY

The agency avers that grievant's pay was set in error and was an administrative oversight. Her salary was changed after an agency audit of direct hire selection files revealed a mistake – i.e., her pay level had been incorrectly set at the FP-6, Step 11 level, when it should have been set at FP-6, Step 1.

Once an administrative oversight is discovered, the agency is required to take corrective action. It must comply with policy requirements and regulations in its Administrative Directive System (ADS), Chapter 470, *Pay Under the Foreign Service*, Section 470.3.7. The latter regulation specifically states:

After M/HR/POD Specialists determine the appropriate class level for a selected applicant, they then determine the salary rate within the class to offer the applicant. Salary offers are usually made at the minimum rate (step one) of the range for the class. Although candidates for employment are not entitled to any higher rate, where possible and when substantiated by appropriate documentation, USAID may offer a higher rate within the range for the class.

These regulations also make it clear that only grievant's prior base salary should have been used in calculating her starting USAID salary: "Only the base salary stated on the employee's IRS 1040 tax form, pay stub and/or statement from the payroll office is acceptable as the salary earned." (ADS 470.3.7.2)

The agency's audit of grievant's file found no supporting documentation to justify a salary above the minimum level. The error occurred when the staffing specialist -- based on a letter provided by the [REDACTED] -- assigned a \$50,000 cash value to the

compensation (including benefits) grievant had received while employed by the [REDACTED]. The agency later determined that grievant's actual base salary was only \$21,850.00.

Grievant has not shown that an agency representative knowingly provided her incorrect information when offering the job – one of the burdens that must be met in order to prevail on an equitable estoppel claim. Unlike FSGB Case No. 2007-034, there was no evidence of an intent on the part of the staffing specialist to misrepresent or mislead grievant; nor did she offer erroneous advice based on salary incentives in a program that no longer existed. The HR specialist who made USAID's offer to grievant herein was not aware that the salary she proposed was incorrect. Her mistake was discovered only through a subsequent audit of the files.

Grievant asserts that invoking equitable estoppel in her grievance appeal will not require the agency to violate any statutory limitations. The agency contends, however, that the error at least violates agency policy and regulations on pay setting in ADS 470.3.7, cited above. Grievant's situation is distinct from FSGB Case No. 2007-034, because here an agency regulation is violated by her receiving the higher pay.

Even if grievant was unaware of the agency's published regulations, she was put on notice of the erroneous salary offer when the April 7, 2009 e-mail message making the offer also attached a specific explanation of how starting salaries in the Junior Officer Program at USAID are determined.

In setting pay, the agency uses base pay only, as stated on the applicant's statement of earnings and leave, pay stub or any other legal official document which shows annual base salary. Per Diem, allowances, bonuses, and locality pay are not included. (emphasis in original). This fact makes it nearly impossible for Grievant to now argue that she could reasonably and in good faith rely upon the Agency's offer, an essential element to estoppel, because she was on notice that it was incorrect.

Grievant provided erroneous documentation that caused the HR specialist to make a mistake in violation of ADS 470. If grievant had followed agency regulations in ADS 470 or

even alerted the agency to its administrative error before accepting its offer, her salary would have been set correctly. This entire issue would have been avoided.

The Comptroller General (CG) in *B-196476* states:

The relationship between the federal government and its employees is not a contractual relationship. Since federal employees are appointed and serve only in accordance with the applicable statutes and regulations, the ordinary principles of contract law do not apply. *Elder and Owen*, 56 Comp. Gen. 85, at 88 (1976) [76 FPBR 1235]. Thus, the government is not bound by the terms of the employment offer.

Grievant asserts that CG decisions are not binding on the Board. However, since setting grievant's salary level based on non-base pay would contradict a regulation, the agency believes that the CG decision is on point and should be taken into consideration by the Board.

For the agency not to correct the error would be a fiduciary irresponsibility. Invoking equitable estoppel would allow grievant to receive compensation to which she is not entitled. It would be unfair to other employees whose pay was established correctly.

IV. DISCUSSION AND FINDINGS

Under the provisions of 22 CFR 905.1(a), grievant has the burden of establishing, by a preponderance of the evidence, that her grievance appeal is meritorious. Based on the discussion below, we find that she has not met that burden.

While serving in [REDACTED], as a [REDACTED] employed by the [REDACTED] in a two-year program, grievant applied for a Foreign Service Population/Health/Nutrition Officer position at the FS-6 level in USAID's Junior Officer Program. After reviewing the application that grievant submitted electronically, the agency determined that her candidacy warranted further consideration. Consistent with standard practice, it sent her a pre-employment package of information on agency employment as well as instructions to provide a variety of additional

information, including information concerning her current salary, within 30 days if she wished to receive further consideration for employment. Grievant's rebuttal makes it clear that she received this guidance for submitting salary information, as she cited some of its provisions in explaining actions she took.

In response to these instructions, grievant sent an e-mail message to the agency on April 2, 2009, attaching a brief letter from the [REDACTED] that described the stipend, allowances, and various benefits provided by the [REDACTED]. She forwarded the letter again on April 9, 2009. The [REDACTED] letter did not provide a breakdown of grievant's salary and benefits, but stated that "the total annual sum for a [REDACTED] is approximately equivalent to a yearly salary of \$50,000."

Grievant explained that she did not have tax or payroll stubs with her and thus submitted the [REDACTED] letter "because the agency instructions stated that an employer letter would suffice in lieu of tax records and payroll stubs." Since the agency never disputed grievant's assertion that it was permissible to submit her salary information in the form of a letter from the [REDACTED] we do not question whether such a submission constituted an "official document" as that term is used in USAID's instructions. However, contrary to grievant's assertions, the Board concludes that the letter did not provide the agency with all of the information it had requested. That is, the USAID instructions clearly stated that there was a need for "an official document that shows your annual base salary." These instructions mentioned "base salary" several times, and in one instance "base salary only" was underscored. The [REDACTED] letter did not provide the agency with this base salary information, although its payroll staff would certainly have had it readily available.

Grievant suggests that the instructions on providing this information were buried deep in a subordinate document. We find that the guidance and instructions were conspicuously and

clearly stated. It was incumbent on grievant to read and follow them and to seek clarification if she did not understand them.

Grievant explained that she submitted the letter from [REDACTED] in [REDACTED] because she could easily obtain it. The record makes it clear that grievant had very good Internet and e-mail connections in [REDACTED] and that she made extensive use of them in her quest for onward employment. We find that grievant could just as easily have asked [REDACTED] to send copies of her W-2 forms or a letter that specifically stated her base salary separately. She did not do so.

The copy of grievant's W-2 form for 2008 provided to the Board by the agency and placed in the record first came into the agency's possession when requested in 2010 as part of its internal audit of salaries paid under the Junior Officer Program, according to grievant's representative. The form states that her "Wages, tips, other compensation" for the entire year were \$21,850. Grievant's employer, [REDACTED] was required to send her this form by the end of January 2009. Her address on the form is in [REDACTED]. She has not suggested that the W-2 form failed to reach her – only that she did not have the form in her possession at her overseas post in early April 2009.

This Board has long recognized the significant hurdles a grievant must be able to clear in order to establish that equitable estoppel should be applied against the Federal government.

Thus, in FSGB Case No. 1990-070 (August 19, 1991), we stated in part:

In the recent case of *Office of Personnel Management v. Richmond* [496 U.S. 414 (1990)], the Court reviewed its decisions, characterizing its rulings as "evinc[ing] a most strict approach to estoppel claims involving public funds," and commenting that "adoption of estoppel based on agency misinformation would . . . vest authority in [government] agents that Congress would be powerless to constrain."⁴

⁴ Indeed, as the agency points out, equitable estoppel should not be applied where the result would be to require the performance of an act prohibited by law or regulation. In this case, the agency asserts that equitable estoppel is inappropriate because USAID regulations specify how initial salary determinations are to be made, and therefore an order directing the agency to pay grievant in a manner inconsistent with those regulations would compel

We also have recognized that there are occasions when a Federal agency may be bound by the representations of its employees. In FSGB Case No. 2007-034 (July 30, 2008), for example, citing *Herzberg v. Veneman*, 273 F.Supp. 2d 67 (D.D.C. 2003), this Board stated that equitable estoppel is appropriately applied where the record shows that (1) there was a “definite” representation to the party claiming estoppel, (2) the party relied on such representation to her detriment, and (3) the party’s reliance on the representation was “reasonable.” Of course, it is well established that the Federal government will not be bound by the representations of its agent unless such agent is acting within the limits of her actual authority.

In this case, it is not clear whether the USAID staffing specialist who proposed the Grade 6 Step 11 starting salary and requested that grievant indicate her acceptance of the salary offer (which grievant did) actually was authorized by the agency to do so, but we will assume that she had such authority for purposes of this decision. Thus, the record indicates in this regard that the staffing specialist made the offer and set the terms of grievant’s starting salary, including locality pay, without input from or review by any other official within USAID. Further, while the formal letter of appointment sent to grievant two months later was issued in the name of the agency’s Chief of the Special Programs Branch rather than the staffing specialist, the record indicates that the June 2009 letter in question was neither signed nor reviewed by that named individual. In addition, there is no indication in the record that the staffing specialist lacked the actual authority to bind the agency to the proffered salary offer, and the agency has not so asserted.

an act prohibited by regulation. We reject such contention. As this Board stated in FSGB Case No. 2007-034 (July 30, 2008), at n.9 and pp. 11, 13, an agency may waive its own policies embodied in internal regulations promulgated within the discretion that Congress has authorized. A Board order requiring the agency, in effect, to waive its own regulation when equity so dictates would not violate a Government-wide regulation having the force and effect of law and thus would not constitute a misapplication of equitable estoppel.

As to the elements of equitable estoppel, there is no question that the staffing specialist made a “definite” representation to the grievant that her starting salary would be as above-stated, an offer finalized two months later in a formal written appointment to the position at the salary previously offered by the staffing specialist in April 2009.

However, we find that grievant failed to meet her burden of proving by a preponderance of the record evidence either that she relied on the staffing specialist’s representation to her detriment or that, if she did, such reliance was “reasonable.”

With respect to the question of detrimental reliance, the record establishes that grievant was nearing the end of her term appointment with [REDACTED] and therefore was in the process of seeking employment with other prospective employers. Remaining with [REDACTED] was not an option. The record also reflects that when grievant received and accepted the salary offer from USAID’s staffing specialist in April 2009, and even after she received her formal letter of appointment in June 2009, she had no competing offers in her possession. Grievant had been pursuing alternative job opportunities with other organizations, specifically the CDC and Concern Worldwide, and continued to do so even after receiving the agency’s formal appointment letter. However, there is no record evidence that she ever received a formal job offer from any prospective employer at any salary level.⁵ Thus, we cannot say that grievant declined other job offers and thereby relied to her detriment by accepting the agency’s salary offer on April 9, 2009, with locality pay included, of \$62,582.⁶

⁵ The record does contain an e-mail from a CDC official to grievant dated June 26, 2009, referring to a telephone conversation he had with her on June 8 concerning a possible \$59,500 salary offer for a position with an organization that provides contractual services to CDC. However, no formal written offer ever was sent to grievant because, in the words of the CDC official, such an “acceptance letter” from CDC “would have been sent to you after you had informed or communicated to me that you accepted the position” and that event never occurred. We further note that no evidence was presented that the CDC official was authorized to hire grievant on behalf of the contractor in any event.

⁶ There is no evidence in this record that grievant lost any other employment opportunities by accepting the agency’s offer. Any finding of detrimental reliance herein on that basis therefore would be purely speculative.

More significantly, even if this Board were to conclude that grievant relied to her detriment on the staffing specialist's erroneous salary offer under the circumstances, we must conclude that such detrimental reliance was not "reasonable." As set forth above, grievant was clearly on notice well before she received the agency's salary offer that only her base salary at [REDACTED] would be considered in determining her initial salary at USAID. Grievant could have furnished (or had [REDACTED] furnish) her 2008 W-2 earnings tax form in response to the instructions that the agency sent to her early in 2009 requesting her base salary information. Instead, she chose to submit a generic letter, which stated that her salary equivalent was about \$50,000 per year. Grievant knew or should have known that the stated salary equivalent in [REDACTED] letter included the estimated value of benefits that the agency, under the clear guidelines it provided to her, would not consider in determining what initial salary to offer. Nevertheless, apart from her generic statement of willingness to provide additional information upon request, grievant did not correct the misimpression created by the [REDACTED] letter that her 2008 salary was "equivalent" to \$50,000 when in reality it was less than half that amount. She did not provide the 2008 W-2 until requested to do so sometime in 2010 as part of the internal agency audit of salaries offered to applicants in the Junior Officer program.

We do not find, and should not be construed to imply, that grievant acted improperly in furnishing only the [REDACTED] letter before receiving the agency's salary offer in mid-2009. The agency has clearly recognized that "[i]n this case, you [the grievant] were not at fault for this [overpayment] error and OHR [Office of Human Resources] acknowledges that an administrative error was made[.]" The staffing specialist clearly was rushing to complete the hiring process involving many applicants when she made grievant the erroneous salary offer a mere few days after receiving the [REDACTED] letter. Instead, the staffing specialist should have

verified what grievant's actual base salary was in 2008 in order to be in compliance with the agency's own regulations. However, while grievant may well have been without fault for the error that was created, she still may be deemed to have had no "reasonable" basis for relying on the erroneous salary offer she received. We conclude that it was not reasonable for her to rely on the terms of that offer when she had clearly been put on notice that only her base salary at [REDACTED] would be considered in setting her starting salary at USAID. A reasonable job applicant would have sought to verify the accuracy of the salary offer, given the wide gap between that offer and her base salary at [REDACTED] in 2008, before acting in reliance on it. Accordingly, we must reject grievant's appeal herein.

In so concluding, we note (as did the agency) that since grievant was not at fault for the administrative error in this case, she is entitled to apply to USAID's Chief Financial Officer for a waiver of the obligation to reimburse the agency for the salary overpayment. We express no opinion at this stage, of course, as to the merits of any such waiver request, if one were to be made.

V. DECISION

The grievance appeal is denied in its entirety.

For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Harlan F. Rosacker
Member

DISSENT

In my view, grievant met the conditions for the Board to apply equitable estoppel and find in her favor: (1) there was a “definite” representation to the grievant in the form of a provisional and then formal salary offer; (2) grievant relied on this representation to her detriment; abandoning other job search efforts when she joined the agency, she now faces years of reduced salary, owing to what amounts now to a changed salary offer; and (3) grievant “reasonably” relied on the representation.

My overarching concern with the decision of the majority is that it requires grievant to bear the burden for a mistake that the agency admits it made. I recognize that the agency had put itself under tremendous pressure to bring in a large number of new-entry officers in a short time period. That, however, does not absolve the agency from attending to the processes needed to properly admit those new employees. In fact, if anything, it should have caused the agency to be doubly careful with its process to ensure that mistakes were not made in the extraordinary effort it was undertaking. Relying on an audit a year later to fix mistakes is not the same as careful work up front; that is especially the case when the impact falls not on the agency but on an individual. It would appear that whatever fail-safes were built into the system were overlooked in the initial salary offer and the subsequent formal offer. The fact that the agency’s senior responsible officer did not review or sign that final offer is an indication of the failure by the agency to maintain effective controls over its process.

The agency has now accepted that its representatives erred in making the salary offer to grievant. Acknowledging the agency’s mistake, the majority considers that it was unreasonable for grievant to have relied on the agency’s offer and for grievant not to have sought to verify the agency’s offer. The majority opines that grievant “knew or should have known” that what she

provided as current salary information was insufficient and that the offer she received was inappropriate, given the notice she had received regarding the agency's method of determining entry salaries.

I agree that, based on grievant's actual salary in her work with the [REDACTED] [REDACTED] the agency should have offered her no more than the salary at the FS-06/01 level, and not FS-06/11. Had grievant provided the agency with her W-2 form and other, more precise information, it is likely that the agency would have offered the correct salary. Yet, it was the agency's responsibility to determine whether it had the information it needed to make a salary determination and then to make that determination. That the agency chose to accept incomplete information and then to misinterpret that information is not grievant's fault.

Furthermore, I disagree with the majority's finding that "a reasonable job applicant would have sought to verify the accuracy of the salary offer, given the wide gap between [agency's] offer and her base salary at [REDACTED]. Rather, I consider it reasonable for the applicant, as someone outside the federal bureaucracy, to have assumed that the agency was competent in its determinations. In particular, when she forwarded by e-mail (to the agency's "DLI" e-mail mailbox) the [REDACTED] letter from the [REDACTED] she told the agency, "Should you have any questions, please do not hesitate to contact me." The majority views this as a generic offer, yet whether it was generic or not, the agency set the salary without further reference to grievant, and an individual working with the human resources specialist who made the salary offer replied to grievant's e-mail. The agency later informed the Board that this individual was a contractor who was not responsible for answering e-mails to the "DLI" mailbox such as grievant's. Yet, that is the answer grievant received, and regardless of the circumstances concerning the drafter, what grievant received was an e-mail reply from someone with an official agency address (and with a

cc to the human resources specialist), telling her that the agency had received her current salary information and that she should have received a competitive salary offer.

Reading the return e-mail, along with the provisional offer letter that arrived soon afterwards, I consider that it would have been reasonable for grievant to have concluded that the agency had reviewed her information, decided nothing further was needed, and made an official offer it considered appropriate. She acted on the offer when it was made final, eventually giving up whatever other job search she had underway, and joined the agency.

We know that grievant was looking for work with more than one potential employer at the time she was applying to join the agency. We do not know the facts regarding what other opportunities or salary offers she might have had in hand when she accepted the agency's provisional and final offers, nor do we know what other considerations she took into effect in deciding to accept the agency's offer. We know, though, that in accepting the final offer and joining the agency, she effectively terminated her job search elsewhere, thereby foregoing whatever other opportunities she might have had or might have developed.

A year later, after an agency audit revealed the mistake the agency had made, she learned that the agency had determined that she was being overpaid by more than 25 percent, that she had to repay the overage, and that her current wages would be reduced. The impact of this decision bears as well on her future earnings, as the effect is carried forward until such time as a future promotion would give her the same step in a new grade as she would have received had she continued along in the grade/step she had before the audit. The cumulative impact thus grows each pay period and will likely total in the tens of thousands of dollars before she arrives at a new grade with the same step as she would have had absent the audit finding. In my view, it would be small consolation for her current indebtedness to be forgiven – which is not guaranteed

– as the reduction in her future earnings will be even greater than the \$13,000 for one year’s excess earnings she is being asked to repay now.

In my view, then, there is significant detrimental impact for grievant, both in terms of her pay and in terms of being unable to rewind the facts and return to the decision that she made when she accepted the agency’s job and salary offer. Whatever pros and cons she had considered when weighing the agency offer against other possibilities for employment, one factor (salary and its related components (TSP, retirement, etc.)) has been changed significantly.

Finally, an earlier case (FSGB Case No. 2001-003) provides one example of how such issues have been handled previously, albeit by a different agency, the Department of State (Department). The grievant in that case asked for his entry salary to be increased, in part because other junior officers in his orientation class had been given higher entry salaries than his, despite similar experience and qualifications. The Department acknowledged it had erred in setting salaries too high for several officers, however, as noted in the decision overview, “Given that those entry-level offers were accepted in good faith, the Department used the discretion permitted under the regulations in deciding not to correct the errors.” Among the Board’s findings in denying the grievance was that “the Department is not obligated to raise the correctly established salary of another employee.” USAID had in the instant case claimed that keeping grievant’s salary at a higher level “is an insult to Grievant’s fellow colleagues with similar backgrounds who are receiving less salary because they followed the appropriate regulations.” In my view, the circumstances between grievant and her colleagues are clearly not as compelling an issue as the agency sees; each entrant chose freely to join the agency based on his or her own circumstances, including the salaries offered to each by the agency. For grievant, the salary offer is being changed after the fact and quite detrimentally for her.

DISSENT



Frank J. Coulter
Member