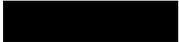


BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2011-053

January 25, 2012

ORDER: TIMELINESS

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Barbara C. Cummings
Lois E. Hartman

Special Assistant

Jill Perry

Representative for the Grievant:

Pro se

Representative for the Agency:

Melinda Chandler, HR/G
Director of Grievances

Employee Exclusive Representative:

James York, AFSA

ORDER: TIMELINESS

I. ISSUE

This order addresses a Request for Preliminary Determination Regarding Jurisdiction and a Request to Toll Time Periods filed by the Department of State regarding the timeliness of the instant grievance.¹

II. BACKGROUND

On May 29, 2009, [REDACTED] (grievant) received a job offer from the Department of State (the Department, the agency) for a position as a DS Special Agent Career Candidate at the grade of FS-06, step 4. In response to the offer, grievant requested that the Department's Salary Review Committee (SRC) reconsider the offered salary level, claiming that the Department failed to consider his Masters in Business Administration (MBA) degree and his prior work experience. The SRC informed grievant on July 2, 2009, that the salary offer was calculated correctly. The same day, grievant signed an agreement to join the Foreign Service. He was appointed on July 19, 2009 and entered on duty on July 20, 2009.

Grievant filed a grievance with the Department on June 28, 2011 contending that his entry-level salary should have been set five steps higher because his advanced degree and subsequent work experience were directly related to the work of a Diplomatic Security Agent. The Department issued its decision on September 16, 2011, dismissing the grievance as time-

¹ The timeliness question is not jurisdictional. It is procedural, subject to waiver, estoppel and equitable tolling. *See*, FSGB Case No. 2011-024 (September 29, 2011); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); G-89-060-State-50 (March 7, 1990). It can be waived by the agency, or tolled by the Board on the basis of equitable considerations. Among the circumstances cited by courts that justify equitable tolling of a statute of limitations are that the grievant received inadequate notice of the time period or was lulled into inaction by the agency and otherwise acted diligently. *See*, for example, FSGB Case No. 2007-047 (June 5, 2008).

barred. The agency did not address the merits of the grievance. Grievant filed an appeal with this Board on November 3, 2011 seeking an increase in his salary level. On November 23, 2011, the Department filed a Request for Preliminary Determination Regarding Jurisdiction and a Request to Toll Time Periods. Grievant filed a response to the Department's Request Regarding Jurisdiction on December 2, 2011. On December 16, 2011, the Board tolled timelines pending its decision on timeliness.

III. POSITIONS OF THE PARTIES

The Department:

The Department argues that the instant grievance was untimely filed and must therefore be dismissed. The Department cites the Foreign Service Act, 22 U.S. Code § 4134(a), which provides in pertinent part:

A grievance is forever barred under this subchapter unless it is filed with the Department not later than two years after the occurrence given rise to the grievance.... There shall be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware of the grounds for the grievance and could not have discovered such grounds through reasonable diligence.

The Department contends that grievant's salary was established on May 29, 2009 in the job offer letter. The agency further contends that although grievant requested reconsideration of the initial salary offer by the SRC, it was the establishment of grievant's entry-level salary on May 29th that gave rise to the grievance. The Department references FSGB Case No. 2006-050 in which the grievant received SRC reconsideration and the Board determined that "the occurrence giving rise to the grievance was the establishment of his entry-level salary." (FSGB Case No. 2006-050 dated May 10, 2007).

The Department argues that although grievant claimed that he was unaware of the grounds for his grievance until he learned from other Special Agents that they received additional pay steps for equivalent masters degrees and related work experience, he does not establish that he could not have learned this information through reasonable diligence. Thus, the agency contends, the grievance is time-barred under 22 U.S.C. § 4134(a).

The Grievant:

Grievant argues that neither the Department's initial offer of a position and salary nor the decision of the SRC were effective until he actually entered on duty on July 20, 2009. Grievant argues that until he entered on duty, he could not be held to be aware of the grievance procedures, nor would he have had standing to file a grievance before then. He argues that neither the Department's initial offer of an entry-level salary, nor the SRC's decision was effective until the date of his entry on duty. Thus, he contends that it was his entrance on duty that was the "occurrence giving rise" to his grievance.

IV. DISCUSSION AND FINDINGS

The Department has asked this Board to make a preliminary decision regarding timeliness. In order to determine the timeliness of the instant grievance, we must determine the occurrence given rise to the grievance. As both parties correctly recognize, 22 U.S. Code § 4134(a) sets a 2-year time limit for filing a grievance such as this one, starting from the date of the occurrence giving rise to the grievance. In an entry-level salary grievance, conceivably there are five possible "occurrences" that can give rise to the grievance. These include: the date on which the initial job offer is made; the date when the grievant accepts the offer of employment;

the date on which the grievant enters on duty; the date on which the grievant challenges the salary decision before the SRC; or the date of the decision by the SRC.

Grievant argues that he was not aware of the grievance procedure until he entered on duty. Further, he contends that the salary offer and decision of the SRC were not effective until he entered on duty. Lastly, he argues that he had no standing to file a grievance of any kind on any issue until he became an employee. The definition of a grievance in 22 U.S. Code § 4131(a) (1) provides that, with exceptions that are not applicable here, a grievance can be filed only by “a member of the Service who is a citizen of the United States.” Grievant, therefore could not have filed a grievance concerning his salary until he became a member of the Service, which did not occur until he entered on duty. In FSGB Case No. 1994-021 (June 6, 1994), this Board found that the occurrence giving rise to a grievance about salary was the date the employee entered on duty. *See also*, FSGB Case No. 1989-067.

In FSGB Case No. 2006-050, the Board stated that the occurrence giving rise to the salary level grievance was the establishment of grievant’s entry-level salary at the time an offer was made. However, the Board’s decision in that case did not turn on the issue of timeliness; rather, it was decided on the merits. Therefore, the Board’s pronouncement that the establishment of the salary at the time the job offer was made was the occurrence given rise to the grievance is not Board precedent and is no more than dicta.

In the instant case, we agree with grievant that the first occasion on which he could have grieved his entry level salary was when he earned it. That occurred when he entered on duty. Before that date, the salary offer, his acceptance, his challenge and the decision of the SRC were all events that dictated the salary he would earn only after he entered on duty. Until he actually

earned the challenged salary, he could not grieve it. We therefore conclude that the grievance was timely filed within two years of his entry on duty.

V. DECISION

For the reasons cited above, the case is remanded to the Department for consideration of the merits of the case.

For the Foreign Service Grievance Board:

Susan R. Winfield
Presiding Member

Barbara C. Cummings
Member

Lois E. Hartman
Member