

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2011- 056

January 11, 2012

**ORDER: TIMELINESS AND
INTERIM RELIEF**

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Frank J. Coulter
Jeanne L. Schulz

Senior Advisor

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda Chandler
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

████████████████████ grievant's reviewing officer, nominated him for an SHA with a suggested cash amount of \$2,000. The SHA nomination was approved by the Joint Country Awards Committee on June 30 and by the U.S. Ambassador in ██████████ on July 1, 2009, but it was disapproved by the Area Awards Committee on July 14.¹ Ultimately, the nomination was approved as a Meritorious Honor Award (MHA) with a \$1500 cash award.² Grievant received the cash award on his Earnings and Leave Statement dated December 31, 2009. In addition to his regular pay and other information, this leave statement listed a payment of \$1,500 for a "Cash Award."

By letter dated March 31, 2010, the Director General informed grievant that pursuant to the Department's rules governing expiration of time-in-class (TIC), he would be subject to mandatory retirement by no later than September 30, 2011, if he was not promoted by the summer of 2010. On April 24, 2010, a Standard Form 50 (SF-50), "Notification of Personnel Action" was entered into grievant's Official Personnel Folder (OPF) reflecting an "Individual Cash Award RB"³ of \$1,500.00. According to the Department, the approved MHA nomination form was added to grievant's performance folder on February 8, 2011. Grievant was not recommended for promotion by the summer 2010 Selection Boards.⁴

¹ Grievant initially disputes this claim by the Department that the Area Awards Committee ever reviewed the nomination. However, he later concedes: "In examining both awards, one states that the [SHA] had been recommended by the Embassy but rejected by the Awards Committee. The cash award was presumable [sic] reduced from \$2000.00 to \$1500 also by the Awards Committee."

² The record does not establish the date on which the award was approved. The narrative in support of the approved MHA was the same as that for the proposed SHA. In addition, much of the narrative was taken from the text of grievant's EER ending April 2009.

³ RB is not further explained.

⁴ The Board notes that materials related to an award and its approval are divided between the two parts of an employee's OPF and that not all would be available to a selection board. To that end, when the parties refer generically to the OPF, the Board recognizes that to mean the "performance folder/file" for the award

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant states that he had no knowledge of his nomination for a Superior Honor Award by his rating officer on May 20, 2009, or of the subsequent actions and Department errors that followed. He alleges that absent procedural errors, conflicting statements and dilatory actions by the Department, either a Superior Honor Award or a Meritorious Honor Award would have been present in his performance folder in time for review by the 2009 and 2010 Senior Threshold Boards. He maintains that there is no evidence that the Awards Committee ever met to properly consider the SHA nomination, and that no justification has been provided for downgrading his award to a Meritorious Honor Award or for reducing the amount of the cash award. He argues that there is nothing to demonstrate that the decision was not arbitrary, capricious, an abuse of discretion or a violation of the applicable regulations. He also states that both unsigned nominations (the SHA and the MHA) were placed in his file in error.

Grievant claims: "In the fall of 2010, I was notified that a Superior Honor Award had been placed in my file for my service in [REDACTED]. Soon after, I was notified that I had received a Meritorious Honor Award for my service in [REDACTED]. In response to this Board's inquiry, however, grievant claims that he "first became aware of a problem in January 2011," when he was notified of the inclusion of an SHA nomination in his OPF with an effective date of July 14, 2009. He states: "Further grounds for the grievance came on February 8, 2011 when, as the Department acknowledges in its Decision Letter, the

nomination form and EER and to mean the "administrative" or "personnel folder/file" for the SF-50 personnel action related to the approved nomination. The Board also recognizes that Employee Profiles made available to selection boards include information derived from the "administrative/personnel" side of the OPF, including information related to the type and effective dates of awards.

(procedurally defective) Meritorious Honor Award nomination was included in my file with an effective date of July 1, 2011 [sic].”⁵ Grievant requests that the Board accept one of these 2011 dates as the date on which he first became aware of the occurrence giving rise to the grievance.

On the issue of interim relief, grievant asserts that he was not attempting to delay his scheduled mandatory retirement by filing a grievance on the day before it went into effect, but rather, he argues, for months he had been attempting to clarify what had happened. He claims that he received conflicting information from the Department until the end of his time in class; therefore, he filed his grievance at the last minute to preserve his rights. He maintains that his purpose in seeking continued interim relief is that he expects to prevail on the merits and continuance of interim relief would prevent him from being removed from the Department’s payroll only to be put back on retroactively.

THE DEPARTMENT

The Department maintains that the occurrence giving rise to this grievance was August 2, 2009, the effective date of the award grievant received. The Department also argues that grievant should have been aware of the cash award when he received it on December 31, 2009.⁶ In addition, the Department claims that on April 24, 2010, an SF-50 Notification of Personnel Action form was placed into grievant’s OPF, indicating that he was given a Meritorious Honor Award with a cash payment of \$1,500, effective on August 2, 2009. The Department argues that this effective date is the controlling date for determining the timeliness of this grievance.

⁵ It appears that the date should be 2009. It is unclear why grievant does not claim that the effective date was August 2, 2009.

⁶ But, of course, this date is within two years of the filing of this grievance.

The Department contends further that after grievant received the March 31, 2010 letter from the Director General advising that he would be separated upon expiration of his TIC if he was not promoted by the 2010 Boards, grievant could and should have taken steps to ensure that his award was in his file prior to the convening of the 2010 Selection Boards.

The Department also argues against continuation of interim relief because grievant knew in 2010 that he had not been recommended for promotion, yet he did not grieve then or in February 2011, when he admits being aware of an award that was not in his OPF. Instead, he waited until the “eleventh hour.” According to the Department, grievant has provided no evidence that he will suffer irreparable damage were he to be separated now and later reinstated, if the grievance is found to be timely filed and if he prevails on the merits.

IV. DISCUSSION AND FINDINGS

Timeliness

In all grievances, other than those in which discipline is imposed, the grievant bears the burden of proof that his grievance is meritorious. 22 CFR §905.1. The Foreign Service Act provides a limitation period within which a grievance must be filed:

A grievance is forever barred under this subchapter unless it is filed with the Department not later than two years after the occurrence giving 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 questions presented by the Department’s claim that this grievance is untimely, then, are: (1) what and when was the occurrence giving rise to this grievance; and (2) during

what period of time, if any, was grievant unaware, despite due diligence, of the grounds for this grievance? The Board finds that the events giving rise to the grievance were the alleged failure of the Department to pay grievant either the \$2000 Superior Honor Award or the \$1500 Meritorious Honor Award, for which he was nominated in 2009, and the failure to include the award in grievant's OPF in time to be reviewed by two Selection Boards (2009 and 2010). The record as developed to date suggests that grievant was approved for an MHA with a cash award of \$1500 that he received on December 31, 2009.

The Department does not dispute grievant's position that he knew nothing about being nominated for any award in the summer of 2009. We find that the first date when grievant knew of the award, or should have known of it through the exercise of due diligence, was December 31, 2009 when he received his Earnings and Leave Statement, clearly listing a payment of a cash award of \$1,500. Grievant had been back from [REDACTED] for approximately 10-11 months by then and was an Office Director in the Department of State. He therefore, presumably had the time and opportunity to investigate the source of funds that had been deposited in his bank account. Despite his claim that he has been unable to "locate records that would confirm that I did or did not receive payment," the record shows that he did receive the award payment in December 2009 and, therefore, it is reasonable to impute to him knowledge of the award upon receipt of the payment.

The Department's logic in claiming that the grievance is untimely is that on April 24, 2010 an SF-50 Notification of Personnel Action sheet was inserted into grievant's OPF with the MHA award listed on it, with an effective date of August 2, 2009. The Department essentially argues that because the effective date on the form was set eight

months earlier than the documented date of the award, grievant should be held to have known of the award on the effective date of August 2, 2009. But, this argument is illogical and unreasonable. There is no evidence that grievant had anything to grieve or any knowledge of a claim prior to December 31, 2009. At the very earliest, grievant could have investigated the December 31 award in January 2010, when he would have been able to identify the source of the cash. He thereafter would have been able to check his performance folder to determine if the award was documented there for the subsequent 2010 Selection Boards to review.⁷

Grievant had a second opportunity to learn of the award when on April 24, 2010, he learned of the SF-50 that documented the \$1,500 MHA award. Had he inquired, he would have learned of the SHA nomination, the MHA award, the change in the cash amount of the two awards and other alleged procedural errors that occurred. Thus, we conclude that this grievance, filed on September 29, 2011, was timely filed within two years of the events giving rise to the grievance – that is, the payment of the MHA on December 31, 2009 in the contested reduced amount and the failure of the Department to include the award in his OPF review by the 2009 and 2010 Selection Boards.

Interim Relief

The Foreign Service Act grants discretion to this Board to provide prescriptive relief to a grieving employee by ordering a suspension of a proposed involuntary separation of the employee pending a decision on the grievance pertaining to the separation. 22 U.S. Code § 4136(8) provides:

If the Board determines that the Department is considering the involuntary separation of the grievant . . . which is related to a grievance pending

⁷ It was clearly too late to ensure that the award was in his file in time for review by the 2009 Selection Boards.

before the Board and that such action should be suspended, the Department shall suspend such action until the date which is one year after such determination or until the Board has ruled upon the grievance, whichever comes first.

In a prior case, we held that:

a grant of interim relief accords with the evident intent of Congress in conferring this authority to avoid the significant and perhaps irreparable dislocations which interruptions of a Foreign Service career may entail. Such action is also consistent with the Board's responsibility to insure the fullest measure of due process for the members of the Foreign Service.

FSGB No. 1997-104 (February 24, 1998) at p. 11.

Our Board has identified certain factors that should be considered on the question whether interim relief should be granted. These factors include: (1) whether grievant's career would be irrevocably disrupted if he were interim relief were denied, but grievant were subsequently successful on his grievance; (2) whether the grievant was dilatory in filing his grievance, suggesting that it was merely a tactic to extend his time on the Department's rolls; and (3) whether the grievance is manifestly without merit on its face or frivolous." *Id.*; FSGB No. 1995-063 (October 11, 1965).

In the instant case, it does not appear that grievant's career would be irreparably disrupted if interim relief were denied now and if he was subsequently successful on this grievance. In any event, he makes no such argument. Likewise, grievant does not explain why he waited until the day before the separation was scheduled to go into effect before filing this grievance, when we have concluded that he was on notice of the grounds for his claim as early as December 31, 2009. It appears to this Board that grievant delayed filing solely to delay the inevitable.

Finally, as for the merits of his claim, we do not conclude at this stage of the proceedings that the grievance is frivolous or patently without merit.⁸ In addition, it does not appear that grievant has yet offered proof that the Committee that declined the SHA in favor of an MHA violated any rules or regulations in making this decision or in reducing the amount of the award.⁹ Lastly, it appears that grievant actually received the cash award, despite his claims to the contrary.

Taking the appropriate factors into consideration, we conclude that an extension of interim relief is not warranted.

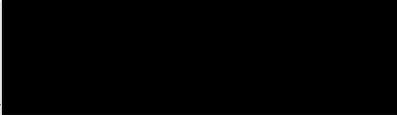
V. DECISION

The grievance was timely filed. Timelines will resume from the date the parties receive this Order. Continued interim relief is denied. Should grievant prevail on the merits, he can be reinstated with minimum disruption to his career.

⁸ We recognize, however, that in order to be successful on his claim, grievant will have to establish that the absence of the award in his OPF was a substantial factor in the decisions of the 2009 and 2010 Selection Boards not to recommend him for promotion. We note that the OPF contained grievant's last EER that recited much of the same information relevant to the award as was contained in the nomination.

⁹ Although grievant contends that there is no evidence that the award decision was not arbitrary, capricious, an abuse of discretion or a violation of the applicable regulations, he has the burden of proving that the decision was in fact arbitrary, capricious, an abuse of discretion or a violation of regulations.

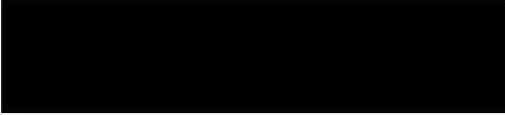
For the Foreign Service Grievance Board:



Susan K. Winfield
Presiding Member



Frank J. Coulter
Member



Jeanne L. Schulz
Member