

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceedings
FSGB Case No. 2011-057



Grievant

May 21, 2012

and

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Barbara C. Cummings
Alfred O. Haynes

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Melinda P. Chandler
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Assoc.

CASE SUMMARY

HELD: Grievant failed to meet his burden to show that the Department violated applicable regulations and Standard Operating Procedures (SOP) when it directed grievant's assignment to [REDACTED].

OVERVIEW

Grievant, an Entry Level Officer (ELO) Career Candidate, challenged the Department's decision directing his assignment to [REDACTED]. He claimed that he had already served in two overseas directed assignments, first in [REDACTED] and second in [REDACTED]. However, when his second directed assignment was cut short after only eight months due to health problems associated with the high altitude in [REDACTED] and his medical clearance was withdrawn, grievant was offered but rejected a reassignment to a lower altitude location within [REDACTED] that would have allowed him to complete his second two-year directed assignment without interruption. The Department thereafter directed his next assignment to [REDACTED], where grievant would be required to serve for another two years. He rejected this assignment also, and instead grieved the Department's interpretation of its regulations so as to preclude him from bidding for what he considered his third assignment through the open bidding process.

Grievant relied on his interpretation of 3 FAM 2424.2 (a), which defines an "assignment" to a Foreign Service position as an assignment for any period of more than six months. He argued that, as he had served in his second directed assignment to [REDACTED] for eight months, he was eligible to bid on his next position in the open bidding process.

The Board found that grievant's reliance on the above regulation was misplaced and that the assignments of ELO Career Candidates such as grievant are managed by the Entry-Level Division in the Office of Career Development and Assignments (CDA/EL) in accordance with the provisions of 3 FAH-1 H-2425.8-6 and Standard Operating Procedures (SOP) B-9 and C-8. These procedures indicate that ELOs must complete two full two-year assignments before they are eligible to participate in the open assignments bidding process.

The grievance appeal was denied.

DECISION

I. GRIEVANCE

██████████ (grievant), a member of the Foreign Service with the Department of State (Department, agency), filed a grievance with the Department in late August, 2011.¹ He claimed that the Department's decision to direct his third overseas assignment to ██████████, violated the provisions of 3 FAM 2242.1 because the Department had already directed his assignment to two Entry-Level positions and he had been recommended for tenure. Grievant claimed that he had been denied an opportunity to bid for his third assignment in the open assignment bidding process. For relief, he asked that he be allowed to obtain his third assignment through that process and that, in the interim, his assignment to ██████████ be put on hold or broken until the grievance has been decided.

On November 10, 2011, the Department issued its decision denying the grievance. In that decision, the Department did not comment on grievant's request for interim relief regarding the ██████████ assignment. On November 14, 2011, grievant appealed the Department's decision to the Foreign Service Grievance Board (FSGB).²

II. BACKGROUND

Grievant, an Economics Officer, entered on duty with the Department as an FP-04 in 2007.³ As an Entry-Level Officer (ELO), grievant received his initial two assignments under the guidance and direction of the Entry-Level Division in the Bureau of Human Resources, Office of Career Development and Assignments (HR/CDA/EL). The guidelines established for the

¹ While ██████████ failed to place a date on his grievance submission to the Department, the latter indicated that it received the grievance on August 25, 2011.

² In his appeal, grievant did not mention the request he had made at the agency level that the ██████████ assignment be broken or put on hold. Grievant also indicated that, unless the Board so requested, he did not intend to supplement his appeal with additional evidence or argument.

³ Grievant was promoted to FP-03 on October 23, 2011.

assignment of ELOs are outlined in 3 FAH-1 H-2425.8-6 and Standard Operating Procedure (SOP) C-08.⁴

As an ELO, grievant served his initial two-year assignment from 2008 to 2010 in [REDACTED]. In December 2010, upon completion of the [REDACTED] assignment, grievant was next assigned to a two-year assignment in [REDACTED]. After having served for only eight months in [REDACTED] (until August 2011), he developed health problems attributable to the high altitude in that location which resulted in the loss of his medical clearance.

The Department then offered grievant an assignment to [REDACTED], where he could have completed the balance of his two-year assignment in [REDACTED] at a lower altitude. When grievant declined the assignment to [REDACTED] for personal reasons, the Department then gave him a directed two-year assignment to [REDACTED]. Grievant initially rejected the [REDACTED] assignment as inconsistent with his interpretation of applicable Department regulations.⁵

On August 17, while grievant was still in [REDACTED] the Director of HR/CDA sent an e-mail to grievant discussing the latter's onward assignment situation and his future in the Foreign Service. In this communication, the Director specifically advised grievant that his only options were to accept the directed assignment to [REDACTED] or resign from the Foreign Service, and that he would be subject to disciplinary action under 3 FAM 4314 for insubordination if he rejected the [REDACTED] assignment. Grievant immediately sought "clarification" as to why his second directed assignment in [REDACTED] did not constitute an "assignment" under the Department's regulations. Two days later, a representative of the Career Development Office replied with an explanation that ELOs must serve two full two-year directed tours of duty before being eligible

⁴ The SOP that was operative when grievant was appointed had been approved in April 2005. Although the SOP was revised and thereafter approved in June 2011, there were no substantive changes in the number of assignments that are directed by CDA/EL.

⁵ On August 3, 2011, grievant was recommended for tenure. He was officially granted tenure on December 19, 2011.

to bid “mid-level,” citing 3 FAH-1 H-2425.8-6 and HR/CDA’s SOP as well as the A-100 training that grievant had received.

On August 22, grievant sent a final e-mail to his CDO, expressing his disagreement with the advice she had provided him and informing her that he planned to file a grievance regarding the matter. The next day, he filed his grievance with the Department. On October 23, he was promoted to FP-03. On November 10, the Department issued its decision denying [REDACTED] grievance. In its decision letter, the Department made the following statements:

Your grievance claims that ... [HR/CDA] has committed a procedural error in directing you to a third Entry-Level assignment in [REDACTED].

After you lost your medical clearance, HR/CDA reassigned you to [REDACTED]. As [REDACTED] was in the same country and under the same mission as [REDACTED], you could have completed the balance of your TOD there. But you refused to take that assignment for personal reasons. HR/CDA thereafter reassigned you to [REDACTED]. HR/CDA explained to you that as you would be in a different country and under a different mission, you must complete an entire two-year TOD there before becoming eligible to bid for open assignments. You disagree and have refused to report to [REDACTED].

On November 14, 2011, grievant appealed the Department’s decision to the FSGB. On November 18, the FSGB acknowledged receipt of his appeal.

On December 14, the Department filed its Response to Grievant’s Appeal. In that filing, the Department raised the question of jurisdiction, contending that, as a preliminary matter, the appeal should be dismissed because the issues raised in the grievance do not fall within the definition of “grievance” set forth in 22 U.S.C. 4131(b)(1).

On January 4, 2012, grievant responded to the Department’s December 14 submission, addressing his opposition to the Department’s claim that his grievance falls outside of the Board’s jurisdiction. Following receipt of these memoranda, on January 25, 2012, the Board

issued an Order finding that grievant was alleging that his directed assignment was contrary to law and, thus, falls within the statutory definition of a grievance. Following receipt of the Board's Order, the parties indicated that they did not plan to submit any further argument on this case. Accordingly, the Record of Proceedings was closed on March 20, 2012.

III. POSITIONS OF THE PARTIES

Grievant

Grievant argues that his directed assignment to [REDACTED], was not in accordance with the Department's regulations. He states that he had already been granted two directed overseas assignments, first to [REDACTED] and then to [REDACTED].

Grievant does not accept the response he received from his CDO when she referred him to the A-100 briefings, 3 FAH-1H-2425.8-6 and HR/CDA's Standard Operation Procedure (SOP) for Entry-Level Officers. He contends that he was not familiar with the SOP or the particular section of the A-100 to which she was referring, but claims in any event that the unambiguous sections of the FAM should not be altered or superseded by either of these sources.

Grievant relies on his interpretation of 3 FAM 2242.1, which states that "the first and second assignments will be identified by HR/CDA" and that "all subsequent assignments will be in the open assignment bidding process." He notes that he had served two full years in his first assignment in [REDACTED]. He contends that, while he only served eight months of his second directed assignment in [REDACTED], 3 FAM 2424.2 states that "an assignment will be for any period greater than six months." Grievant thus concludes that since he had completed the two directed assignments as required by the regulations, he should have been provided the opportunity to use the open assignment bidding process for his third assignment, rather than being directed to [REDACTED] by CDA against his wishes.

The Department

The Department contends that grievant has not shown that he is the victim of any procedural error. It states that, as an ELO, grievant is required to fully complete two directed Entry-Level assignments before becoming eligible to bid for open assignments. It cites HR/CDA Standard Operation Procedure (SOP) C-08 and 3 FAH-1H-2425.8-6 in support of its position.

The Department notes that, when grievant's medical clearance was revoked, he was offered an assignment to [REDACTED], where he could have completed the balance of his required two-year [REDACTED] assignment. However, when grievant rejected that offer for personal reasons, CDA properly exercised its authority by directing his next assignment to [REDACTED]. According to the Department, grievant would have had to complete the full two-year TOD in [REDACTED] before he would be able to select his next assignment through the Department's open assignment bidding process.

The Department again argues that grievant's claim does not meet the statutory definition of a grievance under 22 U.S.C. 4131(b)(1) and, thus, should be dismissed for lack of jurisdiction. It concludes that, in any event, grievant has not met his burden to show that the Department committed reversible procedural error.

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 his grievance appeal is meritorious. Thus, in this case, grievant must produce preponderant evidence to show that the Department erred when it directed his assignment to [REDACTED], rather than providing him an opportunity to select his third assignment through the open assignment bidding process.

With the issuance of the Board's January 25, 2012 Order, the matter of jurisdiction has been resolved in grievant's favor. The only remaining issue is whether grievant has shown that the Department violated the Entry-Level Assignment process when it denied him an opportunity to bid on a third assignment and instead directed him to a two-year TOD in [REDACTED]

We note at the outset that the Department has established a Division (Entry-Level Division CDA/EL) within the Office of Career Development and Assignments (CDA) solely for the purpose of implementing the assignment process for all ELOs such as grievant. Additionally, the Department has promulgated separate guidelines to be followed (3 FAH-1 H-2425.8-6 and Standard Operation Procedures B-9 and C-8) when assigning such ELOs to their first tours of duty. The purpose is to ensure, to the maximum extent possible, that ELOs are assigned at the outset of their Foreign Service careers to posts where they can receive the optimum training and integration into the Foreign Service community.

Subsection b of 3 FAH-1 H-2425.8-6 (Entry-Level Career Candidates) states:

b. Your first *two* assignments will generally be to overseas posts ... We direct, on behalf of the Director General, the first and in most cases, the second assignments. *You may not appeal these assignments.* (Emphasis added)

Section A of SOP C-08 states:

Entry-Level Officers are expected to complete, *in full*, their Entry-Level assignments, before transferring to their mid-level assignments. (Emphasis added)

It is clear from the record that grievant's entire case rests on his interpretation of the following language in 3 FAM 2424.2 (a): "An assignment to a Foreign Service position (22 U.S.C. 3985) will be for any period of more than six months." Grievant argues that he has already served two directed assignments, first in [REDACTED], and then his eight-month stint in [REDACTED].

We find that grievant's reliance on the language of 3 FAM 2424.2 (a) is misplaced. We agree with the Department's reading of its own regulation defining an assignment as a tour of duty that exceeds six months. We find nothing in this general definition of widespread applicability that specifically limits the tour of duty for a Career Candidate such as grievant, whose career was being managed in accordance with the guidelines specifically established for the Career Candidate Generalists (Entry-Level Officers) Program.

Grievant also has relied upon his interpretation of 3 FAM 2242.1 and 2. However, he has not mentioned 3 FAM 2242.3, which states as follows:

These initial two assignments will be in accordance with tenuring requirements and other objectives of the career candidate program. In subsequent assignments, officer candidates participate in the open assignment bidding process. (Emphasis added)

Grievant admits that he does not recall any discussions at the A-100 course regarding the assignment process and that he was unfamiliar with the SOP that governs the implementation of the assignment process for ELOs. The fact that grievant does not recall the A-100 course discussions and is not familiar with the SOP neither negates their existence nor precludes their relevance in resolving this matter.

Section A of the Department's SOP C-08 includes the following instruction:

Entry-Level Officers must complete at least two Entry-Level tours, regardless of tenure status, before they may encumber Mid-Level positions that have not been ceded to CDA/EL....
Entry-Level Officers whose first two tours combined amount to less than 36 months of Entry-Level work must complete a third Entry-Level tour. ... Entry-Level Officers are expected to complete **in full** their Entry-Level directed assignments before transferring to their first Mid-Level assignment. (Emphasis added)

It is thus clear from the SOP that ELOs must serve two FULL directed Entry-Level assignments before moving on to their first Mid-Level assignment via the open bidding process.

Finally, we do not accept grievant's assertion that Department regulations trump all training courses and SOP instructions. To the extent that grievant may contend that the FAM provision upon which he relies is inconsistent with provisions of the FAH, we find that no such inconsistency has been established. In any event, we note that 3 FAM 1112 states that FAH material carries the same weight and force as the FAM. One does not take precedence over the other. We further find no inconsistencies between the FAM regulation cited by grievant and the SOP specifically applicable to ELOs. The regulation cited by grievant deals with the minimum period of time that defines any normal career assignment except for the *initial two* assignments prescribed for Career Candidates. In the instant case, we are dealing with the special criteria that have been approved by the Department for developing and assigning Entry-Level Officers. "Assignment" under this criteria is unambiguously defined as two directed 2 year tours overseas that must be completed *in full*.

Accordingly, and on the basis of the foregoing, we find that grievant has not produced preponderant evidence to show that his grievance is meritorious.

V. DECISION

The grievance appeal is denied.

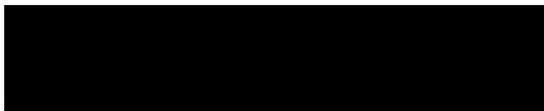
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