

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2011-058

March 21, 2012

ORDER: TIMELINESS

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Lois E. Hartman
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

ORDER: TIMELINESS

I. ISSUE

The grievance in this case, filed by [REDACTED] (grievant), alleges that the Department of State's Office of Civil Rights issued a Report of Inquiry (ROI) that included discriminatory statements against him. The Department denied the grievance as time-barred under section 1104(a) of the Foreign Service Act of 1980 (the Act). The grievant appealed that decision on November 15, 2011. The Board requested that the parties file briefs on the issue of timeliness under section 1104(c)(2) of the Act. This Order addresses whether the grievance should be dismissed as untimely.

II. BACKGROUND

On September 28, 2010, grievant received a Report of Inquiry (ROI) completed by the Department's Office of Civil Rights (OCR), along with a Proposal of Discipline letter. By letter dated November 24, 2010, the Department's Deciding Official issued grievant a Letter of Reprimand on a charge of improper personal conduct involving two specifications regarding his conduct as a Team Leader assigned to the [REDACTED] [REDACTED] in [REDACTED]. Grievant filed an agency level grievance challenging that discipline in which he alleged, among other things, that the ROI upon which the Letter of Reprimand was based contained discriminatory statements about his disability that discredited the witnesses' reliability and biased the Department's decision to discipline him. The Department denied the grievance on May 11, 2011 and he appealed to this Board on May 24, 2011. That case was assigned as FSGB Case No. 2011-021.

On August 2, 2011, grievant filed his agency level grievance in this case (No. 2011-058). Then, on August 5, he filed a “Motion to Stay Proceedings” in the first case (2011-021) pending the outcome of his grievance in this case. On September 16, 2011 the Department denied the new grievance as being time-barred, noting that a grievance based on alleged discrimination must be filed within 180 days after the occurrence giving rise to it (Section 1104 (c) of the Act of; 3 FAM 4427 c.) and that grievant’s filing was well outside that time frame. On September 29, 2011, the Motion to Stay in Case No. 2011-021 was granted by the Board, pending disposition of the second grievance.

Grievant appealed the Department’s denial of his second grievance to this Board on November 15, 2011. The Board requested the parties to submit supplemental briefs on the issue of the appeal’s timeliness, specifically addressing Section 1104(c)(2) of the Act, which extends the time for filing a grievance if the grievant was abroad at the time of the occurrence upon which the grievance is based. Their responses were received on January 27, 2012.

Section 1104 of the Act, 22 U.S.C. 4134, *Time Limitations*, provides:

- a) Limitations period. A grievance is forever barred under this chapter 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.

- c) Grievances based on alleged discrimination

- 1) In applying subsection (a) of this section with respect to an alleged violation of a law, rule, regulation, or policy directive referred to in section 4131 (a) (1) (H), the reference to “2 years” shall be deemed to read “180 days”, subject to paragraph (2).

- 2) If the occurrence or occurrences giving rise to the grievance are alleged to have occurred while the grievant was assigned to a post abroad, the 180-period provided for under paragraph (1) shall not commence until the earlier of –
 - A) the date as of which the grievant is no longer assigned to such post; or
 - B) the expiration of the 18-month period beginning on the date of the occurrence giving rise to the grievance or the last such occurrence, as the case may be.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant concedes that he did not receive the allegedly discriminatory ROI while he was assigned abroad and therefore that Section 1104 (c)(2) is inapplicable. However, he argues that he filed his grievance pursuant to 3 FAM 4412 (2),¹ which includes in the definition of a grievance: “Other alleged violation, misinterpretation, or misapplication of applicable law, regulation, collective bargaining agreement, or published post or agency policy affecting the terms and conditions of the employment or career status of the member.” He contends that included in this definition is his charge that the Department violated 3 FAM 1526.1(a) (What Is Discriminatory Harassment?) and therefore the two year statute of limitations of Section 1104 (a) of the Act and 3 FAM 4427 a.² applies, thereby rendering his grievance timely.

He also contends in the alternative that the “occurrence” giving rise to his grievance is the Department’s continued and ongoing *use* of, not production of, a discriminatory ROI as a basis for its decision to discipline him in November 2010, to deny his appeal to HR in May 2011 and in its ongoing filings against him in FSGB 2011-

¹ Grievant’s reference to 3 FAM 4400 sections including numbers and letters in the paragraphs is from the 6-6-95 transmittal letter. The current version, 09-02-2011 contains no letters or numbers, but reads the same. For ease of reference, the Board will use the 6-6-95 version in its discussions as well.

² Also known as Sec. 1104 (a) of the Foreign Service Act of 1980.

021. Rather than his first review of the alleged discriminatory ROI on September 28, 2010 being the “occurrence” for purposes of section 1104(a), he argues that the occurrence is “ongoing” and not a finite event of the past. He contends that one such “occurrence” was the Department’s use of the discriminatory ROI to deny his grievance in the first case (challenging the issuance of the Letter of Reprimand). That decision was issued within 180 days of the filing of his second grievance, thereby making his appeal timely under 3 FAM 4427 c.

Grievant further maintains that the Department ignored his repeated requests to substantively review the ROI and that it is now “seeking to manipulate the FSGB to block the only independent review of the ROI absent the federal court system.” He claims that each time he approached HR³ or OCR, each of them instructed him to approach the other. HR stated that it was not responsible for the ROI’s contents and OCR stated that the report was in the hands of HR. The refusal of either office to review the “discriminatory ROI substantively” resulted in his August 2, 2011 grievance, in which he requests the Board to rule on the issue of whether the ROI is discriminatory or not.

THE DEPARTMENT

The Department, in both its December 12, 2011 and January 27, 2012 submissions on timeliness, maintains that on August 2, 2011, when he filed the agency level grievance in this case, grievant for the first time claimed that S/OCR engaged in discriminatory conduct by issuing the ROI, almost one year earlier. It provided documentation demonstrating that grievant was assigned domestically on September 28, 2010, when he received a copy of the ROI as an attachment to his proposal of discipline

³ Human Resources

letter. Thus, Section 1104 (c)(2) of the Act is inapplicable to this appeal; instead, Section 1104 (c)(1) of the Act, which requires that grievances based on discrimination be filed within 180 days of the occurrence giving rise to the grievance, applies. The occurrence in this case was grievant's receipt of the ROI. Even if the Board were to find that the "occurrence" in this case was the date the Deciding Official issued his November 24, 2010 Final Decision in FSGB 2011-021, grievant's filing is still beyond the 180 days allowed. The terms of the Act are clear; time limits are linked to the "occurrence" and not to any alleged harm or effect resulting from it.

IV. DISCUSSION AND FINDINGS

In a submission dated December 12, 2011, grievant argued that his grievance was timely under section 1104(a) of the Foreign Service Act of 1980, under two alternative theories. First, he argues that the Department's issuance of an ROI containing discriminatory statements about his mental disability was a violation of S/OCR's discriminatory harassment policy set forth in 3 FAM 1526.1.⁴ As such, his grievance alleges a "violation . . . of . . . applicable law, regulation . . . or agency policy affecting the terms and conditions of [his employment]," for which, under Section 1104(a) of the Foreign Service Act, he gets the benefit of the two-year limitations period.

We disagree. 3 FAM 4427 c. provides that grievances based on alleged "discrimination in violation of any law, rule, regulations, or policy directive referred to in 3 FAM 4412 paragraph c.(9), the reference to '2 years,' shall be deemed to read '180 days.'"

⁴ 3 FAM 1526.1 states: "Discriminatory harassment is verbal or physical conduct that denigrates or shows hostility toward an individual because of his mental disability.... In general, harassment is against the law when it creates an intimidating, hostile, or offensive work environment, or when it interferes with an individual's work performance."

Second, grievant argues in the alternative that his grievance is timely under a “continuing violation theory, which tolls the limitations period.” He claims that his case meets the criteria enumerated in *Tolbert v. Ohio Department of Transportation, U.S.*

Court of Appeals 172 F.3d 934 (6th Cir. 1999):

This court has adopted a three-part inquiry for determining whether a continuing violation exists. First, the defendant’s wrongful conduct must continue after the precipitating event that began the pattern . . . Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the plaintiffs must have been avoidable if the defendants had at any time ceased their wrongful conduct. (citation omitted)

In *Tolbert*, the court held that approval of an Environmental Impact Statement (IES) on construction plans for a parkway, which did not include noise abatement barriers for neighborhoods, did not itself create a continuing violation. Approval of the EIS was a discrete event. A later decision by the ODOT to allocate sound mitigation resources (in that same construction project) to a white neighborhood, but not a black neighborhood was not a part of a pattern. “A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.”⁵

In FSGB Case No. 98-025 (December 18, 1998) Order on Reconsideration, citing *Abrams v. Baylor*⁶ we noted: “[T]he theory of continuing violation has to be guardedly employed because within it are the seeds of the destruction of statutes of limitation.’ While the effects may continue, the act itself (withdrawal of medical clearance) occurred at a discrete and singular point in time.”

Section 1101(a) (1) of the Foreign Service Act provides “. . . the term grievance means an act, omission, or condition subject to the control of the Secretary” The

⁵ Citing *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 11666 (4th Cir. 1991) (internal quotation marks and citations omitted).

⁶ *Abrams v. Baylor College of Medicine*, 805 F.2d 528, (5th Cir.1986)

“act” here was grievant’s receipt of the alleged discriminatory ROI on September 28, 2010. Grievant’s receipt of the ROI, containing statements he alleges are untrue and discriminatory was a single, finite act, triggering the 180-day time limit. The Courts and this Board have held that a continuing violation requires a series of offending acts by the agency, each repeating the discriminatory act. A discriminatory act must occur within the limitations period for there to be a “continuing violation” justifying an extension of the statute of limitations. In this appeal there is no new, allegedly offending act following grievant’s receipt of the ROI. Instead, what he is attempting to grieve are the effects or consequences of that ROI, that is, the proposal for discipline and the Department’s final decision to issue him a Letter of Reprimand on May 9, 2011.

For the above reasons, the grievance in this case is time-barred and will therefore be dismissed.

V. DECISION

The grievance appeal is dismissed on grounds that the grievance is time-barred.

For the Foreign Service Grievance Board:

Elliot H Shaller
Presiding Member

Lois E. Hartman
Member

Jeanne L. Schulz
Member