

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
Case No. 2011-064

Date: May 10, 2012

**ORDER: JURISDICTION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Barbara C. Cummings
Harlan F. Rosacker

Special Assistant:

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: JURISDICTION

1. THE ISSUE

This order addresses the preliminary issue of jurisdiction raised by the Department of State in its “Request for Preliminary Determination Regarding Jurisdiction and Request to Toll Time Periods.” The Board concludes that it does not have jurisdiction of any of the claims presented in the instant grievance appeal for several reasons: some of the claims are presented for the first time on appeal and must be remanded to the agency for review; some of the claims are governed by a separate and exclusive hearing procedure; and for all remaining claims, grievant has either not cited specific statutes or regulations that have been violated, or she has requested relief that the Board is not authorized to provide.

II. BACKGROUND

██████████ (grievant) is a twenty-year Foreign Service employee of the Department of State (Department, agency). While assigned to the U.S. Embassy in ██████████ she and her husband, an ██████████ national, were the subjects of a Bureau of Diplomatic Security (DS) investigation based on allegations by a household worker of sexual abuse and related crimes. This investigation began in June 2009 and ended with a declination of prosecution by the Department of Justice (DOJ) in March 2011.¹ Grievant agrees that she curtailed from post in June 2009 for unrelated reasons.

While the investigation was pending, grievant complains that the agency did not permit her to be assigned to any overseas posts.² She also claims that because of the criminal investigation, she retained a lawyer who charged her twenty thousand dollars for legal services.

¹ Grievant claims on appeal that the investigation of her husband was declined by the Department of Justice in June 2009. The agency’s decision letter, however, states that the investigation began in June 2009 and ended in March 2011. Grievant also claims that there were two investigations of her husband. The agency does not identify more than one criminal investigation of grievant or her husband.

² Grievant states that she was denied two overseas postings and was told that her career was "over."

She argues that if she had been told of the March 2011 declination of prosecution right away, rather than in August 2011, she could have saved five months of legal fees. Grievant further claims that her husband was forced to leave the U.S. because his period of stay as a non-immigrant expired, which, because grievant could not be posted abroad, resulted in duplicate living expenses of approximately twenty-four thousand dollars.

On June 14, 2011, grievant filed a Formal Complaint of Discrimination (discrimination complaint) with the Department's Office of Civil Rights (S/OCR) alleging that the manner in which the agency conducted the investigation of her and her husband was discriminatory based on her gender (female), marital status (married to a non-U.S. citizen), age (over 55) and religion (none). One day after the S/OCR complaint was filed, on June 15, 2011, grievant filed a grievance with the Department complaining that the investigation of her and her husband was improperly conducted. She claimed that the investigation was unreasonably delayed, was motivated by malice, and was not properly supervised. Grievant claims that DS "dragg[ed] out" the investigation that should have been "wrapped up" immediately. She also claims that there were no management controls or supervision of the DS investigator or the DS Division Chief and that the investigations were "fueled by malicious intent" on the part of a former RSO [Regional Security Officer].³ Grievant also claims that DS should not have investigated her at all, when the true subject was her husband. She asserts that this was a violation of 12 FAM 221.7-1, which addresses the fairness, objectivity, and impartiality of DS investigations.

After the criminal investigation was completed, DS began an administrative investigation in about April 2011, to determine whether grievant had violated any of the Department's standards of conduct. An interview with grievant was not scheduled until August 2011, although

³ Grievant also claimed that the Director General (DG) and her senior staff deliberately deceived her about the status of the DS investigation during its pendency.

an attempt was made unsuccessfully to schedule an interview with her in May 2011. This too did not result in any charges against grievant.

Grievant claims that neither she nor her husband was ever informed of the allegations against them. She also complains that no one told her until August 31, 2011 that the criminal investigation was terminated and declined by DOJ.⁴

The Department denied the grievance on October 12, 2011 for lack of jurisdiction, citing Sections 1109 (a)(1) and 1109(b)(1) of the Foreign Service Act. 22 U.S. Code §4109. The agency found that the claims and allegations in the grievance were the same as those in the pending discrimination complaint and thus, grievant had elected the S/OCR as her exclusive forum. The Department also concluded that grievant had not filed an actionable grievance, that is, she failed to prove that she had suffered “a concrete or distinct harm as a result of an erroneous or improper agency action.” The Department cited a Board ruling in FSGB Case No. 2001-026 (Dec. 5, 2001), in which we stated that a grievance must

identify both an erroneous or improper action alleged to have caused harm to a grievant and the harm itself We limit our jurisdiction to granting remedial action that is necessary and appropriate to correct some harm experienced by a particular grievant.

Grievant appealed the Department’s denial to this Board on December 2, 2011.⁵ In her grievance appeal, she advances two new claims: that Acting DCM [REDACTED] sexually assaulted

⁴ Grievant claims that upon her curtailment from [REDACTED] in June 2009, her Management Officer told her that the DS investigation of her husband would be resolved quickly upon her return to the United States. Yet, she states, she waited two and a half years for the matter to be resolved.

⁵ This grievance appeal appears to combine more than one grievance inasmuch as grievant cites two different case numbers and references two separate grievances. The first grievance was filed with the agency on July 12, 2010 under agency number AGS2010-074. The second was filed on June 15, 2011 and bears the agency number AGS 2011-047.

In the first matter, grievant asserted that she was denied an opportunity to pursue overseas assignments in [REDACTED] and [REDACTED] during the pendency of the criminal investigation. This grievance was denied in an agency decision dated August 17, 2010, in which the Department asserted that it had the right at all times to determine which assignments were best suited to meet the needs of the agency. The agency concluded: “Until such time as the case now pending is resolved, the Office of the Director General (DGHR) has directed the Office of Career Development and Assignments (HR/CDA) to limit your assignment to domestic positions.” The agency further

and harassed her in [REDACTED] between January and May 2009; and that she was forced by Acting DCM Post and the Management Officer (MO), [REDACTED] to pay her terminated housekeeper fifteen hundred dollars and to purchase a return ticket for her after grievant informed a [REDACTED] ministry that she no longer employed the housekeeper. She argues that the housekeeper never used the ticket and demands to know how the housekeeper left the country. Grievant also argues for the first time on appeal that her PII (Personally Identifiable Information) and that of her husband were released to a law firm that filed a civil suit against grievant based on information in the DS report of investigation. She demands an investigation of how, why and by whom the information was released as well as disciplinary action against those who released it and those who approved its release.

On December 8, 2011, the Department filed a “Request for Preliminary Determination Regarding Jurisdiction and Request to Toll Time Periods,” under 22 C.F.R. § 904.2. In it, the agency asks this Board to dismiss grievant’s appeal for lack of jurisdiction and to toll the time periods governing discovery and supplemental submissions until it rules on the question of jurisdiction and the scope of the grievance appeal. The agency further asks that if the Board decides to accept jurisdiction, we order the timelines governing discovery and supplemental submissions to commence as of the date of the Board’s decision. On January 4, 2012, this Board informed the parties that we would first resolve the question whether we have jurisdiction and

concluded that grievant failed to assert or prove that there was any procedural error in connection with her assignments. Under 3 FAM 4451, if grievant was dissatisfied with this agency decision, she was obliged to file her appeal with this Board within sixty days of its receipt. This grievance appeal, however, was not filed until December 2, 2011. We therefore, conclude that grievant’s claim pertaining to her assignments while the investigation was pending is untimely.

The second grievance is based on a complaint that DS dragged out its investigation and failed to impose management controls and supervision of the investigation. This grievance that is before us now, was decided in an agency decision dated October 12, 2011 on jurisdictional grounds. The appeal from this decision was timely filed.

that until the Board makes this determination, the filing deadlines for all other matter would be tolled.

On the issue of jurisdiction, the Department claims that the Board does not have jurisdiction over those claims that were earlier filed as part of the pending discrimination complaint. The agency further claims that this appeal includes new allegations that were not raised at the agency level. In addition, the agency asserts that a new allegation on appeal regarding grievant's PII (Personally Identifiable Information) constitutes a Privacy Act claim for which there is a specific and exclusive statutory hearing procedure. Thus, the agency argues, this Privacy Act allegation is expressly barred from grievance procedures, under Section 1101 (b)(4) of the Foreign Service Act.⁶

With leave of this Board, grievant filed her response to the instant Request for Preliminary Determination Regarding Jurisdiction on January 18, 2012. In it, she claims that the factual basis for the complaint filed with S/OCR is different from the basis for this grievance. She also provided a copy of the Formal Complaint of Discrimination (DS-3079). Grievant argues that her discrimination complaint is based on her allegation that she was treated differently by the DS investigators because she has a foreign-born, non-US citizen spouse and because she is a woman over 55 years old who is not religious. She claims that the instant grievance, by contrast, was filed because she was misled by senior Department officials about the status of the investigation and because the investigation was inordinately prolonged.

In response to our request, grievant advised the Board that she seeks the following remedies:

⁶ Section 1101 (b) (4) of the Foreign Service Act, 22 U.S. Code § 4131 (b) (4), states that a grievance "does not include . . . any complaint or appeal where a specific statutory hearing procedure exists, except as provided in section 4139(a)(2) of this title."

- (1) that Senior Department officials be investigated and disciplined by an external law enforcement agency;
- (2) that she receive an immediate release of all of her “records;”
- (3) that she receive compensation for emotional distress;
- (4) that she be awarded \$22,000 as reimbursement for attorneys fees she expended during the criminal investigations;
- (5) that she be awarded \$24,000 as reimbursement for expenses of maintaining a separate household from her husband; and
- (6) that she and her husband receive a verbal and written apology from the agency.

III. POSITIONS OF THE PARTIES

Department:

The Department challenges jurisdiction on three grounds. First, it argues that grievant’s discrimination complaint was earlier filed with the Office of Civil Rights (S/OCR) and involves the same factual allegations as those contained in her grievance. The agency argues that under Section 1109(a) and (b) of the Foreign Service Act, grievant may not proceed with this grievance because she has made an election of remedies that precludes the instant action. Secondly, the agency argues that grievant raises several new allegations in her appeal that were not raised or considered at the agency level. Because it does not waive the objection, the Department asks the Board to dismiss the newly raised issues, pursuant to 22 C.F.R. 16.11(b). Finally, the agency contends that the grievance seeks redress for an alleged harm covered by the Privacy Act which has its own exclusive remedy. Accordingly, grievant may not resort to the grievance process to resolve this issue.

Grievant:

Grievant contends that her discrimination complaint is based on her allegation that she was discriminated against by the DS investigators because she is married to a foreign-born, non-US citizen, and because she is a woman over 55 years old who is not religious.⁷ She

⁷ Her discrimination complaint reads in its entirety:

argues that the instant grievance is different because it is based on the impropriety of the DS investigations and the fact that she was misled by senior Department officials about the status of it, thereby subjecting her to a hostile work environment. Grievant does not address the agency's claims that she raises new issues on appeal or that she has a complaint that falls within the exclusive jurisdiction of the Privacy Act.

IV. DISCUSSION

After considering the parties' positions, applicable statutes and regulations, as well as previous decisions of this Board, we conclude that the Board does not have jurisdiction to consider any of the claims in grievant's appeal.

Under our applicable regulations, a motion to dismiss a grievance appeal for lack of jurisdiction may be filed as a preliminary matter. 22 CFR §904.2 provides:

(a) If an Agency, in its final review, has questioned whether a complaint constitutes a grievance, the Board will make a preliminary determination of its jurisdiction unless the Board concludes that resolution of the question of jurisdiction should be deferred until the Board has compiled a record of proceedings or held a hearing on the merits of the case.

(b) The Board may also make a preliminary determination on any question raised by a Party concerning the timeliness of a grievance, the election of other remedies under §904.3,⁸ or any other issue whose resolution might avoid the necessity of further proceedings.

NEW ALLEGATIONS

I believe that I have been discriminated against on the basis of my sex (female), martial [sic] status (married) to an [sic] non-American spouse, age, (over Foreign Service retirement age eligibility) and Religion (none). I am the employee; and have been discriminated against because of an on-going investigation concerning unfounded allegations against my spouse. I have been victimized and discriminated against because I am the employee and therefore the only one the Department of State can "get."

⁸ 22 CFR 904.3 (a) states in pertinent part:

A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief provided under another provision of law, regulation, or executive order, and the matter has been carried to final decision under such provision on its merits or is still under consideration.

In this appeal, grievant makes allegations that she was subjected to a hostile working environment by the Department and that she was sexually assaulted and harassed. She also raises issues about being forced to pay her housekeeper fifteen hundred dollars and to buy the housekeeper a ticket out of the country. The Department argues that these issues are raised for the first time on appeal. Grievant does not dispute this claim. We find that these allegations in the grievance appeal, though potentially grievable, were not raised at the agency level and are new on appeal.

3 FAM 4452 provides:

In the event that the Board finds that a grievance has not been presented for agency consideration or that a grievance has been expanded or modified to include materially different elements, the Board may return the grievance to the official responsible for final agency review unless the agency waives any objection to Board consideration of the grievance without such review.⁹

Those issues that were not raised or considered at the agency level – including the sexual assault and harassment claims, the claim about money paid to the housekeeper and to buy her a ticket out of the country – must be remanded by this Board to the agency for final agency review of the issues.

PRIVACY ACT CLAIMS

Grievant also raises an issue on appeal that her and her husband's personal information was improperly released to persons with no right to such information, resulting in her being sued in a civil law suit based on information in the DS report of investigation.¹⁰ The Department

⁹ See also, 22 C.F.R. 16.11(b) that states:

In the event that the Grievance Board finds that a grievance has not been presented for agency consideration or that a grievance has been expanded or modified to include materially different elements, the Board shall return the grievance to the official responsible for final agency review unless the agency waives any objection to Board consideration of the grievance with such review.

(Emphasis added.)

¹⁰ At one point in her pleadings, grievant claims that she has been sued. At another point, she claims that she has been threatened with suit.

asserts that this is a Privacy Act dispute, for which there is a specific statutory remedy. Grievant has not responded to this assertion. As in FSGB Case No. 2000-085 (February 22, 2001), we find that such a grievance is expressly barred by Section 1101 (b) (4) of the Foreign Service Act.

REMAINING CLAIMS

The agency alleges, and grievant does not dispute, that on the day before this grievance appeal was filed, she filed a discrimination complaint with S/OCR. If the two actions before the S/OCR and before this Board were based on the same "matter," according to Section 1109(a) and (b) of the Foreign Service Act, 22 U.S. Code §§ 4139(a) and (b), grievant was required to make an election of remedies. Section 1109 (a)(1) of the Foreign Service Act, 22 U.S. Code §4139 (a)(1), states:

A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided under another provision of law, regulation, or Executive order, other than under section 1214 or 1221 of title 5, United States Code, and the matter has been carried to final decision under such provision on its merits or is still under consideration.

Similarly, Section 1109 (b) of the Foreign Service Act, 22 U.S. Code §4139 (b), provides:

(1) With respect to a grievance based on an alleged violation of a law, rule, regulation, or policy directive referred to in section 4131 (a)(1)(H) of this title [discrimination provisions], a grievant may either - (A) file a grievance under this subchapter, or (B) initiate in writing a proceeding under another provision of law, regulation, or Executive order that authorizes relief, but not both. (2) A grievant shall be considered to have exercised the option under paragraph (1) as soon as the grievant timely either - (A) files a grievance under this subchapter, or (B) initiates in writing a proceeding under such other provision of law, regulation, or Executive order.

When the issue of election of remedies has been raised in the past, this Board has stated: "Where the underlying alleged factual circumstances are the same in the two proceedings, they constitute 'the same matter' within the meaning of section 1109 (a) (1). This is true even if different motivation, consequences, or remedies are asserted." FSGB Case No. 2003-031

(November 5, 2004) at p. 17; FSGB Case No. 1998-063 (March 3, 1999) at p. 16. See also, FSGB Case No 1982-102 (Order on Jurisdiction, April 30, 1990).

In the instant case, grievant's complaint before the S/OCR relies on allegations that the DS investigation of her and her husband was improperly conducted, motivated and delayed. Her grievance before this Board is based on similar complaints, despite the fact that she does not allege discrimination in the grievance. Although the underlying facts in both matters are similar, we decline to resolve the election of remedies question because we conclude that grievant fails to allege any grievable claim that can be remediated by this Board.

Section 1101 of the FSA defines a grievance, as relevant here, as "any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service . . . of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including: . . . [a] violation or misinterpretation of laws, regulations or policies; . . ."

Grievant's claims do not meet the above definition of a grievance. With respect to each claim, she either fails to assert any violation of law, regulation, or policy by the agency, or she makes a bare assertion of a regulatory violation unsupported by any allegation about the manner in which the agency committed the procedural error. As the Department noted, we stated in FSGB Case No. 2001-026 (Dec. 5, 2001), at a minimum, a grievance must "identify both an erroneous or improper action alleged to have caused harm to a grievant and the harm itself . . .". Grievant does not do that in this grievance.

She makes the following claims with no assertion at all of any violation of a law, rule or regulation:

- the Chargé d'Affaires in [REDACTED] would not discuss the investigation with her;

- the Management Officer in [REDACTED] promised that the investigation would be resolved quickly;
- grievant demands to know what happened to the ticket she bought for her former housekeeper;¹¹
- the delay in informing grievant of the declination to prosecute cost her additional attorneys fees;
- the Director General would not meet with her to discuss her claims;
- the Deputy Assistant Secretary (DAS) of HR/DG and others lied to her from June 2009 until August 2011;
- the denial of the first grievance (AGS 2010-074) was a deliberate attempt to conceal the Department’s involvement in a cover-up of the lack of supervision of the DS investigation;¹²
- because grievant was denied overseas assignments, she was deprived of the support of her husband when his visa expired and they were forced to incur the cost of operating two households.

We conclude that all of these claims, regardless whether they are deemed to involve the same or different “matters” from those raised before the S/OCR, do not allege grievable adverse actions by the agency that can be resolved by this Board. There is, for example, no statute, regulation or policy that requires a senior post official to discuss an ongoing criminal investigation or to be held accountable if an investigation proceeds longer than anticipated. Grievant does not assert a regulatory basis for reimbursement for her decision to hire an attorney to represent her and her husband during the pendency of the criminal investigation. Nor does she assert a regulatory basis for reimbursement for the cost of operating two households after her husband left the country when his visa expired. Grievant does not specify how the DAS of HR/DG lied to her and about what. Nor does she cite a regulation that supports her claim that she is entitled to relief based on the alleged lies.

Grievant’s only citation to a regulation is her claim that the agency violated 12 FAM 221.7-1 that requires that investigations be conducted fairly, impartially and objectively and that investigators not investigate anyone other than the subject of the investigation. However, she

¹¹ As we noted above, this assertion is new on appeal in any event.

¹² As previously noted, this assertion is untimely.

offers no more than unsupported conclusions that the investigation was unnecessarily delayed, should not have been directed at her, and that the investigators failed to advise her timely of the declination of prosecution.¹³ She fails to assert what erroneous or improper action by the agency made the investigation unfair. Nor does she state how she was harmed by the length of the investigation or by the manner in which it was conducted. She likewise cites no regulatory obligation requiring the agency to conclude an investigation within a set time period or to advise the subject of the investigation immediately of the declination of prosecution by DOJ.

Grievant also fails to cite any authority for the remedies that she seeks. Section 1107 of the FSA, 22 U.S. Code §4137(b), provides the authority of this Board when a grievance is found to be meritorious. It allows the Board to correct personnel records that are inaccurate, or falsely prejudicial; to reverse a decision denying compensation or other financial benefit; to retain an employee in the service who faces separation; to reinstate a separated employee, to award attorneys fees for the cost of prosecuting a grievance and to take other remedial action as may be appropriate.

Grievant asks us to order an investigation of several senior department officials by an external law enforcement agency and to discipline them. This is neither specified in the authority of the Board, nor is it remedial. Likewise, this Board is not authorized to award damages for emotional distress, or to reimburse the cost of criminal attorneys' fees or of separate housing expenses for separated spouses. Nor may the Board order one party to apologize to another.

¹³ As the agency argues, the delay in the investigation may have resulted from witness unavailability, including grievant's unavailability to be interviewed for a period of months, as well as the time it necessarily took to review the allegations against grievant and her husband. In addition, the investigation required review by the DOJ to determine whether the evidence was sufficient to warrant criminal prosecution.

Grievant also seeks release of all of her records. Under 22 U.S. Code § 4138, she is entitled to a decision by this Board allowing her access to any records to which she has been denied. Grievant, however, does not assert what records she has been denied. For example, she claims that DOJ declined to prosecute her or her husband, but then argues that there is no record pertaining to her or her husband at the DOJ Office of Civil Rights or Criminal Division. We cannot discern from her submissions what documents she claims she is entitled to receive.

None of grievant's claims is cognizable because they do not identify a procedural violation or a remediable harm. We conclude, therefore, that we do not have jurisdiction of any of the claims presented regardless whether they are currently pending before another forum.

V. ORDER

The grievance appeal is dismissed because all of the claims are barred, either because they were not presented to the agency for initial decision as required by the FAM, or because they are the subject of a Privacy Act exclusive remedy, or because grievant failed to present a grievable offense or an available remedy. Grievant's claims of harassment, hostile working environment, assault, and those pertaining to payments to and the purchase of a ticket for the housekeeper to leave the country are remanded to the official responsible for the agency's final review.