

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceedings
FSGB Case No. 2011-066


Grievant

April 16, 2012

and

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Alfred O. Haynes
Kevin F. Herbert

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's request to be paid night differential for certain hours worked during the period he served as an Assistant Regional Security Officer (ARSO) in ██████ between 2006-2007 is denied based on lack of timeliness, for the portion of that service for which timeliness was at issue, and on lack of merit for those hours for which the grievance was timely.

OVERVIEW

Grievant, ██████, served in ██████ as an Assistant Regional Security Officer (ARSO) from July 2006 to July 2007. During that period, he claims to have worked 223 hours of overtime which he believes were subject to a night differential payment of ten percent in addition to normal overtime pay. He states he attempted to resolve the night differential pay issue in ██████ but it was not resolved at the time he left post in July of 2007. He further states that it was not until he received an e-mail message on March 6, 2008, from the Management Counselor in ██████ indicating he was not eligible to receive the night differential, that he felt the agency had made a final decision and that this message constituted the "occurrence" that gave rise to his filing a grievance. ██████ filed his grievance on June 19, 2009.

The agency contends that the grievant was aware or should have been aware from the first Earnings and Leave Statement (ELS) he received while in ██████ that he was not receiving night differential pay and that therefore, to be timely under the Foreign Service Act, he had to file a grievance within two years of the date on which he received that statement. The agency contends that all but approximately 50 hours of overtime work, performed at the end of his ██████ assignment, were completed more than two years before the grievance filing date of June 19, 2009, and fell outside of the two-year filing period deadline, and that the bulk of the grievance should therefore be barred for lack of timeliness.

On the merits, the key question is whether the statutory requirement that the overtime work be "regularly scheduled" to qualify for night differential was met. Grievant stated that his circumstances support his position that the work he performed equated to "regularly scheduled" night overtime, while the agency contended that he had not met the burden of proof to support that position. The Board concluded that grievant failed to meet his burden of demonstrating that the work at issue was "regularly scheduled" within the meaning of the statute.

DECISION

I. THE GRIEVANCE

██████████, a member of the Foreign Service with the Department of State (Department), filed a grievance with the Department on June 19, 2009. Grievant claimed he was entitled to night duty differential pay for 223 hours of overtime he worked after 6:00 PM in ██████████ during the period of his assignment. He specifically requested in his grievance:

- a) Night differential pay for the days shown on his time sheet for this period, and
- b) All other remedies deemed just and proper.

The Department denied the grievance on October 18, 2011 on the ground that the claim was time barred with respect to most of the time period for which grievant seeks differential pay; for the remainder of the time period, the claim was denied on the merits. Grievant appealed the agency decision on December 16, 2011 to the Foreign Service Grievance Board (FSGB).

II. BACKGROUND

Grievant is an FP-03 Special Agent in the Department's Bureau of Diplomatic Security (DS). He was assigned to ██████████ as an FP-03 Assistant Regional Security Officer (ARSO) from July 2006 to July 2007. This was a one-year assignment at a high-threat post. The threat environment required extra security at all events, social and official, held on Mission premises after hours. Grievant's position as ARSO included direct supervision of the Embassy's local guard force which provided security for such events. According to the record, the grievant worked 223 hours of overtime in ██████████ after 6:00 PM during the period from August 17, 2006 to June 26, 2007.

On March 4, 2008, grievant sent an email to the Management Counselor in [REDACTED] in which he forwarded information from OPM on overtime and night differentials. In response, on March 6, the Management Counselor sent an email to grievant stating that he was not eligible for night differential and that he, the Management Counselor, had also discussed the issue with the Embassy's Financial Management Officer. The March 6 e-mail stated that the domestic payroll office also indicated grievant was not eligible for night differential. The basic reason cited by the Management Counselor in explaining the ineligibility was that the overtime was not "regularly scheduled."

On June 19, 2009 grievant filed his grievance with the Department. On October 18, 2011, the Department denied his grievance. The Department found that the grievance was time barred with respect to most of the time period at issue. The agency's decision also noted that to the extent the grievance was timely for the remaining time period, the grievant had not met the burden of demonstrating that he was entitled to payment of the night differential. On December 16, 2011 grievant appealed that decision to the FSGB, claiming that the two-year time clock should have begun on the date he received the Management Counselor's e-mail (March 6, 2008), as that was the date a decision had been made and that in-house attempts to remedy the issue had been exhausted.

On January 9, 2012 the Department responded to grievant's appeal reiterating that it considered the grievance untimely for most of the time period at issue and that grievant had failed to meet the burden of proof to establish entitlement to night differential pay. Grievant responded on January 19, 2012 arguing that the two-year time limit was not absolute and citing previous cases where the FSGB did not favor "literal adherence to procedural requirements over the substance and purpose of the process." (FSGB No. 2007-047, Order dated June 5, 2008.)

Grievant contends that even if his claim is time-barred for a portion of the time period for which he seeks differential pay, the remaining portion should still be considered by the Board.

III. POSITIONS OF THE PARTIES

GRIEVANT

Timeliness

Grievant states that he received night differential pay at a previous post for what he described as “similar work.” When he did not receive this premium pay in [REDACTED] he states he pursued the matter through in-house channels. He believed that as long as he was pursuing payment through normal channels, and the post was engaging him on the issue, it was neither necessary nor appropriate to file a grievance. He argues that it was only after he received an e-mail from the Management Counselor in [REDACTED] on March 6, 2008 that he felt the agency had reached a decision and that his only recourse at that point was to file a grievance. He did so on June 19, 2009, fifteen months after receipt of the e-mail from the Management Counselor but within the two-year filing period as outlined in Section 1104.9(a) of the Foreign Service Act.

Grievant states that the March 6, 2008 e-mail represents the “occurrence” which gave rise to the grievance and as such his entire grievance was not time barred. Further, grievant stated that even assuming arguendo that a portion of the hours for which he is claiming night differential is time barred, approximately 50 hours are not time barred and that the Board should consider his grievance for those hours. In addition, grievant stated as follows:

The FSGB has held that “the consistent view of the Board has been that [r]esolution of grievances arising in the employment relationship should be undertaken in an environment of cooperation and fairness insofar as possible, and without favoring literal adherence to procedural requirements over the substance and purpose of the process”. FSGB No. 2007-047 Order on Timeliness of June 5, 2008 at 10 (quoting FSGB No. 89-060 (March 7, 1990).

Applying that principle in FSGB No. 2007-047, the Board further restated its policy that the [Section 1104(a)] filing requirement was not intended to be jurisdictional but was a statute of limitations setting a time period subject to modification under recognized equitable principles ... “we are persuaded that the [two] - year time period prescribed by section 1104 (a) is... subject to waiver, estoppels and equitable tolling. This interpretation of the statute is consistent with the guidance found in the opinions of the Supreme Court which dictate that the time limitation should be construed in a manner that honors the statutory purpose”.

Merits

Grievant states he was entitled to night differential pay and that he had received it at a previous post for similar work. He further states that such pay is governed by 5 CFR 550.1211 and 550.1212 and is payable for regularly scheduled overtime work after 6:00 PM and before 6:00 AM. Grievant also claims that his receipt of two additional hours of Law Enforcement Availability Pay (LEAP) per day should not have impacted his eligibility for the night differential. He supplied time sheets for the hours he worked in [REDACTED] in support of his claim to night differential.

Grievant maintains that his regular duty hours in [REDACTED] were from 7:00 AM to 17:45 PM and that any hours he worked after 18:00 PM and before 6:00 AM the following morning were scheduled hours with a work schedule set in advance in writing and approved by his supervisor. Therefore, he maintains that these hours constituted “regularly scheduled” hours of overtime, entitling him to night differential pay.

THE DEPARTMENT

Timeliness

The Department contends that the grievant has failed to meet the burden of proof that his grievance is timely for the majority of the period of work in question. In its January 9, 2012 Statement on Timeliness the Department stated:

Grievant bears the burden of proof that his grievance is meritorious (22C.F.R. 905.1), including his burden to demonstrate that the Board has jurisdiction to do so. FSGB case No. 98-090 (June 8, 1999). The first question presented in this grievance appeal therefore is whether this grievance is “forever barred” by the time limitations in section 1104 of the Foreign Service Act of 1980:

“A grievance is forever barred under this subchapter unless it is filed with the Department no 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 Department contends that the grievant was well aware of the grounds for his grievance from the first Earnings and Leave Statement (ELS) he received in [REDACTED] on August 31, 2006 in which there was no indication he was receiving night differential pay, listed separately on the ELS. The Department states that the grievant has provided no explanation as to why he did not raise the alleged error in a timely manner with the timekeeper or his supervisor, or otherwise file a timely grievance.

The Department also contends that the e-mail sent by the Management Counselor in [REDACTED] on March 6, 2008 was not a final agency decision which would constitute the “occurrence which gave rise to the grievance” within the meaning of the Foreign Service Act. The March 6, 2008 e-mail was in response to a March 4, 2008 e-mail from grievant, which forwarded an OPM notice on overtime and night differential. The e-mail from the Management Counselor according to the Department was simply a reiteration of why the grievant was not entitled to night differential pay.

The Department notes that no other evidence of prior correspondence that might have established that the issue was ongoing and awaiting a decision was provided by the grievant, despite being requested by the grievance office on February 16, 2011. Therefore, he had not met

the burden of proof which might have justified an exception to the two-year filing requirement. No evidence other than the e-mail exchange from March 2008 was presented that might have suggested the grievant was exercising due diligence in pursuit of a solution.

The Department also noted in its January 9, 2012 statement on timeliness that to the extent the March 8, 2008 e-mail could be considered a “decision” as grievant contends, then he “arguably should have filed his grievance with the Deputy Assistant Secretary for Human Resources within 10 days in accordance with the regulations”. The regulation found in 3 FAM 4434.1 Submission states:

An employee may submit the grievance for agency review if the grievance:

- (1) Is not within the jurisdiction of a post or bureau; or
- (2) Has been considered but not resolved to the grievant’s satisfaction within the post or bureau as provided in 3 FAM 4433 within ten days of the post’s decision (or if no response is received within 25 days after presenting it to the senior official or designee).

In this case, the grievant waited over one year to file his grievance.

Merits

The Department states that the applicable law and regulations make it clear that night work must be regularly scheduled work between the hours of 6:00 PM and 6:00 AM. “Regularly scheduled” work is defined in 5C.F.R.550.103 to mean “work that is scheduled in advance of an administrative workweek under an agency’s procedures for establishing work weeks in accordance with 610.111, excluding any such work to which availability pay under 550.181 applies.” The Department points out that overtime work generally falls into one of two categories: regularly scheduled overtime work and irregular or occasional overtime.

The Department refutes grievant’s claims that his overtime work met the definition of “regularly scheduled” and points out that the grievant has not met the burden of proof required to

support his position. The Department notes that the grievant did not claim night differential for the hours he claimed he worked after 6:00 PM and before 6:00 AM at the time he reported his hours or after he received his ELSs. The Department also notes that grievant has not provided any written approved overtime schedule that corresponds to the hours he is now claiming or any evidence these hours were “regularly scheduled.”

There is also no evidence that these hours were approved in advance by an appropriate authorizing official prior to the start of the work week. The Department contends that the “timesheets” the grievant supplied do not establish that the work was scheduled before the beginning of the administrative work week and that none of the time sheets bore the signature of an authorizing officer. Further discrepancies were noted in the computation of hours worked with grievant claiming his work day began at 7:00 AM, while ██████ standard work day began at 8:00 AM. The Department contacted grievant’s former supervisors in ██████ in an attempt to verify whether the hours claimed by the grievant were “regularly scheduled,” but no documentation to that effect was provided.

IV. DISCUSSION AND FINDINGS

In all grievance cases, other than disciplinary action, the grievant has the burden to show by the preponderance of the evidence that the grievance is meritorious.

On the issue of timeliness, the Foreign Service Act states that a grievance is forever barred unless it is filed within two years of the occurrence giving rise to the grievance. However, that time limit is not absolute. The two-year time limit is not jurisdictional and is subject to waiver, estoppel and equitable tolling. There are circumstances that justify equitable tolling, such as when the grievant receives inadequate notice of the time period or is lulled into inaction by the agency, and otherwise acted diligently.

The Board finds that the grievant has failed to meet the burden of proof to establish that the two-year time limitation period should not be computed in this case from the date on which he received the first ELS for his work in ██████ reflecting that he had not received night differential pay. The grievant has presented no evidence that he either did not know or that he could not have discovered through the exercise of reasonable diligence the grounds for his grievance. The fact that he was paid a night differential at a previous post reflects that he would have been familiar with the regulations on that issue. He has also presented no evidence of any kind that he pursued a resolution of the night differential pay issue from the time he received his first ELS in ██████ for the first pay period involving alleged night work after his arrival at post in July of 2006 until he sent an e-mail to post on March 4, 2008. He states that he was trying to resolve the issue in-house but has provided no copies of correspondence, memos, or e-mails as proof. There was no evidence presented to show that the agency had lulled grievant into inaction, continued to engage him on the subject, or had any communication with him at all on the subject until the e-mail exchanges of March 2008.

Grievant did not provide the names of any individuals or offices with whom he was in contact regarding his claim for night differential pay or statements from any such persons or offices. Even after receipt of the message from the Management Counselor in March 2008 explaining why he was ineligible for night differential, grievant still waited over one year to file his grievance. Therefore, the Board agrees with the denial of the grievance by the Department on timeliness grounds for the majority of the hours in question. There was simply no evidence presented by the grievant to warrant a waiver of the two-year time limit, or to apply the doctrine of estoppel or equitable tolling, and thereby excuse the late filing.

The Board agrees with the Department and grievant that approximately 50 hours of the total of 223 claimed fall within the two-year filing limitation. However, the Board concurs with the decision of the Department that the grievant has not born the burden of proof to show that his claim to night differential pay for those hours has merit. The clearly stated requirement is that these hours must be “regularly scheduled” and approved in advance by a supervisor and authorizing officer. The grievant has not provided convincing proof that this was the case, nor any evidence that an authorizing officer approved of the overtime in advance.

The “time sheets” presented by the grievant are forms from Embassy [REDACTED] that were labeled as “Request for Authorization of Premium Compensation and Temporary Regular Duty for Part-Time Employees.” These forms do not establish which hours were scheduled or that the hours for which grievant is requesting night duty differential were scheduled before the beginning of the work week. The Department points out that the “time sheets” were not always dated and sometimes dated after the work had been completed. In addition, there was no “authorizing officer” signature on any of the forms.

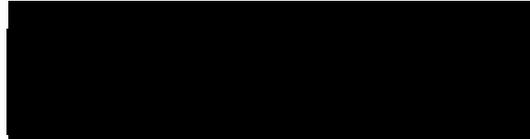
Finally, grievant did not provide any copies of Form DS-3009 (Special Agent Time and Attendance Report) which serves as the official record of hours scheduled for premium pay purposes. The Board notes the Department also contacted two of the grievant’s former supervisors in [REDACTED] who were also unable to provide evidence to support grievant’s claim that his overtime was “regularly scheduled.”

For all of the foregoing reasons, the Board finds that the grievant has not met the burden of proof necessary to sustain his grievance.

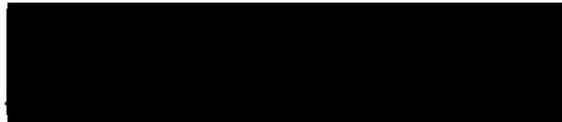
V. DECISION

The grievant’s appeal is denied.

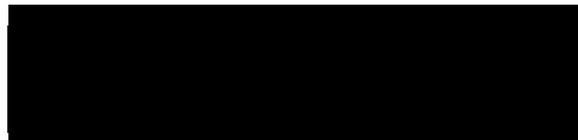
For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



Alfred O. Haynes
Member



Kevin F. Herbert
Member