

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB No. 2011-069

And

May 3, 2012

Department of Agriculture

DECISION – Jurisdiction

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Alfred O. Haynes
Frank J. Coulter

Special Assistant

Jill Perry

Representative for the Grievant:

Pro se

Representative for the Department:

Mark Guberman
Farm Service Agency

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Board dismissed this case because grievant did not meet his burden to show that the matter he is grieving falls within the jurisdictional limitations of what this Board may consider.

OVERVIEW

This case involves a complaint by the grievant that the Agency violated the merit principals of the Foreign Service Act of 1980, specifically, 5 U.S.C. 2301 (b) (5), by not assigning him to one of the three at grade positions on which he bid. Upon receipt of this grievance appeal, the Agency filed a Motion to Dismiss it on the ground that the matter is excluded from consideration by 22 C.F.R. 901.18 (c)(1) and the Foreign Affairs Manual, 3 FAM 4412. In its motion, the agency asks that further proceedings be stayed, pending the resolution of the motion to dismiss. We granted that request.

Grievant relies exclusively on his interpretation of the merit system principles in the Civil Service Reform Act, adopted by the Foreign Service Act of 1980, as amended. He offers a self-assessment of his knowledge, skills and abilities that he compares with other officers who were assigned to the positions on which he bid. The Board found that grievant's self assessment and conclusory comments about the skills of others are an insufficient basis on which to satisfy his burden of persuasion that there was a procedural error in his most recent assignment. Accordingly, the Board concluded that the instant grievance is a complaint about an assignment without evidence of a procedural error, which is not grievable. The motion to dismiss the grievance was granted and the grievance was dismissed.

DECISION

I. THE ISSUE

This decision addresses a Motion to Dismiss the grievance appeal filed by the Department of Agriculture (Department, agency) on January 10, 2012 on the ground that the matter is excluded from consideration by the Board's regulations (22 CFR 901.18(c)(1)) and the Foreign Affairs Manual (3 FAM 4412).

II. BACKGROUND

██████████ is an FO-01 member of the Foreign Agricultural Service (FAS) with the Department of Agriculture. He began working for the agency in 1988 and served abroad in ██████████.

At the time of this filing, grievant was completing a four-year assignment as the Agricultural Counselor in ██████████. In preparation for his onward assignment, grievant bid on three positions, at grade: (██████████) and four positions below grade: (██████████). He was assigned to ██████████ his fifth choice.

Unhappy with this assignment, on December 10, 2011, grievant filed a grievance with the Acting Administrator of the agency. In that filing, he claimed that the agency's failure to assign him to one of the positions on which he bid, at grade, violated the merit principles of the Civil Service Reform Act of 1980, specifically, 5 U.S.C. § 2301(b)(5).¹ For relief, he asked that he be assigned to one of his three choices, at grade. He also "suggest[s]" that Management be ordered to work with the American Foreign Service

¹ The merit principles of the Civil Service Reform Act were incorporated into the Foreign Service Act as amended. See 22 U.S.C. 3901. ("[T]he Foreign Service should be operated on the basis of merit principles." Grievant also mentioned that the agency's actions violated additional merit systems principles under 5 U.S.C. §2301, subsections (b)(1), (8) and (9). Because he did not offer any arguments in his grievance appeal concerning these latter provisions, we deem his claim concerning them to be abandoned.

Association (AFSA) to make the assignment process more open and transparent and to revise the performance management system for Foreign Service Officers. The agency did not respond to the grievance before he filed the instant grievance appeal on December 29, nineteen days after he filed his grievance.

In this filing, grievant claims that he filed his agency-level grievance with the responsible officer in the agency who, at that time, was the Acting Administrator and the Director of the assignment process. He claims that because he did not receive a reply within fifteen (15) days, as required by 3 FAM 4432(b), he is authorized to file this grievance appeal. He also amends the remedy he was seeking, adding a request to grant him sufficient Limited Career Extensions to enable him to complete a three-year assignment, in the event he is not promoted.

On January 10, 2012, the agency filed the instant Motion to Dismiss the grievance on the basis that the grievance is excluded from consideration by 22 CFR 901.18(c)(1) and the Foreign Affairs Manual at 3 FAM 4412. In the motion, the agency requests that further proceedings on this matter be stayed, pending the resolution of its Motion to Dismiss. On January 13, 2012, grievant filed his opposition to the motion and on January 23, this Board issued an Order staying the proceedings until a decision is reached on the Motion to Dismiss.

III. POSITIONS OF THE PARTIES

Grievant:

Grievant argues that the agency's failure to assign him to one of the three positions on which he bid at grade violated the merit principles embodied in the Foreign Service Act of 1980, as amended. Recognizing that he cannot lawfully grieve an

assignment unless it is contrary to law or regulation,² grievant argues that he is not grieving his assignment, but is instead grieving what he considers to be a violation of regulations governing the assignment process. He claims that 5 USC 2301(b)(5) provides that the Federal workforce shall be used “effectively and efficiently.” He states that the assignment of an officer to a position at grade and in cone is the most efficient use of human resources. He contends, therefore, that since he was assigned to a down stretch position while other allegedly less-qualified officers were assigned to the at grade positions on which he bid, this is proof that the Agency violated the merit principle of effectively and efficiently assigning its employees. Grievant also cites Article 27.3 of the Collective Bargaining Agreement (CBA) between the agency and AFSA that describes the agency’s commitment “to maintain the most effective staffing of positions possible” as further support for his claim of a violation of regulations.

The Agency:

The agency argues that the CBA provides for an internal appeal process for international assignments of officers. Grievant did not avail himself of that process, thus, this appeal is not ripe. The agency also maintains that grievant has filed this grievance appeal before the agency has had a full opportunity to address it. According to the agency, grievant erroneously submitted his agency-level grievance first to the Agency Responsible Official before submitting a complaint to his Responsible Officer. The agency argues that the Responsible Officer has fifteen days to respond to a complaint. After that process is accessed and the complaint is unresolved, only then can an employee submit a grievance to the Responsible Official who has ninety days to respond to the

² See 22 U.S.C. §4131(b)(1).

grievance. The agency contends that the instant appeal was filed after the expiration of only fifteen days and is thus premature.

The agency also contends that this grievance must be dismissed because it concerns an individual assignment, which is not grievable under Board regulations and the Foreign Affairs Manual. It cites 22 C.F.R. 901.18(c)(1) which excludes from the definition of a grievance, complaints about individual assignments, except those that are contrary to law or regulations. The agency contends that grievant has not established that his assignment was made contrary to law or regulation. It cites case law that provides that an alleged violation of merit system principles, does not, by itself, state a claim for relief.³ The agency further argues that even if grievant properly relied on the merit system principles, he does not prove that the agency's decision was a violation of such principles. His claims are speculative and conclusory based on his assumption that if he did not get an at-grade assignment and other officers whom he deemed less qualified were assigned to positions on which he bid, then, by definition, this was an inefficient deployment of resources.

IV. DISCUSSION AND FINDINGS

In all grievances, other than those concerning disciplinary actions, the grievant has the burden to show, by a preponderance of the evidence, that his grievance is meritorious.⁴ In this case, grievant claims that his appeal is timely and not premature and that the agency violated merit system principles when it failed to assign him to one of the three at-grade positions he selected during the bidding process. If he is to prevail, he must produce preponderant evidence to support these claims.

³ The agency cites *Summers v. Department of Treasury*, 4 MSPR 1, 2, n.1 (1980), that states: “[M]erit systems principles are not “self executing.”

⁴ 22 U.S.C. 905.1(a).

The Board finds that this grievance appeal is not ripe because grievant did not exhaust his administrative remedies for the reasons stated by the agency. We also conclude that the instant complaint is not grievable for the reasons we discuss below.

Throughout his presentation, grievant relies exclusively on his interpretation of the merit system principles embodied in the Civil Service Reform Act, adopted in the Foreign Service Act of 1980, as amended.⁵ However, he has not produced any credible factual evidence to show how the agency misapplied the merit systems principles or any statute or regulation implementing these regulations when it made the assignment decision not to place him in one of the three positions at-grade on which he bid.

Grievant offers a self-assessment of his knowledge, skills and abilities that he compares with those employees who were assigned to the positions on which he bid. We find that his self-assessment and conclusory comments are an insufficient basis to satisfy his burden of persuasion that the Agency violated a statute, regulation or policy implementing the merit systems principle of utilizing personnel efficiently. See FSGB

⁵ See *Wells v. Harris*, 1 M.S.P.B. 199 (M.S.P.B. 1979), which states:

[5 U.S. Code] § 2301 sets forth "merit system principles" with which Federal personnel management "should be" consistent. As indicated by the Act's findings and statement of purpose, these principles are "expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business." The principles, stated in hortatory terms, are not self-executing.¹¹

n11 The Conference Report states: "Unless a law, rule or regulation implementing or directly concerning the principles is violated (as under section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency." Legislative History, at 1970.

22 U.S.C. 3905 implements these principles. It provides:

Personnel actions

(a) Merit principles; "personnel action" defined.

(1) All personnel actions with respect to career members and career candidates in the Service (including applicants for career candidate appointments) shall be made in accordance with merit principles.

(2) For purposes of paragraph (1), the term "personnel action" means--

(A) any appointment, promotion, assignment (including assignment to any position or salary class), award of performance pay or special differential, within-class salary increase, separation, or performance evaluation, and

(B) any decision, recommendation, examination, or ranking provided for under this Act which relates to any action referred to in subparagraph (A).

Case No. 2001-020 (March 4, 2002) (“The grievant has the burden of establishing the merits of his grievance, and [he] has not submitted sufficient information to establish a *prima facie* case, that the agency acted contrary to law or regulation in connection with his assignments”).

Accordingly, we find that grievant has not met his burden of proving that a violation of law has occurred. In the end, the instant grievance appeal remains a complaint about an assignment, which is not grievable.

V. DECISION/ORDER

This grievance is neither ripe nor does grievant establish a *prima facie* case that there was a violation of a statute, regulation or policy in the assignment action that it took. The grievance is therefore dismissed for lack of jurisdiction.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



Alfred O. Haynes
Member



Frank J. Coulter
Member