

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceeding

██████████

FSGB Case No. 2013-031

Grievant

July 1, 2014

and

DECISION

Department of State

EXCISED

For the Foreign Service Grievance
Board:

Presiding Member:

John M. Vittone

Board Members:

James E. Blanford
William B. Nance

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Nicholas Woodfield, The
Employment Law Group

Representative for the Department:

Kathryn Skipper
HR/G

Employee Exclusive
Representative:

American Foreign Service
Association

CASE SUMMARY

HELD: Grievant did not prove by a preponderance of the evidence that the Department erred in calculating his retirement pay. The appeal is denied.

OVERVIEW

Grievant was a criminal investigator with the Office of Inspector General of USAID who retired in 2010. From the year 2000 until his retirement, he was paid special differential pay in the amount of 18-20% of his base salary, the equivalent of Law Enforcement Availability Pay (LEAP) which other law enforcement officers receive. During several of those years, the special differential brought his salary above that of GS 15/Step 10, a level at which most federal salaries are capped. The Department determined that for purposes of calculating grievant's retirement pay, his high three years must be capped at the GS-15/Step 10 level, and his annuity was calculated accordingly. Grievant disputes this interpretation of OIG regulations and policy, claiming that his retirement should be calculated based on his actual pay during those years.

Although OIG criminal investigators were excluded from Title 5 USC 5541 that established LEAP, the Inspector General of USAID authorized OIG criminal investigators to receive the special differential at the same rate as LEAP, initially set at 15 percent of base pay. The LEAP rate was subsequently raised to 18 percent, and in March 2006 the USAID Inspector General issued a memorandum authorizing commissioned Foreign Service criminal investigators to receive special differential at the same 18 percent rate.

Prior to 2006, USAID OIG criminal investigators were not subjected to the federal pay cap, either during their employment or for purposes of calculating their retirement pay. However, the Inspector General's March 2006 memorandum implemented a bi-weekly pay cap for all Foreign Service officers, except for those whose total compensation was already above the pay cap at the time the memorandum was written. Grievant claims that this "grandfather" clause applied to him, that he was not subjected to the pay cap during his employment, and that it was not a correct interpretation of the memorandum to apply the pay cap for purposes of calculating his annuity. The Department disagreed, and was able to demonstrate that grievant was never intended to be included among those few officers who were "grandfathered" at the time the memorandum was issued.

DECISION

I. THE GRIEVANCE

Grievant, a criminal investigator with the Office of Inspector General of the U.S. Agency for International Development (USAID), retired in 2010. For the last ten years of his employment, he was paid special differential pay in the amount of 18-20 percent of his base salary, the equivalent of Law Enforcement Availability Pay (LEAP), a differential paid to other law enforcement officers. During several of those years, the special differential brought his salary above that of GS-15/Step 10. The Department of State determined that for purposes of calculating his retirement pay grievant's high-three years must be capped at the GS-15/Step 10 level, in accordance with agency regulations. Grievant disputes this interpretation of agency regulations, claiming that his retirement should be calculated based on his actual pay, following a long-standing practice for retiring USAID Foreign Service criminal investigators.

II. BACKGROUND

██████████, a Commissioned Foreign Service Officer, was a U.S. Foreign Service Criminal Investigator in the Office of Inspector General of the U.S. Agency for International Development (USAID) for fifteen years, until his retirement in May 2010. He held the rank of FS-01/Step 10 at the time of retirement.¹

When Law Enforcement Availability Pay (LEAP) was established by Congress under Title 5 USC 5541, Foreign Service Officers were specifically excluded from the statute. The Inspector General of USAID, Donald A. Gambatesa, issued a March 31, 2006 memorandum that is at the heart of this grievance, and primarily set out to clarify the status of USAID Foreign Service Officers who serve as criminal investigators. Gambatesa's memorandum addressed two key issues. It 1) established parity between LEAP recipients and USAID Foreign Service

¹ Grievant Rebuttal, January 23, 2014, p. 1.

criminal investigators with respect to “special differentials,” and 2) determined that the Federal bi-weekly pay cap should apply to all Foreign Service Officers within OIG.

With respect to the rate of special differential for OIG Foreign Service criminal investigators, the Gambatesa memorandum is clear that the Inspector General believed his authority permitted him to authorize a special differential level at or above that set in the FAM, but he also believed that setting the rate above the level authorized for LEAP would lead to repercussions in the Foreign Affairs community. He chose, therefore, to match the level authorized in the FAM, and the memorandum raised the special differential for FS criminal investigators to the same level as LEAP. Under the memorandum, the OIG Inspector General agreed to compensate Foreign Service criminal investigators for unscheduled hours of overtime by paying them a special differential, initially limited by the Foreign Affairs Manual (FAM) to 15 percent of base pay. The special differential limit was subsequently raised to 18 percent.

The Gambatesa memorandum also addressed the bi-weekly pay cap established for GS employees, which, in certain cases also applies to other types of personnel, including those in the ranks of the Foreign Service.² The Inspector General included in his memorandum his decision to “implement a bi-weekly cap for all FS Officers,” except that “[e]mployees whose total compensation is above the cap will be allowed to maintain their current total compensation as long as they continue to work a sufficient number of unscheduled hours to maintain the special differential.” The Department and grievant have different interpretations of what was intended by this exception.

² 5 USC § 5547(a) and 5 CFR § 550.105 limit GS employees and other covered employees to certain types of premium pay for a bi-weekly pay period to the sum of basic pay and premium pay for the pay period to a rate payable for (1) GS-15/Step 10 (including any applicable locality payment or special rate supplement), or (2) the rate payable for level V of the Executive Schedule. The Department confirmed that the numbers used for grievant’s annuity computation correspond to the maximum salary payable to a GS-15/Step 10 during the relevant years.

Grievant claims to have been paid various rates of special differential from shortly after his employment began with USAID as a Criminal Investigator until his retirement from the agency, including a period while serving in [REDACTED] during which he claims that USAID authorized 20 percent special differential pay for Commissioned Foreign Service Officers serving in [REDACTED] and [REDACTED].³ He was never subjected to a pay cap on the compensation he received while employed by USAID OIG. After retiring in May 2010, grievant received his first retirement payment in September 2010, and became aware that the Department of State had calculated his retirement annuity by including special differential pay for purposes of calculating the annuity, but only to the extent that his retirement pay was capped at a level equivalent to a GS-15/Step 10. Grievant filed an agency-level grievance on March 2, 2012, claiming that the Department had miscalculated his retirement annuity. The Department denied the grievance on May 10, 2013 and grievant appealed – via counsel – to this Board on July 11, 2013. On July 15, 2013 grievant requested a hearing, to which the Department objected on August 5, asserting that grievant had not demonstrated that a hearing was warranted. On September 16, this Board denied grievant’s request of a hearing. Grievant then filed his Supplemental Submission November 25, and the Department responded on January 9, 2014. Grievant filed his Rebuttal on Jan. 23, 2014, and the Board closed the ROP the same day.

III. POSITIONS OF THE PARTIES

A. The Grievant

Grievant contends that as a commissioned Foreign Service Officer serving as a Criminal Investigator with the U.S. Agency for International Development, he was authorized to receive a payment of special differential pay. When he was commissioned in 1998, that special

³ Grievant does not provide record evidence of this increase, nor does he present evidence that he received a 20% special differential while he was assigned to [REDACTED]

differential amounted to 15 percent of his base pay; it was raised to 18 percent in 2006, and to 20 percent from August 2009 when he was serving in ██████████⁴ until his retirement in May 2010. Grievant cites 22 USC § 4046 as the authority on which an employee's retirement payments are to be calculated on his/her high-three year average salary, i.e., averaging an employee's basic pay in effect over any period of three consecutive years of creditable service. He argues further that the provisions of 22 USC § 4046 (8) mandate that special differential pay is to be included in the definition of "basic pay" for the purpose of computing one's retirement annuity.

Grievant argues that the Department incorrectly determined that his "basic pay" used for calculating his annuity should be capped at the equivalent of a comparable GS-15/Step 10 salary level. He contends that the Board has held that "[s]uch differentials [under 22 USC § 3972] are not subject to the limitations of the premium pay cap." FSGB Case No. 2006-033 (July 28, 2008), at 9. He argues also that both 22 USC § 4046 and 22 USC § 3972 are silent as to limitation by any cap when calculating "basic pay." Moreover, grievant argues that USAID never informed him during his tenure with the agency that he was subject to a pay cap, and that according to his interpretation of §807(8) of the Foreign Service Act, he was not subject to a pay cap. Finally, he argues that another USAID Criminal Investigator who recently retired did not have his basic pay capped at the GS-15/ Step 10 level; nor were former Foreign Service Officer Special Agents who retired before him.

Grievant requests that his retirement annuity be re-calculated based on his actual "base pay," not capped at the GS-15/Step 10 level, that it be corrected for back pay to cover

⁴ Grievant claims he received 20 percent special differential pay during his tour in ██████████ – 18 percent during the overseas assignment, and "an additional 2 percent was paid manually while assigned in ██████████ from 08/05/09 to 05/03/10." See Grievant Supplemental Submission, November 25, 2013, p. 3]. He also claims that USAID calculated his estimated annuity using the 20percent figure for that period of service.

“insufficient retirement annuity payments to date,” and adjusted so that he receives his proper retirement annuity payments going forward.

B. The Department

The Department argues that grievant’s retirement annuity is calculated correctly, and that the salary cap was properly applied in calculating his annuity. The agency agrees with grievant that special differentials are included in the definition of “basic pay” for purposes of calculating annuities under the FSRDS for Foreign Service criminal investigator/inspectors of the Office of the Inspector General, USAID, citing 22 USC § 4046(a)(8). The Department contends that the special differential that grievant was authorized to receive was included in calculating his high-3 average salary, but only up to the bi-weekly pay cap, in accordance with the 2006 Gambatesa Memorandum, that raised the special differential rate from 15 percent to 18 percent, but which also stated that:

...special differential is subject to a bi-weekly pay cap under the Foreign Affairs Handbook, which is similar to the one provided to General Schedule employees. Therefore, along with granting the increase in special differential, OIG will also implement a bi-weekly pay cap for all FS Officers. Employees whose total compensation is above the cap will be allowed to maintain their current total compensation ...

The Department argues that the grievance should be denied because while the USAID OIG approved a “grandfather provision” for those employees whose total compensation was above the salary cap in 2006, this did not apply to grievant since his pay at the time was not above the 2006 bi-weekly cap. He was not, therefore, grandfathered under this provision and his annuity was calculated correctly.

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, grievant must show by a preponderance of evidence that the grievance is meritorious. 22 CFR § 905.1. For the reasons discussed below, we conclude that grievant did not carry his burden in this case.

As grievant claims, and the Department agrees, Section 412 of the Foreign Service Act of 1980, as amended, authorizes a “special differential under certain circumstances.” This provision is embodied in 22 U.S.C. § 3972(a), and reads as follows:

- (a) Additional work requirements. The Secretary ⁵ may pay special differentials, in addition to compensation otherwise authorized, to Foreign Service officers who are required because of the nature of their assignments to perform additional work on a regular basis in substantial excess of normal requirements.

Grievant is also correct in asserting that special differentials are included in the definition of “basic pay” for purposes of computing annuities under the FSRDS ⁶, in which grievant was a participant, for Foreign Service criminal investigator/inspectors of the USAID Office of the Inspector General, as authorized under 22 U.S.C. § 4046(a)(8), which states in relevant parts:

- (a) Measurements; reduction for special contributions; Foreign Service investigator/inspectors....
- (8) . . . For purposes of . . . this subsection, the term “basic pay” includes pay as provided in accordance with section 3972 of this title or section 5545(c)(2) of title 5.

The Gambatesa memorandum is clear with respect to parity of special differential pay. However, the memorandum is much less clear with respect to the pay cap, and how he anticipated it might be applied to OIG FS criminal investigators at or near the top of the salary

⁵ “Secretary” refers to the Secretary of State, except that the exercise of the functions under the Act with respect to any agency authorized by law to utilize the Foreign Service personnel system, in which the term means the head of that Agency. USAID is authorized by law to utilize the Foreign Service personnel system, and in 1996 the USAID Administrator delegated to the USAID Inspector General all personnel authorities under the Foreign Service Act of 1980 for members of the Foreign Service assigned to the Inspector General and directly involved in audit and investigation functions.

⁶ Foreign Service Retirement and Disability System

range. Clearly, Inspector General Gambatesa disagreed in his memorandum with the Special Agent who had raised the argument that special differential was not subject to the federal bi-weekly cap. Rather, Gambatesa accepted the opinion of his Acting Legal Counsel that the special differential is subject to a bi-weekly cap under the Foreign Affairs Handbook. Therefore, he chose in the third sentence of the penultimate paragraph of his March 2006 memorandum to “implement a bi-weekly pay cap for all FS Officers.” However, the sentence that follows that clear declaration introduces some ambiguity into how this might be interpreted. The sentence reads:

Employees whose total compensation is above the cap will be allowed to maintain their current total compensation as long as they continue to work a sufficient number of unscheduled hours to maintain the special differential.

Except for questions about what Gambatesa meant by allowing [certain] employees to “maintain their current total compensation...,” it is clear that he intended his memorandum generally to apply the bi-weekly pay cap to “all FS Officers.”

The Department interprets the memorandum to mean that OIG intended that all Foreign Service officers would be subject to the bi-weekly pay, with the possible exception of those who were already above the bi-weekly cap level at the time the Gambatesa memorandum was written in 2006. The Department’s May 10, 2013 Decision Letter, denying grievant’s grievance, makes it clear that the agency accepts that the memorandum contains a ‘grandfather’ clause, but argues that the clause does not apply to grievant:

I recognize that the Gambatesa Memorandum also goes on to state that “[e]mployees whose total compensation is above the cap will be allowed to maintain their current total compensation as long as they continue to work a sufficient number of unscheduled hours to maintain the special differential.” USAID OIG has confirmed that this is a grandfather provision for only those employees whose total compensation was above the cap at the time the decision was made in 2006. **[Grievant]’s pay, including special differential as of March 31, 2006, was not above the 2006 bi-weekly cap,** and therefore he was

not grandfathered under this provision, and this did not affect the computation of his annuity.⁷

(emphasis added)

In support of its arguments about what Gambatesa intended by his policy pronouncement, the Department introduced a declaration by Gambatesa's Deputy Inspector General at the time the memorandum was written – Michael Carroll, who, at the time he was consulted, was Acting USAID Inspector General. Carroll's recollection of Gambatesa's intentions are quite clear, and in January 2014 he provided the following declaration, referring to those Foreign Service criminal investigators who were already at or above the bi-weekly cap at the time the memorandum was written:

For those officers only, the intention was to maintain and freeze their compensation at its then-current level until the bi-weekly pay cap level (which generally increased each year at that time) reached their compensation level, at which time the bi-weekly cap would apply to those individuals as well. At that point, the bi-weekly pay cap would apply across the board to all Foreign Service Officers. There was never any intention to permanently exempt any Foreign Service Officer from a bi-weekly pay cap.

Carroll states that he was “personally involved” in Gambatesa's decision to implement a bi-weekly cap on the compensation of the investigators and that he has “personal knowledge” of the memorandum's intent. The Carroll declaration provides a perspective on how the Inspector General most likely intended the pay cap to apply to FS criminal investigators, particularly those at the top of the pay scale. Acting Inspector General Carroll's clear declaration that OIG intended that the grandfather clause was applicable only for those agents already above the level of the Federal pay cap at the time the memorandum was written in 2006 is persuasive, and is consistent with the language of the Gambatesa memorandum.

⁷ Department Decision Letter of May 10, 2013, p. 4, included in Grievant Initial Grievance Appeal of July 11, 2013.
Page 10 of 15

Grievant argues that prior to the 2006 memorandum, USAID criminal investigators were not subject to the bi-weekly pay cap, either while they were employed in OIG or for purposes of calculating their retirement annuities. He interprets the relevant part of the Gambatesa memorandum to mean that his annuity calculation is grandfathered and not subject to a bi-weekly pay cap. In support of this claim, he argues that the memorandum provides no clear indication that the intent was to ultimately subject all officers to the bi-weekly pay cap. He also argues that both 22 U.S.C. § 4046 and 22 U.S.C. § 3972 are silent as to limitation by any salary cap when calculating “basic pay.” In any case, he contends that the agency never subjected him to a pay cap – even when his basic pay exceeded the pay cap level during his employment as a criminal investigator.

Grievant argues that in 2006 when the memorandum was issued, he held the rank of FS-01/Step 6, and was receiving a base salary of \$106,082; he also claims to have received \$15,912.30 as special differential pay while stationed in [REDACTED] for a total “base pay” of \$121,994.30 in 2006, calculated based on a 15 percent rate (grievant claims the special differential pay rate was later increased retroactively to 18 percent for 2006, which, if recalculated at the higher rate, would bring his total base pay to \$125,176.76).

The Department of State Retirement Office in the Bureau of Human Resources (HET/RET) in May 2013 indicated why grievant’s total income was below the pay cap and why the ‘grandfather’ clause of the Gambatesa memorandum did not apply to him:

In 2006, [grievant]’s total compensation (including SD) was \$121,931⁸ when the cap was \$139,774. Therefore, he would not be entitled to the grandfathering provision in the memo, but would be subject to the cap. As a side note, the reason why he wasn’t at the cap, is because he was overseas while the others were domestic. They were receiving locality while he wasn’t.⁹

⁸ This figure is slightly different from that quoted by grievant above.

⁹ Email from Richard A. Crisp, Supervisory HR Specialist, HR/RET, to Kathryn Skipper, HR/G, dated May 2, 2013.

In 2006, the base salary in for GS-15/ Step 10 was \$118,957. The 2006 Locality Rate for the Washington, DC – Baltimore, MD area was 17.5 percent. It appears that the Department established the pay cap for the year by adding the Washington area Locality Rate to the base salary for GS-15/Step 10 ($\$118,957 \times 1.175 = \$139,774$).

The Department recorded the pay caps for the years 2006 -2010 ¹⁰ as follows:

2006 - \$139,774
2007 - \$143,471
2008 - \$149,000
2009 - \$153,200
2010 - \$155,500

The year 2006, the year the Gambatesa memorandum was issued, is pivotal. Since the document was written during the first quarter of 2006, the Department could have interpreted it literally, and grandfathered only officers whose total compensation was above the bi-weekly cap for the previous year or for those whose compensation had reached the cap level by the date of the memorandum, but it did not. Instead, it permitted officers to **project** their total compensation for calendar year 2006, based on their salary rates and special differential rates in effect on March 31, 2006. This interpretation benefitted grievant since his special differential was revised retroactively and increased his total compensation beyond the level he could have projected in March 2006. Still, it was not sufficient to raise his total compensation to the level that would have qualified him to be grandfathered under the new policy. Since grievant did not meet the ‘grandfather’ criteria in 2006, he was subject to the pay cap for that year and subsequent years as well.

The Department attempts to adjust compensation for Foreign Service Officers in ways that seek to even out various living conditions that are encountered at different posts, by use of a

¹⁰ Department Decision Letter, *supra*, p.3. In establishing how grievant’s high-3 average salary was derived for annuity purposes, the agency cites the annual [applied bi-weekly] pay caps for 2007 – 2010.

wide variety of post allowances and differentials (limits on time spent at certain posts, mandatory home leave, hardship differentials of many types, danger pay and Sunday pay in posts overseas, etc.; and various locality rates in different areas of the U.S.). While grievant was living abroad in 2006, he received salary and other adjustments he was entitled to receive, and did not experience the high cost of living that officers assigned to the U.S. experienced, and for which they received a locality rate adjustment. Grievant cannot now claim that he is somehow entitled to receive an annuity based on compensation he was not entitled to receive when he was employed as a criminal investigator.

This Board finds no evidence and no support for grievant's contention that the agency "recently drafted a Declaration ... to create authority for its historic position."¹¹ We find credible the Acting USAID OIG declaration that one purpose of the Gambatesa memorandum was to avoid reduction of compensation for any eligible officers who had already exceeded the bi-weekly cap, and to freeze their compensation at those levels until the pay cap reached their compensation levels, at which time they, too, would be subject to the pay cap. We also find reasonable the Department's earlier assessment, expressed in its May 2013 Decision Letter, that the Gambatesa 'grandfather' clause does not apply to grievant.

Grievant also cites precedent of other FS criminal investigators and FS Special Agents who retired without having their "basic pay" or their annuities limited by the bi-weekly pay cap. He argues that he contacted a recently retired Foreign Service Criminal investigator, who confirmed that he was not capped at the GS-15/step 10 level. He also cites two other recent retirees, both Foreign Service Officer Special Agents, who also confirmed to him that they retired without being subject to the pay cap. All three of these cases, grievant argues, support his contention that the Gambatesa memorandum was not intended to reduce his retirement annuity

¹¹ Grievant Rebuttal, January 23, 2014, p. 2.

by capping his basic pay for the high-three years used for calculating his annuity. The Department does not dispute that some criminal investigators may not have had their annuities capped, but argues that grievant's case is distinguishable from the cases cited by grievant, since two of the officers in question retired three years prior to the Gambatesa policy change. The third had total compensation that was above the cap at the time the Gambatesa memorandum was issued in March 2006, and therefore benefitted from the grandfather provision of that memo. We find both of these arguments persuasive.

Finally, grievant argues that when the agency issued the Gambatesa memorandum, it did not provide proper notice and explanation regarding its effect. He claims not to have seen a copy of the memorandum until sometime in 2009, and that his lack of knowledge about the policy change prevented him from taking more "immediate steps to address the issue with the Agency." Grievant claims that he became aware around September 2010, some four months after he retired, that his pay had been capped for purposes of calculating his annuity – although he had seen the Gambatesa memorandum a full year earlier. The principal focus of the memorandum was on seeking parity with LEAP, but the March 31 Gambatesa memorandum instructed staff to "Please inform your criminal investigators of this change and our initiative to seek a legislative solution to have OIG's FS criminal investigators covered under LEAP." While the record does not show the distribution of the memorandum or track how managers used the information or disseminated descriptions or explanations of the changes to their investigators, it is clear that grievant – once he read a copy of the memorandum before his retirement – did not take actions of any kind to bring his concerns to anyone of authority within the OIG.

Based on record evidence, we conclude that grievant has not carried his burden of proving by a preponderance of the evidence that his annuity was miscalculated. Rather we find

it was calculated consistent with existing OIG policy, and compliant with the Gambatesa memorandum that established the policy. The grievance appeal is denied.

V. DECISION

The grievance appeal is denied in its entirety.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



James E. Blanford
Member



William B. Nance
Member