

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████ ██████

Grievant

and

Department of State

For the Foreign Service Grievance
Board:

Record of Proceeding

FSGB No. 2013-031R

February 23, 2016

DECISION ON REMAND

EXCISED

Presiding Member:

John M. Vittone

Board Members:

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

DECISION ON REMAND

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 10 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 USAID regulations. Grievant disputes this interpretation of USAID 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

The Board issued its Decision in this case on July 1, 2014, finding that grievant did not prove by a preponderance of the evidence that the Department erred in calculating his retirement pay. The July 1, 2014, Board Decision upheld the Department's conclusion that it had calculated grievant's annuity correctly when it decided to cap grievant's high three years of annual compensation for retirement purposes, limiting his annuity to that of GS-15/Step 10, the same level at which many Civil Service salaries are capped. Grievant petitioned the U.S. District Court for the District of Columbia to set aside the FSGB's Decision, contending that it was not in accordance with law under the Administrative Procedure Act (APA), 5 U.S.C. Sections 701-706 (2014). The Court issued a Remand Decision and Order on September 11, 2015¹. The Court held that regardless of the analysis on which the Board based its Decision, the Board had not

¹ [REDACTED] v. Kerry, Civil Action No. 14-cv-1492 (KBJ) (D. C. Sept. 11, 2015).

examined whether the Department of State (Department, agency) has the statutory authority to import an unexecuted salary cap, or otherwise to adjust a participant's high three salary average, when it undertakes to calculate a participant's annuity – as was done in calculating grievant's annuity. The District Court found that the Department's statutory authority with respect to annuity calculations is found in Section 4046 of Title 22 of the U.S. Code, which is silent with respect to permitting the agency to make any kind of adjustment to the annuity calculation. The statute states that “[t]he annuity of a participant *shall* be equal to 2 percent of his or her *average basic salary for the highest 3 consecutive years of service* multiplied by the number of years, not exceeding 35, of service credit obtained in accordance with Sections 4056 and 4057 of this title[.]” 22 U.S.C. Section 4046(a) (emphasis added). The Court concluded from the wording of Section 4056 that “this provision clearly indicates that Congress intended for the State Department to base the high three average on the annuitant's actual basic salary as a historical fact, rather than on what the agency believes (in retrospect) the annuitant *should* have been paid, and indeed, the statute does not appear to confer to the agency any discretion whatsoever with respect to adjusting the figures that are to be plugged into the annuity variables.”²

The Court noted that the Congress specified only one instance in which the agency can import hypothetical figures regarding an annuitant's salary, and that situation applies when an officer retires while stationed overseas. In such an instance, the agency is permitted to replace the actual salary the annuitant received with *a sum certain*, see, e.g., 22 U.S.C. Section 4046(a)(9), providing that “[f]or purposes of . . . annuity computation . . . the basic salary or basic pay” of a participant stationed overseas “shall be considered to be the salary or pay that would have been paid to the member had the member's official duty station been Washington, D.C., including locality-based comparability payments.” This exception applies when an

² *Ibid.* at 13.

annuitant's overseas service is taken into account for retirement purposes. The Court concluded, therefore, that while the agency has at its disposal "other well-established mechanisms for adjudication and recouping salary overpayments," the Congress did not intend for the annuity calculation to be the context for resolving alleged errors pertaining to prior salary payments.

The Court vacated the Board's Decision and remanded the case to the Board for further proceedings consistent with its findings.

III. POSITIONS OF THE PARTIES

A. GRIEVANT

In the original proceedings before the Board, grievant asserted that from the time he became a commissioned officer in 1998³ until his retirement effective May 3, 2010, he was paid special differential and was not subjected to a salary cap under 5 U.S.C. Section 5547(a) or any other provision. He argued that his retirement annuity should be based on the actual payments he received while employed by USAID/OIG as a commissioned Foreign Service criminal investigator.

After grievant retired, he received his first retirement annuity payment in September 2010 and became aware that in calculating his annuity, the Department had calculated his "high three" years for retirement purposes including his special differential, but only to the extent that his base pay plus special differential in each relevant year did not exceed the Federal pay cap in effect at the time. In other words, although his actual salary while employed with USAID/OIG as a commissioned Foreign Service criminal investigator had never been subjected to a salary cap, his retirement annuity was in fact capped at the pay level of GS-15/Step 10, in accordance with 5 U.S.C. Section 5547 – which grievant contends was an incorrect standard for calculating his annuity.

³ Grievant joined USAID/OIG August 21, 1994.

Grievant requested that his retirement annuity be re-calculated based on his actual “base pay” (which includes special differential) and not be capped at the GS-15/Step 10 pay level. He also requested that he be awarded back pay to compensate for “insufficient retirement annuity payments to date,” and that his annuity be adjusted so that he would receive his proper retirement payments going forward.

Grievant made no additional arguments to the Board relevant to our consideration of this Remand Decision.

B. THE DEPARTMENT

In the original proceedings, the Department agreed that certain categories of Federal law enforcement officers receive LEAP, a type of premium pay that is provided to “ensure availability of criminal investigators for unscheduled duty in excess of a 40 hour work week . . . 5 U.S.C. Section 5545(a), and that Foreign Service Officers are generally excluded from receiving these premium payments.⁴ The Department agreed also that USAID/OIG properly exercised its authority under 22 U.S.C. Section 3972 to provide this special differential to its commissioned Foreign Service criminal investigators. The Department agreed further that grievant, as a commissioned Foreign Service Officer and a criminal investigator for the Office of the Inspector General of USAID, was entitled under certain circumstances to receive this “special differential” in addition to compensation otherwise authorized, intended to substitute for the premium pay for which he was not eligible under LEAP, but argued that such payments to him were limited by the salary cap at the GS-15/Step 10 pay level, pursuant to 5 U.S.C. Section 5547. The Department contended that a 2006 memorandum, issued by USAID/OIG Inspector General Gambatesa, not only raised the special differential to a level comparable to LEAP (18 percent at the time), but also implemented a biweekly pay cap for all Foreign Service

⁴ Certain special agents in the Diplomatic Security Service qualify to receive LEAP.

USAID/OIG criminal investigators. The Department argued in addition that grievant was not, contrary to his contention, “grandfathered” by the Gambatesa Memorandum based on his total compensation at the time the memorandum went into effect.

The Department averred that the proper calculation of grievant’s annuity includes his base pay plus special differential for each relevant year, but only to the extent that the total compensation does not exceed the salary cap established pursuant to 5 U.S.C. Section 5547, i.e., GS-15/Step 10.

The Department submitted earnings reports on November 20, 2015 for Mr. [REDACTED]

IV. DISCUSSION AND FINDINGS

During his career as a criminal investigator for USAID/OIG, grievant was a Foreign Service Officer who received salary payments in accordance with the Foreign Service salary system, authorized under 22 U.S.C. Sections 3963 and 3966.

Section 4046 of Title 22 of the U.S. Code stipulates how Foreign Service Officers’ retirement pay is to be calculated. Specifically, Section 4046(a)(1) provides that:

The annuity of a participant shall be equal to 2 percent of his or her average basic salary for the highest 3 consecutive years of service multiplied by the number of years, not exceeding 35, of service credit obtained in accordance with sections 4056 and 4057⁵ of this title . . . [.]

While “base pay” is not specifically defined in the statute, Section 4046(a)(8) provides that

The term “basic pay” includes pay as provided in accordance with section 3972 of this title.

22 U.S.C. 3972(a) provides in relevant part that an agency is authorized to 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.

⁵ Section 4057 provides that extra credit toward retirement can be awarded for service in certain unhealthful posts, under certain conditions and within a specified timeframe. None of the conditions applies to grievant.

From 1998 to his retirement, grievant was paid his regular salary, as authorized under 22 U.S.C. Sections 3963 and 3966, and an additional “special differential,” pursuant to Section 3972(a), cited above.

With regard to service performed while outside the United States, Section 4046(a)(9) provides that:

For purposes of any annuity computation under this subsection, the basic salary or basic pay of any member of the Service whose official duty station is outside the continental United States shall be considered to be the salary or pay that would have been paid to the member had the member’s official duty station been Washington, D.C., including locality-based comparability payments under section 5304 of title 5.⁶

The Department relied on Section 4046 in calculating grievant’s annuity, but then adjusted the calculation based on its determination of the applicability of 5 U.S.C. Section 5547, which capped his annuity at the GS-15/Step 10 pay level.

The Department acknowledged that grievant’s salary was not capped under any statute or regulation during his employment with USAID/OIG. Nevertheless, the Department concluded that his annuity payments should be subjected to the limitations of the Gambatesa memorandum, and, by extension, to the limitations of 5 U.S.C. Section 5547. Thus, the Department concluded that grievant had been overpaid during his employment with USAID/OIG, that this elevated salary basis should be re-calculated as part of the annuity determination process, and that the “overpayments” should not continue into retirement.

In accordance with the Court’s findings in its Remand Decision and Order, Sections 4056 and 4057 contain no provision for adjusting an annuity calculation – except when an annuitant’s

⁶ Effective December 29, 2002, the State Department defines this calculation as “virtual locality pay” (see 3 FAM 6181.2 [2012]), and states that participants under the Foreign Service Retirement and Disability System “who are assigned abroad will be credited the Washington, DC basic pay rate, rather than the overseas basic pay rate for the purpose of retirement annuity calculation.”

overseas service is taken into account, pursuant to Section 4046(a)(9), cited above. On that basis, the Department did not act according to statute when it elected to adjust grievant's annuity calculation in the context of determining his proper retirement annuity. Even if the Department is correct that grievant was overpaid – a claim it made at the time grievant's annuity was set and in subsequent filings – there is nothing in the relevant statutes or in Department regulations governing annuity calculation that would permit an adjustment to be made as part of the annuity-determination process, i.e., in the context of implementing the provisions of Section 4046(a)(1). If Department claims prevail that grievant received payments to which he was not entitled, there are several options available for pursuing its claims – the annuity calculation process, however, is not one of those options.

V. DECISION

This Decision on Remand reverses the Board's July 1, 2014, Decision, and finds that the Department erred when it adjusted grievant's retirement annuity calculation by electing not to base the annuity calculation on the actual salary payments grievant received prior to retirement.

The Department is ordered to re-calculate grievant's annuity based on the actual basic salary plus special differential pay he received while employed as a Foreign Service criminal investigator for USAID/OIG; to award grievant back pay in an amount representing the difference between what he actually received up to the date of the re-calculated annuity adjustment and what he should have received, including interest; and to make the necessary adjustments so that grievant receives retirement annuity payments based on the findings herein prospectively.

Grievant may submit a request for attorney fees accompanied by all necessary supporting documentation (see Section 908.2 of the Board's regulations) within 30 days of the date of this Remand Decision.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



William B. Nance
Member