

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

████████████████████

Grievant

Record of Proceedings

FSGB Case No. 2013-043

and

September 30, 2014

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

William E. Persina

Board Members:

Garber A. Davidson

Jeanne L. Schulz

Special Assistant:

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Agency:

Kathryn Nutt Skipper, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD – The Board held that grievant had not shown by a preponderance of the evidence that the Department committed procedural error in deciding not to extend his limited non-career appointment (LNA). The Board also held that grievant had not shown that he was entitled to a hearing on the merits of the Department’s non-extension decision. The appeal was therefore dismissed.

SUMMARY – Grievant was serving on a one-year LNA that expired in April 2013. In May 2013 an LNA review panel recommended, based on his previous job performance, that grievant’s LNA be extended. However, at the same time, the Department’s Bureau of Diplomatic Security suspended grievant’s security clearance while it investigated allegations of misconduct against him. Because grievant could not perform his job without a security clearance, the Director General gave grievant 30 days’ notice as provided for in, among other places, his employment agreement, that his LNA would not be extended. Grievant claimed that it was procedural error for the LNA review panel not to have met at least 30 days prior to the April 2013 expiration of his LNA. The Board denied this argument because there was no law or regulation that required an LNA review panel to meet at any particular time. The only procedural right to which grievant was entitled was 30 days’ notice prior to the expiration of his LNA, and the Department followed that procedural requirement.

Grievant also alleged that he was entitled to a hearing on the merits of the Department’s decision not to extend his LNA. The Board rejected this argument, holding that he was not separated for cause under section 612 of the Foreign Service Act as amended, 22 U.S.C. § 4011, as is required for a right to a hearing based on the termination of a limited appointment. The Board also held that grievant was not entitled to a hearing on the merits under the Fifth Amendment due process clause. In this connection, the Board found that the Department had not deprived grievant of a liberty interest under the Fifth Amendment in seeking future employment when it decided not to extend his LNA.

DECISION

I. THE GRIEVANCE

Grievant claims that he was entitled to certain procedural protections in connection with the U.S. Department of State's (Department) decision not to extend his limited non-career appointment (LNA) as a Foreign Service Security Protective Specialist (SPS) in the Bureau of Diplomatic Security (DS). In particular, he argues that the Department made procedural errors in deciding not to extend his LNA, and that he was entitled to a hearing before the Board on the merits of the Department's decision. Grievant requests that he be reinstated to his position with back pay, and that he be granted a hearing before the Board on the merits of the Department's non-extension decision.

II. BACKGROUND

Grievant was first appointed to a 13-month LNA as an SPS in March 2011. As part of the appointment process, grievant signed an employment agreement specifying that, among other things, the Department could terminate his LNA "at any time with at least 30 days' notice," unless the termination was "for cause," in which case the 30-day notice period would not apply. Upon expiration of his first LNA in April 2012, grievant was appointed to a second LNA, which was not to extend beyond April 12, 2013. He was serving in [REDACTED], at that time. Both of these LNAs were documented in a Standard Form (SF) 50.

On April 17, 2013, grievant received a TMONE cable extending his [REDACTED] assignment for one month, and indicating that he would be assigned to [REDACTED], starting in October 2013. On May 9, 2013, an LNA Review Panel met to consider whether to extend the LNAs of several SPSs, including grievant, whose previous LNAs had expired during the period

February to April 2013. The Panel's assessment was based on the SPSs' prior work performance. The Panel recommended to the Department's Director General (DG) of the Foreign Service that grievant's LNA be extended.

Also on May 9, 2013, DS's Director of the Office of Personnel Security and Suitability sent grievant a memorandum informing him that his Top Secret security clearance had been suspended as a result of several allegations of misconduct that were being investigated by DS. These allegations included sexual misconduct, domestic violence, and lack of candor in an official investigation. Maintaining his security clearance was a requirement for grievant to remain in his SPS position. Accordingly, grievant was unable to perform his job duties pending completion of the DS investigation. Grievant received a memorandum the next day, informing him that he would be reassigned from [REDACTED] to a DS overcomplement position in Washington, DC. This memo also noted that grievant's LNA had expired on April 13, 2013, and reminded grievant that there was no guarantee of his continued employment and that if the Department decided not to extend his appointment he would be provided 30 days' notice of that fact.

On May 16, 2013, DS informed the Department's Bureau of Human Resources (HR) of the suspension of grievant's security clearance. Based on the vetting information DS provided to HR concerning grievant's suspended security clearance, the DG decided not to extend his LNA. On July 1, 2013, the DG approved a short extension of grievant's LNA, to allow for him to receive the 30 days' notice of the Department's decision not to extend his LNA, as provided in his employment agreement. As a result, a Senior DS Assignment Officer sent a letter to grievant

on July 5, 2013, informing him that the Department had decided not to extend his appointment, and that his LNA would therefore expire on August 4, 2013.¹

Grievant filed the grievance in this case with the Department on July 30, 2013. He argued that his LNA was improperly terminated for cause without procedural due process rights, most notably a hearing on the merits of the Department's decision not to extend his LNA. He also requested interim relief from separation. The Department granted interim relief pending the Department's resolution of the grievance. The Department denied the grievance by decision dated September 18, 2013. It concluded that it was without jurisdiction to rule on the merits of the grievance because it dealt with a decision not to extend an appointment.² Grievant then filed with the Board his appeal of the Department's decision and a request for the continuation of interim relief. The Department responded to the appeal by requesting a preliminary ruling on the Board's jurisdiction. It also opposed the granting of interim relief.

On January 14, 2014, the Board issued an Order ruling that it had limited jurisdiction to consider whether the Department had acted contrary to law, rule or regulation by not extending grievant's LNA. The Board also denied grievant's request for interim relief, holding that he had not established either a reasonable expectation of prevailing on the merits of his appeal, or that he would experience irreparable harm to his career in the absence of interim relief being granted.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

¹ Due to administrative oversight, the Department did not issue an SF-50 reflecting this action until September 10, 2013. That SF-50 indicates that grievant's LNA expired on August 4, 2013.

² Section 1101(b)(3) of the Foreign Service Act, as amended, 22 U.S.C. § 4131(b)(3), excludes from the definition of a "grievance" a claim concerning the expiration of a limited appointment.

Grievant argues that the Department committed procedural violations in connection with the LNA extension process. Specifically, he states that the Standard Operating Procedure (SOP) and associated worldwide Department cable (“ALDAC”) (12 STATE 00119034, Nov. 30, 2012) concerning LNAs were violated because the LNA Review Panel did not meet until one month after his LNA expired in April 2013.³ He claims that this delay prejudiced him because if, consistent with past practice, the Review Panel had met 30 days prior to the expiration of his LNA in April 2013, he would have received another one-year LNA extension. In this regard, grievant states that one of the misconduct allegations against him did not come to DS’s attention until mid-April 2013, one month after he argues the LNA Review Panel should have met and recommended that his appointment be extended. He therefore asserts that under the SOP, he would have been entitled to a hearing on the merits of the Department’s decision to terminate his appointment.

Grievant also argues that the Department’s decision not to extend his LNA mandates that he be provided with due process protections under the Fifth Amendment due process clause of the United States Constitution. More specifically, he argues that the suspension of his security clearance led to the loss of his position, and therefore he has been “stigmatized” in his pursuit of other employment. Further, he claims that he will have to make public the fact that he had his clearance suspended because such a disclosure is required on the application form for other government security jobs requiring a security clearance. As a result of this alleged deprivation of his liberty interest in pursuing other employment, he asserts that he is entitled to a hearing in

³ The SOP, HR/PC-01 (revised 7/8/2013), Limited Non-Career Appointment Hiring Programs, Terminations and Non-Extension Procedures, originally issued on May 7, 2013, provides in relevant part that termination of an appointment for the loss of a security clearance requires “full separation for cause procedures,” including a hearing on the merits before this Board. Another SOP, HR/PE SOP (Sept. 26, 2012), HR/PE Standard Operating Procedures for Extension of Limited Career Appointment (LNA) Employees, set out certain time limits for actions to be taken by various personnel in connection with LNA extension decisions. These time limits are consistent with HR/PC-01, although the HR/PE SOP does not contain the “separation for cause” language in HR/PC-01.

order to be able to rebut the charges made in connection with the suspension of his clearance. Based on the foregoing, grievant requested reinstatement and back pay pending a hearing on the merits of the Department's decision not to extend his appointment.

B. THE AGENCY

The Department argues that it did not violate procedure in deciding not to extend grievant's LNA. In support of its position, the Department argues that the time limits set out in the SOPs and ALDAC call for the date by which HR/PE must solicit performance appraisals from the employee's supervisor, and the date by which the appraisals must be submitted. However, the Department points out, the SOPs and ALDAC do not specify a date by which the LNA Review Panel must convene. Rather, they only provide at the most that the LNA's Assignment Manager must give written notice to the LNA of the decision not to extend an appointment "at least 30 days in advance of the expiration of the appointment term."⁴ The Department argues that grievant in fact received 30 days' notice of the decision not to extend his appointment, and therefore there was no procedural violation.

The Department also claims that in any event, the Review Panel's recommendation is based solely on past job performance, and is thus only one element in the DG's decision whether to extend an LNA. Vetting information from other Department offices like DS is also considered. Accordingly, the Department claims, it is purely speculative to suggest that grievant's LNA would have been extended for another year if the Review Panel had met in March 2013. Further, the Department disputes grievant's assertion that there was an established past practice of Review Panels meeting 30 days prior to the expiration of an appointment.

⁴ This provision is found only in HR/PC -01. The HR/PE SOP and ALDAC do not contain this language.

The Department next argues that grievant is not entitled to a hearing on the merits of his LNA not being extended either under the FSA or the Fifth Amendment due process clause. A merits hearing before the Board under the FSA is required only if an employee is terminated for cause. Here, however, grievant was not terminated for cause. Rather, his appointment was not extended. Further, the Department asserts, he was not deprived of either a property or liberty interest, so no due process hearing is required.

IV. DISCUSSION AND FINDINGS

Under the provisions of 22 CFR § 905.1(a), a grievant in a case not involving a separation for cause or discipline has the burden of establishing by a preponderance of the evidence that his grievance is meritorious. For the reasons that follow, we hold that grievant has not sustained his burden of proof in this case, and his appeal is denied.

1. The Department Did Not Commit Procedural Violations

We find that the Department did not commit any procedural violations when it advised grievant on July 5, 2013, that his LNA would expire on August 4, 2013. The gist of grievant's argument on this point is that the Department was mandated to convene his LNA Review Panel at least 30 days prior to the April 12, 2013, expiration of his LNA. If that had happened, he claims, the Panel would have recommended that his appointment be extended, the misconduct allegations would not have been known to the DG at that time, and the DG therefore would have been appointed to another one-year LNA.

We reject this claim for several reasons. For one thing, we find no procedural mandate requiring that the LNA Review Panel that considered grievant's performance file have met in March 2013. As noted at p. 7, above, neither the SOP HR/PE (Sept. 26, 2012), nor SOP HR/PC-

01, nor the ALDAC (12 STATE 00119034, Nov. 30, 2012) governing the procedures for extending LNAs set out any time frame within which a Review Panel must act. The most that can be said of any of these documents is that they mandate that an appointee receive at least 30 days' notice that an LNA will not be extended. As the Department has correctly claimed, grievant in this case received this required notice in the form of the July 5, 2013, letter to him from DS, telling him that his LNA would expire on August 4, 2013.

We also conclude that grievant is in error when he argues that his right to 30 days' notice of non-extension must be applied in advance of the expiration of his second yearly LNA, which ended on April 12, 2013. Rather, we find that from April 13 to August 5, 2013, grievant served as a *de facto* employee of the Department. The record does not contain any written documentation of the nature of his appointment during this period. However, there appears to be no dispute about the facts that he continued to be available for work, and that he was apparently paid for his service.⁵ These facts establish that grievant was effectively reappointed as an SPS as of April 13, 2013, serving in a day-to-day capacity. Thus, he was not serving in an "appointment year," as he arguably had been up until April 12, 2013, based on the SF-50s covering that time period.⁶ He therefore is not entitled to "full separation for cause procedures," including a Board hearing, because his LNA was not "terminat[ed] . . . for the loss of a security clearance" as called for in SOP HR/PC-01. *See United States v. Testan*, 424 U.S. 392 (1976) (a federal employee is

⁵ We make no judgment on whether such a practice by the Department is consistent with rules and regulations governing Federal agency appointment practices, as this is a matter that has not been raised before us for resolution.

⁶ The TMONE cable that extended grievant's tour of duty in [REDACTED] by one month and assigned him to a tour of duty in [REDACTED] to begin in October 2013 did not extend his appointment and did not address whether his appointment was extended. Rather, it was an anticipated assignment action subject to a decision by the DG whether to extend grievant's LNA.

not entitled to the benefits of a position until he has been “duly appointed” to the position). As the Department correctly argues, his LNA was not terminated, it was simply not extended.

Further, grievant’s procedural claim is based on the assumption that if the LNA Review Panel had met in March 2013, his LNA would have been extended for another year because the DG was not aware of the allegations of misconduct against him at that time. While it appears from the record that one of the allegations against grievant was not known to DS until April 2013, it further appears that DS was investigating the other misconduct allegations prior to that time.

A decision whether to extend an LNA is solely within the discretion of the DG. As is clearly stated in SOP HR/PE (Sept. 26, 2012) and 12 STATE 00119034 (Nov. 30, 2012), a recommendation to extend an LNA by a Review Panel does not automatically mean that an employee will receive the extension. The DG will also consider other vetting information about the employee in making a decision on whether to extend an LNA. Grievant here has not established by preponderant evidence that if the LNA Panel had met in March 2013, the DG would not have known of DS’s misconduct investigation and would therefore have extended grievant’s LNA for another year.

Finally, we note that even if we assume the facts as alleged by the grievant, he still does not establish a remediable procedural error by the Department concerning its non-extension of grievant’s LNA. That is, even if we assume that grievant was reappointed to another year-long LNA beginning on April 13, 2013, we believe that the Department still could have acted as it did in this case. First, section 612 of the FSA, 22 U.S.C. § 4011, states in relevant part that, except for a separation for cause (a matter we discuss beginning at p. 12, below), the Secretary of State

“may terminate at any time the appointment of any member of the [Foreign] Service serving under a limited appointment.” As Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. 137 (1803), “[w]here an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern because the act is at any time revocable.”

Moreover, there is no dispute that when grievant initially became employed as an SPS in 2011, he signed a document entitled “Conditions of Employment.” One of the provisions of this agreement held in relevant part that grievant understood and accepted as a condition of his employment as an SPS that the Department could terminate his LNA “at any time with at least 30 days’ notice.” Under this provision, the Department could, in the particular circumstances of this case, have given grievant 30 days’ notice on July 5, 2013, or at any time during his tenure with the Department, that his appointment would expire in 30 days, and it would have acted in a manner fully consistent with the terms of grievant’s appointment.

There are other indicators, in addition to grievant’s employment agreement, that the Department could on 30 days’ notice have ended grievant’s LNA at any time during his tenure with the Department. For example, SOP HR/PC-01 states at p. 2:

The timeframe of the [LNA] appointment period does not commit the Department to employing such individuals for the entire term if it becomes no longer in the interest of the Department to do so. LNA Foreign Service employees are told at the time they are hired that they can be separated at any time, other than for cause. Section 612 of the Foreign Service Act allows the DG to separate LNAs *at anytime* for reasons other than misconduct, e.g.; unsatisfactory performance, or when the need no longer exists for the employee’s service. Per 3 FAM-1 H-2525, the LNA must receive written notification of the separation at least 30 days in advance of the separation date.

In sum, even assuming for argument’s sake that grievant could establish that the Department committed procedural error because the Review Panel did not convene in March 2013, and he should therefore have been given a renewed year-long LNA, it would be a procedural violation

without a remedy. In those circumstances, absent a specified termination for cause, the Department would have been able to do as it did in this case; that is, it could at any time during the appointment year have ended grievant's year-long LNA by giving him 30 days' notice.

2. Grievant Is Not Entitled to a Hearing Under the FSA or the Fifth Amendment

Grievant argues that he is entitled to a hearing on the merits of the Department's decision not to extend his appointment because that decision constitutes a separation for cause, which, under the FSA, mandates a hearing before the Board.⁷ We reject grievant's claim and find he is not entitled to the hearing rights set out in section 610(a)(2). In *USIA v. Krc*, 905 F.2d 389 (D.C. Cir. 1990), the court held that in order to invoke the FSA's right to a Board hearing on the termination of a limited appointment, the appointment must have been terminated directly pursuant to disciplinary procedures that address misconduct issues. The fact that misconduct may in some way have formed the background for a termination action that was not explicitly based on a finding of misconduct does not in itself give rise to the right to a Board hearing on the termination.

In the present case, grievant was not separated based on misconduct. Rather, the Department simply decided not to extend his LNA because the suspension of his security clearance pending investigation rendered him unable to perform his job duties. This kind of agency action clearly does not give rise to a right to a Board hearing on the merits under section 610(a)(2) of the FSA. The fact that the basis for the Department's action was the suspension of grievant's security clearance, which rendered him incapable of performing his job duties, does not bring his case within the ambit of actions covered by section 610(a)(2).

⁷ Section 610(a)(2) of the FSA, 22 U.S.C. § 4010(a)(2), provides in pertinent part that the Secretary of State may not separate a member of the Foreign Service for misconduct until after a hearing on the merits before this Board.

Nor is Grievant entitled to a hearing on the merits of his security clearance suspension under the Fifth Amendment due process clause. He argues that the Department's decision not to extend his LNA has "conferred a stigma" on him that has "crippled" his ability to gain meaningful employment, thus depriving him of a liberty interest under the Fifth Amendment. In support of his claim, grievant relies on the Supreme Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Paul v. Davis*, 424 U.S. 693 (1976); and *Bishop v. Wood*, 426 U.S. 341 (1976). However, these cases do not support grievant's argument.

In *Roth*, for example, a state university decided not to rehire an untenured college professor after his one-year appointment expired. The professor claimed that his non-renewal was in fact based on his having exercised his right to free speech, and that the university's decision not to renew his appointment, without providing him a hearing on the merits, harmed his ability to find new employment. The Court rejected his argument. It held that the non-retention of the teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would "stretch the concept too far" to suggest that a person is deprived of liberty when he simply is not rehired in one job, but "remains as free as before to seek another." 408 U.S. at 575. As the Court said in *Bishop*, 426 U.S. at 348, "this same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge."

In the present case, the DG based his decision not to extend grievant's LNA on the simple fact that grievant's security clearance had been suspended. He therefore could not perform his job functions. Grievant argues that the lack of a hearing deprives him of fundamental procedural due process and impinges on his constitutionally protected property right of employment. The suspension of a security clearance, however, does not provide grievant with

a constitutional property or liberty interest. As mentioned above, *Egan* precludes the Board from reviewing the merits of the grant or denial of security clearances, and its edict has been extended to the suspension of clearances as well. *Hill v. Department of Air Force*, 844 F.2d 1407 (10th Cir. 1988). *See also Robinson v. Department of Homeland Security*, 498 F.3d 1223 (Fed. Cir. 2007). In *Hill* the employee claimed that a suspension of his clearance and dissemination of such information impugned his standing and reputation and limited his ability to find future employment, much as grievant argues in the instant grievance. The Court, citing *Egan*, stated that a clearance does not equate with judgment of an individual's character, and that a security clearance is "merely temporary permission by the Executive for access to national secrets." The Court emphasized there is no individual property right in access to such secrets. *Hill* at 1411. Moreover, the DG did not indicate any opinion on the underlying merits of the misconduct allegations that formed the basis for DS's investigation and clearance suspension action. DS's security clearance suspension is functionally distinct from the DG's decision not to extend grievant's LNA. Accordingly, there has not been any public disclosure of misconduct allegations. If there is public disclosure of anything (and we find no record evidence that there has been), it is only of the fact that the Department decided not to renew his LNA. As we indicated in our Order denying interim relief, this fact could hardly be said to cause harm to grievant's career prospects.

Grievant argues that if he pursues another security job in government, he will have to complete an SF 86, which will require him to disclose the fact that his clearance was suspended. This fact, however, does not help his case before this Board. For one thing, if grievant should apply for a position requiring him to file an SF 86, he will be able to make his arguments to the hiring agency as to why his security clearance was wrongly suspended. Depending upon the

circumstances, grievant may be entitled to apply anew for a clearance from another agency, and at that time may avail himself of procedures for notice and hearing with respect to any proposed adverse action. *See* for example 32 CFR § 155 (1987). Further, regardless of the outcome of this grievance appeal, the fact that the clearance was suspended cannot be undone. So grievant would have to inform a prospective future employer of that fact in any event. Accordingly, we conclude that the non-extension of his LNA is not an action that will stigmatize grievant's ability to seek future employment, and we therefore deny his assertion of a hearing right under the Fifth Amendment.

V. DECISION

We hold that grievant has not sustained his burden of showing by a preponderance of the evidence that his grievance appeal should be affirmed. We therefore deny the appeal.

For the Foreign Service Grievance Board:



William E. Persina
Presiding Member



Garber A. Davidson
Member



Jeanne L. Schulz
Member