BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2013-050

March 21, 2014

ORDER OF DISMISSAL

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:	Cheryl M. Long
Board Members:	J. Robert Manzanares Jeanne L. Schulz
Special Assistant	Joseph Pastic
Representative for the Grievant:	*Pro se*
Representative for the Department:	Holly Colburn Grievance Analyst
Employee Exclusive Representative:	American Foreign Service Association

ORDER OF DISMISSAL

I. ISSUE

This order addresses the Request for a Preliminary Determination of Jurisdiction, filed by the Department of State (Department/agency) on January 10, 2014.[1] The specific issue is whether the grievance contains a claim that is within the subject matter jurisdiction of the Board. The agency contends that the grievance articulates nothing more than dissatisfaction with the substantive promotion decision of a Selection Board, a type of grievance expressly prohibited by law and not cognizable by the Board.

II. BACKGROUND

In his grievance submission, grievant states that he is an Information Management Officer (IMO), currently working at a post outside the United States. He joined the Foreign Service in 2000 at grade FP-05 and that he was subsequently promoted to FP-04 in 2001 and FP-03 in 2003.[2]

The grievant challenges the decision of the Selection Board not to promote him to the grade of FP-02. He filed his grievance at the agency level on October 24, 2013. The agency denied the grievance in a decision issued on November 27, 2013. As the deciding official, the Deputy Assistant Secretary (DAS) of State for Human Resources denied the grievance, concluding as follows:

> You do not allege in your grievance that the Selection Board's decision to not recommend your promotion to the FP-02 was the result of any procedural violations of law, regulation, collective bargaining agreement, or prohibited personnel practice. Rather, you simply contend that, '[you] have [. . .] outstanding technical and managerial duties including

[1] ROP 005, page 46.
[2] For the sake of discussion, we assume these historical facts to be correct.

> receiving a Masters Degree in Telecommunications Management. [You] think the promotion board has made an error this time and [would] greatly appreciate [] being looked at again.' Finally, you state that the 'promotion panel did not [use] due diligence when looking at [your] Employee Evaluation (EER).' As such, I find that your grievance is not cognizable under the Foreign Service Act (FSA), and I have no basis on which to consider it.

ROP 001, page 9.

The Assistant Secretary cited a second, independent basis for denying the grievance. She wrote,

> Moreover, selection Boards [*sic*] and their members operate under a rebuttable presumption of regularity, which is also referred to interchangeably as a presumption of integrity. The presumption of regularity or integrity holds that 'public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations.' This 'presumption stands unless there is 'irrefragable proof to the contrary.' The Foreign Service Grievance Board (FSGB) has consistently applied the presumption of regularity to SBs. Furthermore, the FSGB requires 'specific evidence . . . to overcome the presumption' of regularity. Even if your grievance were cognizable under the FSA, I find you have not met your burden of proof that there was any irregularity in the promotion process.

Id. (citations and quotations omitted).[3]

In its request for a determination of subject matter jurisdiction, the Department defines the pivotal issue as follows:

> In the Agency Decision the Department advised the grievant that implementing regulations at 3 FAM 4412 expressly exclude from the definition of a grievance '[t]he judgment of a selection board established under section 602 of the Act, [. . .] except that alleged procedural violations of law, regulation or collective bargaining agreement or prohibited personnel practice(s) arising under those procedures are grievable.'

ROP 005, page 46.

[3] The lower case "s" in the reference to Selection Boards is original.

The Department further observes that grievant has tendered no claim of any procedural violation, etc., but only discusses his accomplishments and performance while at post . . . ." *Id.*

III. DISCUSSION AND FINDINGS

In all grievance cases, other than disciplinary actions, the grievant has the burden to show by a preponderance of the evidence that the grievance is meritorious. This burden also applies to preliminary matters, including the question of the Board's jurisdiction. Having carefully reviewed the entire record, we conclude that the Board has no subject matter jurisdiction to consider the merits of the matter raised by grievant and that the appeal must be dismissed with prejudice.

We have scrutinized the record of proceedings (ROP) closely. We have combed all of grievant's contentions and find that the articulation of his dissatisfaction before this Board is no different than his original contentions before the agency. For the sake of brevity, we will not quote the entire presentation of the appeal submission. However, a few passages illustrate and confirm that the grievant is simply dissatisfied with the qualitative judgment of the Selection Board. Most assuredly, his contentions do not set forth a grievable claim. The following examples of the grievant's arguments support dismissal of this appeal.

One, grievant states that he should have been promoted because of his superior performance. He states:

> If promotions in the Foreign Service are based on potential to perform at higher levels rather than on demonstrated outstanding performance at the present level, I have fulfilled those criteria and more. When I joined the Foreign Service I was informed that if you perform above, [*sic*] and beyond at a higher level you will be rewarded for your outstanding work. Three years in a stretched assignment and with an excellent Employee

> Evaluation Report (EER) I am beginning to believe mediocrity seems to be the norm not an exception in the Foreign Service promotion process. Statistically, the people who are promoted in my line of work are [*sic*] either been in the same position for a long time or now someone.

ROP 001, page 4.

Two, grievant listed his accomplishments in setting up certain technical services while on post. For example, he stated:

> Under my guidance post replaced the Chief of Mission (CMR), Deputy Chief of Mission (DCMR) . . . residence telephone system. The state of the art Voice over [*sic*] IP (VOIP) upgrade has made it easier for COM, DCM and . . . residence to have a stable system.

ROP 001, page 4.

The balance of the grievant's appeal submission similarly highlights his professional accomplishments, pleading his case for promotion. We conclude that the present grievance is not legally grievable before this Board on the merits and that the Department justifiably denied it.

The applicable regulations explicitly prohibit an employee from pursuing a grievance based upon a challenge to the judgment of a Selection Board. *See* 3 FAM 4412, quoted correctly by the agency. In examining the appeal submission, we are aware that the grievant commenced his appeal with the following paragraph:

> My grievances [*sic*] based [*sic*] the Selection Board decision for not recommending me to an FP-2 position <u>is a result of procedural violations of the law, regulations, collective bargaining, or prohibited personnel practice for the following reasons. I am not satisfied with the decision made and appealing [*sic*] to the Foreign Service Grievance Board.</u>

ROP 001, page 4 (emphasis added).

In the language highlighted above, the grievant for the first time uses the legal phraseology of "procedural violations," etc. He may have been cued to do so by the

content of the agency's denial of his grievance. In any event, he does not support this introductory label with any specific evidence or citation to any law. For this reason, the quoted words have no legal significance. Merely intoning the language of the FAM is not enough to comply with the substantive requirements of the FAM. Likewise, the ceremonial injection of such conclusory wording does not rescue a prohibited grievance from the legal bar to pursuing it. The quoted passage alone does not create subject matter jurisdiction where it does not otherwise exist.

The grievant has failed to respond to the discrete jurisdictional issue. His response to the agency's request for the preliminary ruling was only a repetition of his original arguments, even though the threshold issue was clearly identified as a jurisdictional question.[4]

Based upon the analysis set forth herein, the Board concludes that it has no subject matter jurisdiction to consider the merits of this appeal. As a practical matter, the Board will treat the agency's request for a preliminary ruling as a motion to dismiss.

IV. ORDER

The appeal is hereby dismissed, with prejudice, for lack of jurisdiction.

[4] The email traffic between the parties and the Board staff demonstrates that the grievant was on notice that the Board would first adjudicate the matter of jurisdiction and that he was afforded the opportunity to brief this specific issue. He elected to "resend" what he had filed originally. *See* ROP 004, pages 21-43.

For the Foreign Service Grievance Board:

[redacted]

Cheryl M. Long
Presiding Member

[redacted]

J. Robert Manzanares
Member

[redacted]

Jeanne L. Schulz
Member