

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████

and

Department of State

Record of Proceedings
FSGB Case No. 2013-051

July 21, 2014

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

*William B. Nance
Bernadette M. Allen*

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Daniel M. Creekman
Attorney Advisor
HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD: Grievant failed to meet his burden of proof that the Department committed a procedural error in downgrading a Senior Foreign Service (SFS) position in his functional specialty, or in providing him information necessary to make an informed decision about opening his window for promotion, thus disadvantaging him in his possibilities for promotion into the SFS.

SUMMARY: The grievant, [REDACTED] is an FP-01 Foreign Service Construction Engineer Specialist (FSCES) within the Department of State. In 2008 he opened his window to compete for promotion into the Senior Foreign Service (SFS). He was reviewed six times, and the Department did not promote him to the SFS by the completion of his final review in 2013. On July 3, 2013, grievant filed a grievance with the Department, alleging he decided to open his window in 2008 based on his assumption there would be three FE-MC promotion opportunities available in his skill code. He maintained that the Department's reclassification and downgrade of a Deputy Director position from FE-MC to FE-OC caused him harm. He sought as a remedy a one-year extension of his single-class time in class (TIC), a one-year extension of his six-year window and any additional relief deemed just and proper.

The Department disputed that the organizational restructuring within the Bureau of Overseas Building Operations (OBO) that led to reclassification and downgrading of the Deputy Director position had any adverse effect on grievant. The Department argued that grievant's reliance on his assumption about prospective promotion opportunities was misplaced and unreasonable. The Department also maintained that the Board has no jurisdiction in this case because the grievant did not identify any distinct injury or harm.

On December 23, 2013, grievant appealed the Department's decision to this Board. In addition to his previous arguments, he contended the Department failed to provide reliable information on the FSCES career path generally, and that, consequently, he relied on erroneous information to decide to open his window.

The Board found that assuming it had jurisdiction in this case, the grievant suffered no injury from the organizational restructuring within OBO or the downgrading of a Deputy Director position; an equal or greater number of FE-OC promotion positions were available to him after the restructuring. The Board did not find any erroneous or improper action on the Department's part in the process it followed. For these reasons, the Board denied the grievant's appeal.

DECISION

I. THE GRIEVANCE

██████████ (grievant) is an FP-01 Foreign Service Construction Engineer Specialist (FSCES) within the Department of State. On July 3, 2013, he filed a grievance with the Department alleging that an organizational restructuring within the Bureau of Overseas Building Operations (OBO) and the downgrading of a Managing Director position from FE-MC to FE-OC caused him to suffer harm. He contends the OBO organizational restructuring and Deputy Director position downgrade were conducted without proper consultation/vetting with the Human Resources/Office of Resource Management and Organization Analysis (HR/RMA) and adversely impacted the calculation of promotion opportunities for him at the times of his review. He maintains there is an absence of reliable information across the FSCES career path, resulting in a dysfunctional system in which employees in his skill code cannot make informed decisions. As a remedy, he seeks a one-year extension of his single-class time in class (TIC), a one-year extension of his six-year window and any additional relief deemed just and appropriate.

II. BACKGROUND

The grievant opened his window in 2008 to compete for promotion into the SFS. Shortly thereafter, OBO, which is the office responsible for those in grievant's skill code, submitted a proposed restructuring to HR/RMA, the office responsible for workforce planning, including position classification. Under this proposed restructuring, OBO upgraded one of its Managing Director positions to a Deputy Director position. HR/RMA approved the restructured position at the FE-MC level.

A year later, OBO initiated another restructuring, downgrading the position that it had just upgraded, returning it to its original Managing Director title. However, it failed to submit this change to HR/RMA until almost two years later, in 2011. In the meantime, therefore, the position remained classified as FE-MC. In December 2011, HR/RMA reclassified it to FE-OC.

Once grievant opened his window, including the period of these restructurings, he had six reviews and was not promoted by the time of his final review in 2013.¹ He was mid-ranked at the first two reviews (2008 and 2009). In 2010, he was ranked four out of 10, recommended for promotion but not reached, as only two FE-OC promotion opportunities were available. In the 2011 review for promotion, grievant ranked six out of eight, and again only two FE-OC promotion opportunities were available. In 2012, grievant ranked six out of seven and again was recommended but not reached, as only two FE-OC promotions were available. In 2013, the time of the grievant's final review, he was not promoted to the sole FE-OC promotion opportunity. On July 3, 2013, grievant filed his agency-level grievance. On October 16, 2013, the Department denied the grievance. On December 20, 2013, grievant made his appeal to the Board. The Record of Proceedings (ROP) was closed on April 8, 2014.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant argues that OBO's two-year implementation of its organizational restructuring together with the downgrade of a Managing Director position from FE-MC to FE-OC caused

¹ Per 3 FAM 6213.8 (dated 03-06-2007 - State only), an annual Senior Threshold Selection Board (STB) review for members in specialist categories who request promotion into the SFS shall only be counted during years when at least one promotion opportunity is available. The number of STB reviews for any member shall be limited to six and, if a member is not promoted during the "Senior Threshold Window" upon completion of the sixth review, the member is retired mandatorily in accordance with 3 FAM 6216.

him harm. He concludes the reclassification of the FE-MC position reduced the number of promotion opportunities available to the FSCES in the 2012 and 2013 promotion cycles. The grievant further alleges that since the change in OBO organizational structure had not been fully explained to the FSCES, he made the decision to open his window based on an assumption there would always be three FE-MC positions in his skill code.

With respect to the timing of the implementation, he questions why it took two years to complete the process. He argues that the 2012 reorganization was not accompanied by an announcement or cable to all diplomatic and consular posts (ALDAC) and contends that OBO committed a procedural error by not conducting proper consultation/vetting with HR/RMA. He further alleges there are systemic issues detrimental to the FSCES career path that the Department, the American Foreign Service Association (AFSA) and the Foreign Service Construction Engineer corps have failed to address. He maintains that the lack of information on promotion opportunities for FSCES equates to omission of reliable information and, consequently, makes it impossible for the FSCES, including himself, to make informed decisions on matters related to the FSCES career path (e.g., when to open one's window).

B. THE DEPARTMENT

The Department contends that the two-year implementation of the OBO organizational restructuring and downgrade of the Managing Director position from FE-MC to FE-OC did no harm to the grievant because there was no adverse effect on the number of promotion opportunities at the FE-OC level. Further, it attests that, in fact, the timing of the implementation produced one additional promotion opportunity in the 2012 cycle for the FSCES at the FE-OC grade; that is, there were two promotion opportunities when the grievant was ranked sixth. In the

2013 promotion cycle, there was only one promotion opportunity, and grievant was not the highest ranked among the members competing for promotion.

With regard to the process followed for the downgrade of the Managing Director position, the Department maintains that OBO did not, and cannot, remove or reclassify a position without HR/RMA's input. It notes that HR/RMA, not OBO, is responsible for reclassifying positions and that HR/RMA determined that the extra layer of supervision between the Managing Director and Director, together with the corresponding change in responsibilities, resulted in the reclassification and downgrade of the Managing Director position.

Finally, citing FSGB Case No. 2001-026 (Decision & Order: Jurisdiction, dated December 5, 2001), the Department contends that the grievance falls outside of the Board's jurisdiction because no elements of an erroneous or improper agency action causing harm to the grievant were identified.

IV. DISCUSSION AND FINDINGS

This grievance does not involve a disciplinary action; thus, the burden of proof that the grievance is merited, by a preponderance of the evidence, rests with the grievant (22 C.F.R. § 905.1).

It is questionable whether the grievant has asserted a colorable claim that he was harmed by a position downgrade in OBO that was accomplished in a procedurally improper way, such that the Board would have jurisdiction of this grievance. However, assuming without deciding that it does have jurisdiction, we find that the grievance lacks merit in any event.

Grievant's primary contention is that when he made the decision in 2008 to open his window, that decision was "based on the previous assumption that there would always be three

FE-MC positions in the 6218 skill code”; the two-year implementation of OBO’s restructuring and downgrade of the FE-MC Managing Director position adversely affected his promotion opportunities.

Grievant does not allege any specific misrepresentation to him about the number of FE-MC positions that would be available beyond his understanding of those positions that actually were available at the time he opened his window. As a factual matter, although grievant alleges there were three such positions, our understanding from the record is that the third position resulted from the first restructuring in OBO that occurred *after* grievant opened his window. The subsequent downgrading of that position on which his claim is based occurred still later.

As a statutory and regulatory matter, Section 501 of the Foreign Service Act of 1980, as amended, and as implemented by 3 FAM 2632, authorizes the Secretary of State to classify positions in the Foreign Service. 3 FAM 2637.2 designates HR/RMA as the office responsible for implementing position management programs and approving organizational structures.² Organizational restructuring and position reclassifications occur frequently within the Department in order to meet the needs of the Service, and may either advantage or disadvantage particular officers in the promotion process. The FAM specifically states, “There are no provisions for Foreign Service employees to file classification appeals.” (3 FAM 2639.2 b.) Grievant has provided no evidence that the Department violated any law, regulation, or provision

² 3 FAM 2637.2 Office of Resource Management and Organizational Analysis (HR/RMA)

a. Manages the Department’s position management program, and establishes and administers policies and procedures for the conduct of organizational and workload studies and the approval of new organizational structures or modifications to existing structures.

of its bargaining agreements when it implemented this particular restructuring and position reclassification.

Moreover, grievant has not demonstrated that he was harmed by this restructuring. Grievant opened his window in 2008 and was reviewed four times (2008, 2009, 2010 and 2011), during which time the Managing Director position in question was still FE-MC grade. Although OBO internally reclassified the position in 2009, leading grievant to assume that it had been downgraded, in fact, the position downgrade did not occur until HR/RMA regraded the position in 2011, since only HR/RMA has the authority to change position grade levels. The change was integrated into the promotion cycle the following year. Thus, there were officially three FE-MC FSCES positions factored into the promotion process until 2012, just as grievant had believed from the time he opened his window.

Although grievant is pointing to the change in FE-MC positions, he was actually competing for promotion to the FE-OC level, and thus presumably concerned with the impact the FE-MC change had on that level. In order to assess the impact of the position change on the FE-OC level, the Grievance Staff requested HR/RMA to conduct hypothetical scenarios without the FE-MC Managing Director downgrade. The results from the hypothetical scenario for the 2012 cycle showed, as might have been expected, there was “actually *one more* promotion opportunity in 2012” to FE-OC as a result of the Managing Director reclassification and downgrade. The hypothetical for 2013 showed there were no changes in FE-OC promotion opportunities as a result of the downgrading of the FE-MC position. Grievant’s opportunities for promotion were therefore not harmed by the OBO restructuring and Deputy Director downgrade.

Moreover, even if there had been one additional promotion opportunity at the FE-OC level, as shown previously, grievant was not ranked high enough in any of the years up until

2013 to have been promoted into such a hypothetical position. Nor was grievant promoted into the sole position available in 2013. (Neither the Department nor the grievant provided information on where grievant was ranked in the 2013 cycle.)

In sum, the Board finds no evidence that the Department violated any laws, regulations, established policy or provision of its own collective bargaining agreement as a result of the implementation of the OBO restructuring and reclassification of the Managing Director position that resulted in a downgrade from FE-MC to FE-OC. We find the downgrading of the Managing Director position caused no harm to the grievant, especially in light of his rankings at the time of his promotion reviews.

The Board finds that the grievant's argument that OBO did not properly consult on or vet with HR/RMA the FE-MC Managing Director position downgrade has no merit. The Department aptly noted that OBO cannot remove or reclassify a position without HR/RMA's approval, since the FAM allocates this authority to HR/RMA. It maintains that HR/RMA, not OBO, downgraded the Managing Director position from FE-MC to FE-OC, congruent with this authority. Grievant provided no evidence to the contrary.

Grievant further argues that the Department does not provide reliable information, resulting in a dysfunctional system that does not permit the FSCES corps, including himself, to make informed career decisions. This argument goes beyond the scope of this appeal, as it was not raised or addressed during the agency-level grievance. The Board, therefore, will not express an opinion on this claim.

With regard to grievant's argument that implementation of the 2012 OBO reorganization was not accompanied by an announcement or cable to all diplomatic and consular posts

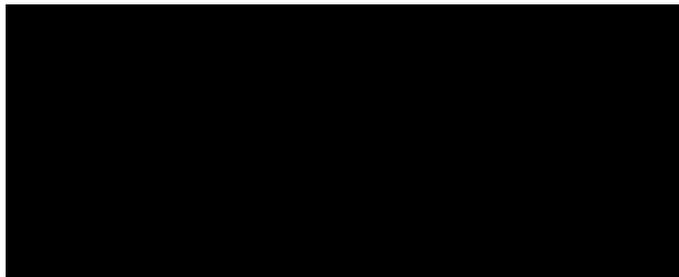
(ALDAC), the Board does not find the argument relevant to his case, given the grievant had already opened his window in 2008.

In conclusion, grievant failed to meet his burden of proof under 22 CFR § 905.1.

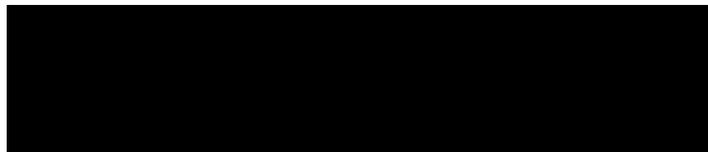
V. DECISION

The appeal is denied.

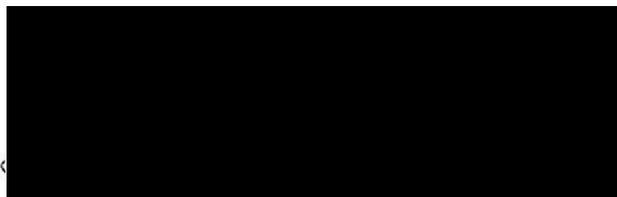
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