

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

████████████████████

Grievant

Record of Proceedings

FSGB Case No. 2014-013

And

September 15, 2014

Department of State

ORDER: JURISDICTION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

William E. Persina

Board Members:

Bernadette M. Allen

William J. Hudson

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Holly T. Colburn, Grievance Analyst,
HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: JURISDICTION

I. THE ISSUE

The Department of State (Agency) requests that the Board make a determination as to whether it has jurisdiction in the grievance appeal of [REDACTED]. The grievance appeal concerns the agency's decision to remove an office from grievant's supervision and subsequently grant his request for curtailment. The Board finds that it does have jurisdiction in this case.

II. BACKGROUND

Grievant is an FE-OC Management Officer who assumed duties as the [REDACTED] [REDACTED] in July 2013. He supervised five offices, including the [REDACTED] [REDACTED]. According to grievant, he initially supported the [REDACTED] supervisor. However, after a few months of his assuming his position in [REDACTED] he received numerous complaints about the supervisor in [REDACTED] including allegations that he was an overly rigid manager who primarily favored younger African American female employees in the office; and that there were improprieties in procurements. Grievant alleges his "efforts to address long-standing HR, EEO and possible malfeasance issues in [REDACTED] resulted in [his] removal as supervisor of that office" by the Deputy Director of [REDACTED] his immediate supervisor.

Grievant alleges serious violations of law in his grievance. Grievant maintains that [REDACTED] management's reassignment of grievant's former [REDACTED] portfolio was "motivated by a desire to silence [his] objections to discriminatory practices [in [REDACTED] and violated equal employment opportunity principles." Grievant avers that this adverse action was retaliation for his whistleblower actions and for objecting to discrimination in [REDACTED] both statutory violations.

Further, he maintains that the personnel actions taken against him violated 5 U.S.C. § 2302, which “should have protected [him] from retaliation for [his] objections to mismanagement of Department resources,” and that those actions also violated 42 U.S.C. § 2000e-3(a) because he “opposed conduct that violated EEO principles.”

The agency requests the Board to make a preliminary determination as to whether it has jurisdiction over the subject grievance appeal. It alleges that this grievance does not achieve the requirements for a grievance under 3 FAM 4412, which stipulates that a grievance pertains to an “act, omission, or condition subject to the control of a foreign affairs agency which is alleged to deprive a member of the Service . . . of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member.” It notes that federal regulation 22 CFR § 901.18 defines a grievance as “a source of concern to the member.” The agency maintains that grievant does not have the right to grieve on behalf of other employees. The agency posits that it is not permissible to grieve on behalf of other employees because grievant did not identify any applicable law, regulation or negotiated agreement that was violated as a consequence of this decision that was prejudicial to him. Therefore, the agency maintains the Board lacks the jurisdiction to consider this matter. Grievant maintains that personnel actions taken against him violate 5 U.S.C. § 2302 and 42 U.S.C. § 200e-3(a). He avers that these provisions should have protected him from retaliation, but did not, and that the action the Agency took against him, transferring supervision of [REDACTED] disadvantaged him. He argues the Board does, therefore, have jurisdiction.

III. DISCUSSION AND FINDINGS

This order addresses the Board's ability to look at issues involving alleged violations under the laws governing whistleblower actions and acts relating to retaliation against an employee for opposing conduct that allegedly violated EEO principles. This limited order does not address the merits of this grievance; rather it narrowly focuses on the Board's jurisdiction in cases where a grievant alleges discrimination, retaliation, and unlawful actions due to certain actions by an agency that were prejudicial to the grievant.

As defined by the FAM, a grievance means any act, omission, or condition subject to the control of a foreign affairs agency which is alleged to deprive a member of the Service . . . of a right or benefit authorized by law or regulations or which is otherwise a source of concern or dissatisfaction to the member. . . ."¹ In this case, grievant alleges that personnel actions, i.e. removal of █████ from his supervision, violated 5 U.S.C. § 2302 and 42 U.S.C. § 2000e-3(a). Further, grievant argues that under these provisions, members of the Foreign Service are protected from prohibited personnel practices as enumerated in 5 U.S.C. § 2302. Subsection (b)(8)(A) states:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority . . . take or fail to take, or threaten to take or fail to take , any personnel action against any employee or applicant for employment because of . . .

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation. . . .

Section 2302(b)(8) protects federal employees who report agency misconduct. A federal agency violates the section if agency authorities take (or threaten to take) retaliatory personnel action against any employee or applicant because of disclosure of information

¹ 3 FAM 4412

by that employee or applicant. Whistleblowers may file complaints that they believe reasonably evidence a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Grievant alleges violations of this law by the agency when the office of [REDACTED] was transferred from his supervision. He asserts this was done because he had complained to his senior management about mismanagement in the office. Again this is an area in which the Board has jurisdiction. The Board has on several occasions addressed on the merits claims that the Department has committed prohibited personnel practices under 5 U.S.C. 2302(b)(8).² The Department presents no argument here that would warrant a different result in this case.

Grievant also claims that the agency's action to remove [REDACTED] from his supervision violates 42 U.S.C. § 2003e-3(a), which provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made an unlawful employment practice by this subchapter**, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. [Emphasis supplied.]

The Board has regularly addressed on the merits issues arising under this section.³ The Board and the courts have laid down criteria for judging such cases that require the employee to show the following: (1) he engaged in an activity protected by statute; (2) he subsequently was

² See, e.g., FSGB Case No. 2006-012 (June 6, 2007); and FSGB Case No. 2000-056 (Order dated June 28, 2002).

³ See FSGB Case No. 2007-040 (April 3, 2008), and FSGB Case No. 2004-059 (December 7, 2006), among many cases dealing with these issues.

subjected to adverse personnel action; (3) agency officials responsible for the action had actual or constructive knowledge that the employee had engaged in protected activity; and (4) there is a causal connection between the protected activity and the adverse personnel action. These are issues that clearly fall under the Board's jurisdiction and can be addressed on the case's merits. It is not necessary under the "opposition clause" referenced above for a claimant to only protest employer practices that affect the claimant directly. The discriminatory practice being opposed can affect others. Ernest C. Hadley, *Representing Agencies & Complainants Before the EEOC*, 2nd Ed. (2005), at 103.

The agency cites 3 FAM 4412, 22 CFR § 901.18 and AFSA grievance guidance that reinforces the idea that "the sole issue [in a grievance] should be: What can the agency do to remove the disadvantage suffered by the grievant?" The Board agrees and notes that grievant, in this case, claims that the transfer of [REDACTED] from his supervision did him harm, and he offers a number of remedies the Board might consider to rectify the situation. We again stress that we in no way suggest any holding on the merits of grievant's claims. However, the parties to this grievance should brief their positions on the merits and present their arguments to the Board for decision.

The Board finds that it does have jurisdiction in this case.

For the Foreign Service Grievance Board:

[REDACTED]

William E. Persina
Presiding Member



Bernadette M. Allen
Member



William J. Hudson
Member