

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2014-036

December 19, 2014

ORDER: Motion to Dismiss

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

William J. Hudson
Nancy M. Serpa

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Thomas D. Boyatt

Representative for the Department:

Daniel M. Creekman
HR/G
Attorney Advisor

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO DISMISS

I. THE ISSUE

This order addresses a motion to dismiss all claims raised by grievant in her grievance appeal. The Board finds that the motion to dismiss should be granted as to the first two of grievant's claims, but denies the motion to dismiss grievant's third claim.

II. BACKGROUND

Grievant, [REDACTED] has been a Foreign Service Officer with the Department of State (Department, agency) for more than 30 years. From 2009 to 2013, she served as the president of the Foreign Service employee union, the American Foreign Service Association (AFSA). On April 11, 2013, while grievant continued to serve as president of AFSA, she and two retired ambassadors co-authored and published a newspaper op-ed article that criticized a perceived trend of placing an increasing number of civil service and political appointees in the highest leadership positions in the Department, in lieu of career Foreign Service Officers.

On April 24, 2013, the Deputy Assistant Secretary (DAS) for the Bureau of Public Affairs (PA), Valerie Fowler, and the Principal Deputy Assistant Secretary (PDAS) for PA, Dana Smith, along with several other senior Department officials, issued a strongly worded response (letter-petition) to the op-ed, challenging grievant's assertions and conclusions. On May 9, 2013, the Director General issued a letter disagreeing with statements made in the op-ed and agreeing with the letter-petition. AFSA filed an unfair labor practice (ULP) petition against the Department with the Federal Labor Relations Board in which the organization challenged the senior officials' response to the op-ed piece. The Department and AFSA settled the ULP in a memorandum of agreement. The parties have not disclosed the details of this agreement to this

Board. Subsequently, grievant filed a second ULP, concerning the letter-petition; however, she later withdrew this ULP.

During the summer of 2013, grievant was considered for promotion in the annual Selection Board (SB) process. Valerie Fowler was assigned as a member of the SB that considered grievant and other members of her class. Ms. Fowler did not recuse herself from consideration of grievant's file during her promotion review and grievant did not request that she do so. Grievant was not recommended for promotion. The Department thereafter advised her that because she had not been promoted, she would be mandatorily retired from the Foreign Service on September 30, 2014, at the conclusion of her time in class (TIC) at the grade of Counselor (FS-OC).

Grievant then filed the instant grievance on June 9, 2014, challenging the actions of the senior officials who wrote the critical letter-petition and asserting that the letter-petition damaged her reputation and resulted in a delay in receiving an onward assignment after she relinquished the presidency of AFSA. In addition, grievant asserts that Valerie Fowler should have, but failed to, recuse herself from consideration of grievant's Official Performance Folder (OPF) when she served on the 2013 Selection Board. Grievant claims that she was denied a fair promotion opportunity based on Ms. Fowler's bias against her.

Grievant amended her grievance on July 24, 2014, adding the allegation that the senior officials who wrote the letter-petition violated agency policies (5 FAM 723(5)) regarding use of email and Department communications systems. Grievant expanded her original requests for relief to include two additional requests (marked with an asterisk):

1. *Interim relief.
2. That an appropriate senior Department official send a letter to the authors, signers, and recipients of the letter petition attacking me (copy to me and AFSA) stating

that their action was a violation [of] 5 FAM 723(5) and that they be enjoined from such action in the future.

3. That the Director General send a letter to the authors, signers, and recipients of the letter-petition making clear that the assertion in said letter that in the Department “the overwhelming majority of top leadership position at the DAS level and above are filled by Foreign Service” is factually incorrect.
4. That my promotion case be reconsidered and if necessary that a reconstituted 2013 promotion panel be convened to give me the fair and unbiased consideration of my performance denied to me by the failure of a member of the Selection Board who had a clear and publicly expressed negative bias against me to recuse herself. That AFSA and I have the right to reject any members we consider biased against me or AFSA.
5. That the Department inform in writing the Senate Foreign Relations Committee (SFRC) in accordance with Section 1107e (2) of the Foreign Service Act (FSA), informing them of the actions of the authors/signers of the letter-petition.
6. *Should this grievance have to be appealed to the Foreign Service Grievance Board [FSGB, the Board], we will ask the FSGB to direct the Department to report to the SFRC as required by Section 1107e (2).
7. Any other relief deemed just and proper.

On September 16, 2014, the Department denied the grievance. The instant appeal was filed on September 24, 2014. Because grievant requested a hearing, the Board held a telephone conference call with the attorneys for the parties on October 27, 2014 to determine a schedule of events preceding the hearing. During that conference call, the Department indicated that it might file a motion to dismiss some of the claims. In order to expedite a discussion of such a motion, the Board scheduled a motion hearing on November 19, 2014 at 9:30 a.m. at the Board office. The Board issued oral rulings at the conclusion of the hearing. This order states in writing the Board’s findings with regard to the motion to dismiss.

III. POSITIONS OF THE PARTIES

A. The Department:

The Department moves to dismiss all three claims raised by grievant in her grievance appeal, including:

Claim One: Senior agency officials made improper use of government communications channels by publicly attacking grievant, contrary to agency regulations. (5 FAM 723).

Claim Two: Senior agency officials wrongfully accused grievant of factual inaccuracies and attempted to undermine her professional credibility, irreparably damaging her working environment.

Claim Three: Senior agency officers committed reprisals against grievant by not giving her a timely onward assignment and failing to give her fair consideration for promotion, including not requiring Valerie Fowler to recuse herself from the selection board that reviewed grievant's Official Performance File (OPF) for promotion.

The agency argues that all claims by grievant should be dismissed because the Board does not have jurisdiction of any of them. In general, the agency maintains that in each claim, grievant failed to articulate an improper action by the agency, an identifiable harm to herself, and/or a remedy that the Board is authorized by statute to award. The agency notes that in instances when the Board cannot provide a remedy, it ordinarily does not accept jurisdiction.

The Department moves to dismiss grievant's first claim that senior agency officials, Smith and Fowler, made improper use of government communication (email) channels when they communicated among themselves and others via email, soliciting opposition to grievant's op-ed and publishing the strongly worded written letter-petition. The Department argues that it did not write or expressly authorize the letter, thus, it was not an action of the agency.

The Department also argues that grievant suffered no remediable injury. That senior officials elected to express in writing their disagreement with grievant's position in the op-ed piece does not demonstrate that grievant suffered any harm. The Department notes that

grievant's requests for relief #2, 3, and 6 that seem to pertain to this claim – a request for written acknowledgement from an unnamed Department official stating that the response writers violated Department regulations; a written acknowledgement from an unidentified official that the response letter was “inappropriate and ill-considered”; and a letter to be sent to the SFRC in the future *if* any signatory on the letter is nominated to a position requiring the advice and consent of the Senate – do not seek remedies that the Board is authorized to order. According to the Department, grievant's remedial requests are an attempt to obtain a declaratory judgment or a Board-ordered admonishment of other Department employees, none of which the Board has the power to grant.

The Department also moves to dismiss grievant's second claim that senior agency officials wrongfully accused her of making factually inaccurate statements and thereby undermined her professional credibility and irreparably damaged her working environment. The agency argues that, again, there was no agency action taken against grievant; these employees were acting on their own and were expressing their personal opinions. The Department asserts that their actions cannot be imputed to the agency. Moreover, the Department contends that neither the letter-petition authored by Fowler and Smith nor the letter written by the Director General harmed grievant in any way. The agency maintains, moreover, that the relief grievant seeks would not actually benefit her. The Department notes that grievant's claims for relief #4 and 6 that seem to pertain to her second claim – a request for a written acknowledgement that certain factual statements in the letter response were “incorrect” and the same request for a letter to be sent to the SFRC – seek remedies that the Board is not authorized to order, nor will the relief sought improve grievant's current position.

With regard to grievant's third claim, the Department maintains, as well, that the alleged delay by the agency to assign grievant and the decision to mid-rank her do not fall under the Board's jurisdiction. The agency challenges grievant's claim that she has been materially disadvantaged by both the process of receiving her assignment and the deliberations of the promotion board. The Department argues first that assignments are not grievable under the FSA. Moreover, the agency contends, grievant has no grievable claim since she received an assignment after she left the position of president of AFSA; she simply did not get her first preference.

With regard to the decision of the 2013 selection board not to recommend grievant for promotion, the Department argues that grievant makes no claim and has no evidence of "ongoing or acute animosity" between herself and DAS Fowler. Accordingly, there was no obligation on Fowler's part to recuse herself. Moreover, since grievant was permitted to, but did not, request that Fowler recuse herself from participation on the selection board that considered her performance, she cannot now be heard to complain of the results of that board's decision. Finally, it notes that grievant was mid-ranked, just as she had been in the preceding three years.

B. Grievant:

Grievant opposes the motion to dismiss, noting that under the FSA and the agency's regulations, the Board is charged to ensure the fullest measure of due process to the grievant. She asserts that a Board decision to dismiss this grievance would not afford her the due process she deserves under law and regulation. Grievant maintains that her allegations are all grievable and not subject to dismissal because the agency failed to enforce its own regulations against the misuse of its communication systems and allowed her to become the victim of a "character assassination." Grievant alleges that the "abusive" letter-petition, which was not acknowledged

as inappropriate by senior agency officials, created an atmosphere which resulted in a six-month delay before she was given an assignment after she concluded service as president of AFSA. Further, the agency did not follow its own procedures when it failed to ensure that a particularly hostile member of the senior service (Fowler), who was key to developing and propagating the harmful letter-petition, did not recuse herself from the promotion board which considered her performance file for promotion. According to grievant, these actions essentially ended her career.

III. DISCUSSION AND FINDINGS

According to 22 CFR 904.2:

- (a) If an Agency, in its final review, has questioned whether a complaint constitutes a grievance, the Board will make a preliminary determination of its jurisdiction. . . .
- (b) The Board may also make a preliminary determination on any question raised by a Party concerning . . . any other issue whose resolution might avoid the necessity of further proceedings.

The Board has accepted the Department's motion to dismiss and grievant's opposition thereto as a preliminary matter because we find that a determination of the issues presented will avoid the necessity of further proceedings on certain of the claims raised in the instant appeal.

As grievant argues, the FSA mandates that the grievance system ensure the fullest measure of due process for members of the Foreign Service and where a grievance is meritorious, appropriate remedies must be provided.¹

¹Section 101 of the FSA at 22 U.S.C. 3901 reads in pertinent part:

- (b) The objective of this Act is to strengthen and improve the Foreign Service of the United States by . . .
- (4) establishing a statutory basis for participation by the members of the Foreign Service, through their elected representatives, in the formulation of personnel policies and procedures which affect their conditions of employment, and maintaining a fair and effective system for the

As applicable to the instant grievance, a grievance is defined in Section 1101 of the FSA

as meaning

any act, omission, or condition subject to the control of the Secretary 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, including

(A) separation of the member allegedly contrary to laws or regulations . . .

(B) other alleged violation, misinterpretation or misapplication of applicable laws, regulations or published policy affecting the terms and conditions of the employment or career status of the member . . . and

(D) dissatisfaction with respect to the working environment of the member.

22 U.S.C. § 4131(A), (B) and (D).

In several Board cases, we have held:

In considering whether the Board has jurisdiction, the Board must first determine if grievants' allegations raise a grievable issue that the Board may entertain under . . . (the Act). Next, the Board must determine if the grievants have suffered any harm, been denied a right or entitlement, either grounded in law or regulation, or if they have demonstrated that there is a clear threat of irreparable harm.

See, FSGB Case No. 1997-098 (March 10, 1998) at p. 6.

[A]n actionable grievance must identify both an erroneous or improper agency action alleged to have caused harm to a grievant and the harm itself. We do not, for example, accept jurisdiction over grievances that do not allege and seek to rectify individual injury or concrete or distinct harm. We limit our jurisdiction to granting remedial action that is necessary and appropriate to correct some harm experienced by a particular grievant.

FSGB Case No 2001-026 (December 5, 2001) at p. 14.

Grievant argues that all three of her claims allege actions taken by senior Foreign Service officials that were and are a source of concern or dissatisfaction to her, including, the alleged misuse of the Department's internet and email policies; damage to her professional credibility

resolution of individual grievances that will ensure the fullest measure of due process for the members of the Foreign Service.

and reputation; an assignment that was allegedly made contrary to agency practices; and a performance review by a selection board that was allegedly conducted contrary to agency regulations.

After considering the arguments of the parties, the Board concludes that grievant does not allege an actionable grievance in either of her first two claims. We will discuss each claim in turn.

Claim One: In the first claim, grievant complains that in direct contravention of agency regulations, certain senior employees misused their agency email to invite other employees to sign a letter-petition opposing the views that grievant expressed in the op-ed. Grievant contends that her op-ed article dealt with an issue that was important to Foreign Service officers, both active and retired.

The Board concludes that it does not have authority to grant the requested relief. Section 1107 of the FSA, 22 U.S.C. § 4137, provides the contours of the Board's authority for remediating a meritorious grievance. This statute allows the Board to correct personnel records that are inaccurate, or falsely prejudicial; to reverse a decision denying compensation or other financial benefit; to retain an employee in the service who faces separation; to reinstate a separated employee; to award attorney's fees for the cost of prosecuting a grievance and to take other remedial action as may be appropriate. Grievant asks the Board to order *an appropriate senior agency official* to produce a written acknowledgement to be mailed to the authors and recipients of the letter-petition, stating that it violates 5 FAM 723(5). Grievant does not indicate who the appropriate senior agency officials are or on what statutory authority the Board could require such a statement from those officials. As we stated in FSGB Case No. 2001-026

(December 5, 2001) at p. 13: “Our jurisdiction is not limitless. We are a creature of a statute that has its own statutory boundaries.”

The instant grievance is one between [REDACTED] and the Department. The authors of the letter-petition are not parties to this matter. We agree with the Department that by these requests, grievant seeks a declaratory judgment from the Board, which is not authorized by statute, as well as a wholly unauthorized order from the Board to a non-party “senior agency official” to deliver the declaratory judgment. Nothing in the FSA allows the Board to issue a declaratory judgment stating that the action of senior officials was improper. Nor does it provide authority to issue directives to agency officials to issue letters of admonishment for certain actions as a remedy. “It is not within our authority to order the Department to issue a press statement clearing grievant of wrongdoing.” FSGB Case No. 2013-030 (June 4, 2014) at p. 19.

Finally, even if the Board could order production of such letters, the letters would not directly remedy the ultimate harm that grievant alleges.² The only remediable harm that grievant cites is her impending separation due to the expiration of TIC without a promotion. Her request for letters admonishing senior officials for writing the letter-petition will certainly have no impact on the proposed separation. The Board therefore grants the agency’s motion to dismiss Claim One.

Claim Two: In this claim, as with Claim One, grievant asks the Board to order a senior agency official to issue a letter stating that the letter-petition was inappropriate, ill-judged and inaccurate, among other things. For the reasons stated above, i.e., the Board’s lack of authority to mandate production of such a letter and the fact that the requested remedy would not improve

² We actually doubt whether such a letter would benefit grievant’s reputation. We question whether a letter of the kind that grievant demands would misfire and work to her further detriment.

grievant's circumstances or remediate the alleged harm to her career, we conclude that this is not a grievable claim. The Board therefore grants the agency's motion to dismiss this claim.

Claim Three: Grievant alleges that the atmosphere created by the letter-petition resulted in irreparable damage to her working environment and reprisals taken against her, in both the assignment and promotion processes. She maintains that she did not receive an onward assignment in a timely fashion after she completed service as president of AFSA. She states that it took six months for the agency to find an appropriate assignment for her because it first offered her a position where she would have had to report to both Fowler and Smith. Further, grievant objects to the fact that after drafting the letter-petition impugning her integrity, DAS Fowler served on her promotion board and should have, under agency regulations, recused herself from considering grievant's file for promotion.

Under Section 1101(b) of the FSA, 22 U.S. C. § 4131(b), an assignment is not a grievable event, unless it is alleged to be contrary to law or regulation. Grievant asserts that her assignment, following publication of the letter-petition, so damaged her reputation that in reprisal for her op-ed, she was denied her requested assignment and was not offered a reasonable position for more than six months. In cases where a lack of, or delay in providing, an assignment might produce inaccurate or falsely prejudicial information in an employee's Official Performance File (OPF), the failure to assign or the delay in assigning the employee is cognizable as a grievance.

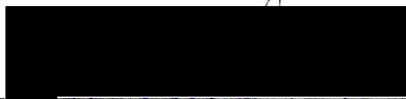
Grievant also alleges that her assignment was made contrary to agency policy and as a reprisal for the views that she expressed in the op-ed. We are satisfied that this is an assertion of a grievable offense – an assignment that is allegedly made contrary to law or regulation. Accordingly, the Department's motion to dismiss this aspect of Claim Three is denied.

Similarly, grievant challenges the decision by the 2013 Selection Board not to recommend her for promotion and the decision by Ms. Fowler to decline to recuse herself from consideration of grievant's performance file. Promotion decisions are not excluded from the definition of grievable events, particularly where the employee alleges that the promotion decision was the product of procedural errors. Moreover, the question whether a member of a promotion board should have recused herself from review of grievant's OPF for promotion is also a procedural issue that is grievable. Accordingly, we deny the Department's motion to dismiss this aspect of Claim Three.

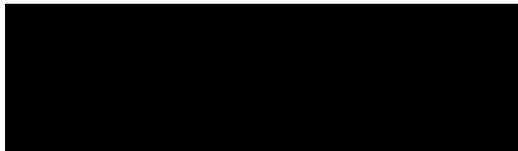
IV. DECISION

The Board grants the agency's motion to dismiss Claims One and Two, but denies the motion to dismiss Claim Three. The Board also grants grievant's oral motion to add a request for relief to include an extension of her TIC due to the alleged untimeliness of the assignment process.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



William J. Hudson
Member



Nancy M. Serpa
Member