

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

  
Grievant

Record of Proceeding  
FSGB No. 2014-037

And

May 4, 2015

Department of State

**DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

James E. Blanford  
Barbara C. Cummings

Special Assistant:

Joseph Pastic

Representative for the Grievant:

James Yorke, AFSA  
Labor Management Representative

Representative for the Agency:

Melinda Chandler, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** The Board concurred with the Department that grievant's return to post on Temporary Duty status (TDY) for fewer than 42 days did not entitle him to receive the post hardship differential. Grievant failed to demonstrate by a preponderance of the evidence that the Department erred in denying payment of the hardship differential pay despite assurances he had received that if he returned to post after a scheduled home leave at the Department's request to cover an unexpected staffing gap, he would continue to receive the benefits he had received during his one-year assignment at the post.

## OVERVIEW

Shortly before grievant was due to finish his one-year assignment in [REDACTED] and depart on home leave, the Department requested that he continue in his position to cover an unexpected staffing gap caused by his successor's medically delayed arrival at post. Grievant agreed to do so on the condition that he continue on his scheduled home leave and, upon return to post, that he continue to receive all the benefits he had received during his assignment. Grievant's orders, however, called for him to return on temporary duty status and as he completed only 24 days in that status, the Department determined that he was not entitled to receive the hardship pay differential. The Board concurred and the grievance was denied.

## **DECISION**

### **I. THE GRIEVANCE**

Grievant, [REDACTED], is an FE-OC grade economic-coned officer who has been employed with the Department of State (Department, agency) since 1991. He grieved the denial of 20 percent hardship differential pay for 264 hours (covering 2012 pay periods 17 - 20) that he was assured would be paid if he agreed to return to post to cover an unexpected staffing gap. The Department denied grievant's request on May 20, 2014, citing Department of State Standardized Regulations (DSSR) that require service of 42 days or more in TDY status at a hardship differential post to qualify for payment of the post differential. Grievant appealed the Department's decision to the Foreign Service Grievance Board (FSGB, the Board) on September 26, 2014. The Record of Proceedings was closed on January 18, 2015.

### **II. BACKGROUND**

Grievant served at the U.S. Embassy in [REDACTED], on a one-year assignment from August 2011 to July 2012 in a position funded by the Bureau of Population, Refugees and Migration (PRM, the Bureau). As he prepared to depart post at the end of his tour, on orders transferring him to another overseas assignment via home leave, PRM asked him to extend his tour to cover a staffing gap because his successor would be unable to arrive at post as scheduled. He agreed to continue in his position until the end of September 2012, on the condition that he be allowed to take previously scheduled home leave in mid-August, and that he would continue to receive all the benefits he had been paid during his tour. Both the Bureau and post agreed to arrange an extension of his assignment, as opposed to a TDY from Washington. However, once in the U.S. on home leave, grievant received orders indicating that he would be returning to post in TDY status rather than as an extension of his previous tour as agreed. The orders arrived on

the Friday evening before his scheduled return flight to post on the following holiday Monday. In order not to delay his return, he continued with his travel plans and, upon arrival at post, was again assured that he would receive his full benefits--danger pay, post differential and premium pay--as he had received during his one-year assignment. In his first paycheck, all three additional payments were missing. He received a danger pay adjustment in November, 2012. He received a notification dated December 4, 2012 that he could not receive post differential or premium pay since he had been in country on TDY for less than 42 days. However, he subsequently received a premium pay adjustment in May 2013. The Department continued to deny him post differential for the period of time he spent on home leave and the 24 days spent on TDY at post. Grievant filed his agency level grievance on June 4, 2013 seeking payment of the post differential for approximately four pay periods in 2012. The agency denied his grievance on May 20, 2014 and he appealed to this Board on September 26, 2014.

### **III. POSITIONS OF THE PARTIES**

#### **The Grievant**

Grievant asserts that he returned to the post he was leaving for an onward assignment in order to fulfill an urgent service need. The clear intent of both the bureau and the post, as well as his understanding prior to agreeing to return to post, was for his assignment to be extended approximately a month and a half from August 14, 2012 until September 28, 2012. Although his bureau drafted his orders for him to return to post in TDY status, the emails attached to his agency-level grievance attest to the fact that the bureau and the post had agreed to pay him full benefits--danger pay, post differential and premium pay--for service at post after his return from home leave.

The Department of State Standardized Regulations (DSSR) govern post differential, among other allowances. Given the bureau's intent that grievant should return to [REDACTED] for 6 weeks as an extension of his tour, rather than as a TDY, he argues that he should fall under the rules in DSSR 531.2<sup>1</sup>, and the exception shown in DSSR 532b<sup>2</sup>. Not only did 531.2 authorize grievant to resume post differential after a temporary absence, the fact that he was serving at a Footnote "n" post meant that he was entitled to retain his post differential during the temporary absence from [REDACTED] of less than three weeks from August 14 to September 3, 2012.

Grievant emphasizes that there was no intent when he left on August 14, for him to depart post for "transfer, including transfer combined with leave or detail," (DSSR 532(a)) but to return after a temporary absence of less than 30 days. Even though he proceeded on home leave, his travel orders taking him back to post show his "Official Duty Station" as the post he temporarily left. Taking home leave did not contravene any home leave regulation in 3 FAM 3431.25 or conflict with the requirements of the DSSR. Grievant completed 12 months of service at an extraordinarily difficult post; returned to service abroad immediately after home leave; then proceeded within six weeks (on November 1, 2012) to his next official assignment overseas.

Finally, grievant maintains that DSSR 017<sup>3</sup> gives wide authority to the Secretary to grant special allowances when "unusual circumstances" exist. Grievant's case is an "unusual circumstance," and there is no bar to his being paid the appropriate post differential for the period in question.

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<sup>1</sup> 531.2 Upon Return to Post: The hardship differential to an employee whose differential was terminated during a period of absence shall commence as of the date of his/her return to his/her differential post.

<sup>2</sup> Exception: Hardship differential may continue when an employee assigned to a footnote "n" post is in the United States for up to 30 days;

<sup>3</sup> Grievant cites DSSR 017 which is non-existent, but correctly quotes DSSR 013: "Furthermore, when the Secretary of State determines that unusual circumstances exist, the head of an agency may grant special quarters, cost-of-living, and representation allowances in addition to or in lieu of those authorized in these regulations."

## **The Agency**

Conceding that the bureau and post mistakenly told grievant that his final month of extended service would be compensated at the same rate as his first twelve months, which included danger pay, post differential and premium pay, the agency points out that grievant was subsequently advised that he could not receive post differential because he was in country on TDY for fewer than 42 days.

Employees are entitled to Danger Pay when in service at countries meeting the specified conditions. Premium pay is additional compensation for substantial amounts of extra work expected to be performed by employees and is paid in lieu of overtime pay. Grievant eventually received a "danger pay adjustment" from PRM in the amount of \$3,551.18 in November of 2012. He received a "premium pay adjustment" from PRM in the amount of \$2,254.72 in May of 2013. Grievant's claim that he is also entitled to receive post differential from the time he initially left post on his home leave, until he left post permanently on September 28, 2012 is not permitted by the regulations.

DSSR 540 specifically addresses eligibility requirements for post differential for employees on "extended detail" in a foreign area and requires them to serve 42 days or more at a hardship differential post in order to be eligible for the differential. Grievant was at post on TDY orders for only 24 days. Nothing in the DSSR allows the waiver of this 42-day requirement.

Grievant took home leave which is ordinarily authorized only at the conclusion of an overseas assignment. On August 15, 2012, a TM-5 Departure from Post cable was issued which properly terminated post allowance, differential and Separate Maintenance Allowance (SMA). There were no options to extend his tour and he had not been paneled for an extension. As a result, the only option that allowed for his return to post was for him to be placed on TDY orders.

While post and PRM had agreed to pay the differential, it was never contemplated that such differentials would be paid to cover the time that grievant was on home leave.

If grievant had in fact been assigned to post rather than sent there in TDY status, he might have been responsible for repayment of his home leave. If he were extended, grievant would have been taking home leave mid-tour and would not be completing an additional year at his assignment. Pursuant to 3 FAM 3439, unless granted an exception, "An employee must be indebted for the home leave used if he or she: (1) Following the return from home leave taken mid-tour or in conjunction with a follow-on overseas assignment, fails to complete 1 year of the current or new assignment." As Grievant was no longer assigned to his former post, he was properly placed on TDY orders.

DSSR 013 only authorizes the head of an agency to grant post differential "subject to the provisions of these regulations and the availability of funds." DSSR 013 only permits agencies to grant additional amounts with respect to quarters, cost-of-living, and representational allowances, and only when the Secretary of State determines that "unusual circumstances exist." While PRM expressed a desire to pay this differential, there is nothing in the DSSR that allows the waiver of this 42-day requirement. The claim for post differential should be denied.

#### **IV. DISCUSSION AND FINDINGS**

Except in disciplinary grievances, the grievant has the burden of proving by a preponderance of the evidence that the grievance is meritorious. 22 C.F.R. § 905.1(a). Following a review of the evidence presented and the applicable regulations, the Board finds that grievant has not met this burden of proof.

The record indicates that the post and the bureau mistakenly assured grievant that he would receive full benefits (including hardship pay) if he agreed to return to post to fill an

unexpected staffing gap. In recompense for his additional service following his return to post in September 2012, grievant eventually received the full danger pay and premium pay due. The sole remaining issue is post differential pay, which, as the parties agree, is governed by the DSSR.

In faulting the agency's decision, grievant relies first on DSSR 531.2.

#### 531.2 Upon Return to Post

The hardship differential to an employee whose differential was terminated during a period of absence shall commence as of the date of his/her return to his/her differential post.

This section, which falls under general section 531 "Commencement," can only be read in context as applying to employees assigned to a hardship post and returning to that assignment.

As the Department has shown, grievant's assignment to post ended when he transferred in connection with his home leave. The agency has provided a copy of the TMFIVE cable notification that was sent August 15, 2012 by grievant's previous post announcing his departure en route to his gaining post. According to 3 FAH-1 H-3763.3-3 TMFIVE-Departure from Post,

- a. The losing post sends a TMFIVE—DEPARTURE FROM POST (see 3 FAH-1 Exhibit H-3764(3)) to the Department, gaining post, and the Global Financial Services Center in Charleston (USOFFICE FSC CHARLESTON) to advise them of your actual time of departure (ATD). This should be sent on the day of departure or by the next work day following, at the latest.
- ...
- b. The TMFIVE—DEPARTURE FROM POST is used by Global Financial Services (GFS), formerly known as the Charleston Financial Services Center (CFSC), to terminate allowances and differentials due to your transfer from post and/or home leave.

Thus, it is clear that, despite the apparent wishes of grievant, bureau and post, grievant departed post definitively on August 14, 2012 with no provision for return to an extended assignment. Although neither the Department or grievant mentioned that grievant had received

orders assigning him to his next posting (a TMFOUR assignment notification would have been sent prior to grievant's departure from post), the Board can assume from the fact that grievant departed post for home leave that grievant was in possession of orders transferring him to his onward assignment via the scheduled home leave.

It is undisputed that grievant returned to post under TDY orders and was aware that he was returning to post in TDY status rather than in the capacity of an employee completing an extended tour. Grievant has not demonstrated that the agency had any option--other than TDY--under its regulations that would have allowed grievant to take the home leave he was adamant about and also return him to post to provide the additional service to which he agreed. An August 21 to 23, 2012 exchange of emails between the embassy and Washington reveals that a group of personnel experts struggled to reconcile grievant's insistence on "his entitlements" and the agency's travel regulations. At one point, the embassy states,

You all will either have to tell [grievant] he will come back on TDY or send someone else on TDY if he does not accept the arrangement. I do not see any other way when his R&Rs [rest and recuperation travel] have been used and now it is HL [home leave].

Grievant states that he accepted the TDY arrangement because he did not wish to cancel or delay his return since it was a holiday weekend and he could not resolve his travel status before his scheduled return flight. His professional standards are commendable but his decision to return to post under TDY orders also placed him in a different posture than if he had forgone home leave and extended. Grievant states that he had expressly made his return to post conditional on receiving the full benefits he had received during his one-year assignment. Grievant stated that he was "chagrined" when he received the orders indicating that he would be returning in TDY status. However, grievant was aware that the TDY status could affect his

entitlement to benefits but, despite his expressed condition for returning to post, he continued with his planned return rather than choosing to delay his trip until he could clarify his status and receive amended travel orders. Because he has not demonstrated that DSSR 531.2 applies to employees on TDY orders, his burden of proof -- that of the preponderant evidence -- has not been carried with respect to this claim.

Next, grievant maintains that the DSSR gives wide authority to the Secretary to grant special allowances, including post differential and danger pay, when "unusual circumstances" exist. DSSR 013 provides, however, that the head of an agency is "subject to the provisions of these regulations" and may exercise this authority only "when authorized by law." The benefit grievant seeks directly contravenes the regulations governing receipt of hardship differential for employees in TDY status and is, therefore, beyond the scope of the head of agency authority granted in DSSR 013. Again, we find that the grievant has not shouldered his burden of proof.

Lastly, grievant argues that DSSR 532b contains an exception that applies to him.

- c. date the employee departs the post for any period of leave (including Rest and Recuperation leave) in the United States. However, if leave is taken in a foreign area en route to the United States, hardship differential shall cease as of the date of arrival in the United States;

Exception: Hardship differential may continue when an employee assigned to a footnote "n" post is in the United States for up to 30 days; (eff. 11/4/03; published TL:SR 632)

We disagree. Like DSSR 531.2, this section can only be read as applicable to an employee who is permanently assigned to a post and is returning to that assignment. This was not grievant's situation. An employee who went on ordinary leave, who took an R&R, or who took home leave and returned to their uninterrupted assignment would be covered by this exception. As we have explained above, under the Department's regulations, grievant completed

his assignment. He quit post definitively when he left on home leave under orders transferring him to his onward assignment via home leave. His TMFIVE was issued which terminated his benefits associated with his previous one-year assignment at post. He took his home leave in connection with an onward transfer to another post. DSSR 532 provides for termination of the hardship differential,

at the close of business on the earliest of the following dates:

a. date the employee commences travel under orders for:

- (1) transfer. Including transfer combined with leave or detail;
- (2) travel to the United States."

Grievant has failed to show that--despite the hopes and promises of the post and bureau-- that the agency had any alternative but to offer him TDY orders to return to post. Grievant further argues that because his TDY travel orders showed his "Official Duty Station" as [REDACTED] that this somehow indicates that he was still officially assigned to post. Grievant presented no evidence that would support this argument or negate the fact that all of his other documentation, such as his onward assignment orders, TMFIVE termination of benefits cable, and the other information in his TDY orders indicates that he had permanently left his previous assignment. Because a TDY employee can only receive post differential after 42 days in a hardship post, grievant's shorter stay did not allow him to qualify for the differential during his home leave or return to his previous post of assignment.

While neither party raised the issue of equitable estoppel<sup>4</sup>, grievant's claim emphasizes that he was repeatedly, and mistakenly, told that he would receive all of the benefits he had been receiving when he was permanently assigned to post, and he relied on that assurance when he

agreed to return after his home leave. The Board, nevertheless, considered the applicability of this principle of equity to this case and concluded that it does not apply. While grievant may have relied on the representations made to him, our review of case law indicates that courts are reluctant to find that estoppel principles apply to the government when its employees agree to actions beyond the scope of statutory and regulatory authority.<sup>5</sup> In this case, there was no regulatory or statutory authority for the Department to pay grievant the differential pay under the circumstances presented.

We recognize that grievant's frustration at the mistaken assurances of the bureau and post, and also recognize that grievant was clearly trying to assist the Mission in covering an urgent personnel gap; however, there is no basis for relief absent a finding of agency error that is actionable. Since grievant has not shown by the preponderance of the evidence that the agency violated law, published agency policy or collective bargaining agreement, or misapplied the regulations regarding his home leave and TDY travel, his appeal must be denied.

## **V. DECISION**

This grievance appeal is denied.

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<sup>4</sup> Numerous FSGB cases have addressed the issue of equitable estoppel: FSGB Case No. 1990-070 (August 19, 1991); FSGB Case No. 2005-069 (April 27, 2009); FSGB Case No. 2007-027 (February 6, 2008); FSGB Case No. 2007-034 (July 30, 2008); FSGB 2010-003 (July 6, 2010).

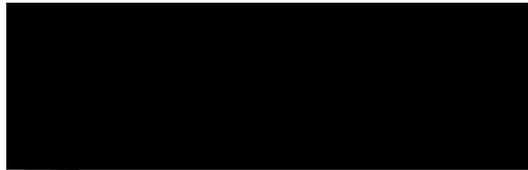
<sup>5</sup> Federal Crop Insurance Corporation v. Merrill, 322 U.S. 380, (1947); Schweicker v. Hansen, 450 U.S. 785 (1981).

**For the Foreign Service Grievance Board:**



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John M. Vittone  
Presiding Member



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James E. Blanford  
Member



Barbara C. Cummings  
Member