

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████
Grievant

Record of Proceedings
FSGB Case No. 2014-042

And

April 28, 2015

Department of State

ORDER: Preliminary Determination

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Bernadette M. Allen
James E. Blanford

Special Assistant

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Kathryn Skipper, HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: Preliminary Determination

I. THE ISSUE

The Department of State (Department, agency) sought a preliminary ruling on the present grievance, contending that the grievance was untimely filed and not covered under the Board's jurisdiction.

II. BACKGROUND

Grievant is a former Foreign Service Officer (FSO) who was appointed as an FSO Class 6 on November 26, 1954. He had been in grade for eight years as a FSO Class 4 when the 1968 Selection Boards did not recommend him for promotion to Class 3. On January 17, 1969, the Department of State (agency, Department) officially notified him that he would be separated for expiration of time in class (TIC) effective April 30, 1969. Having already learned informally of his proposed termination, grievant met personally with the then Secretary of State on January 2, 1969, and gave him a paper, "Notes for the Secretary." The notes detailed policy clashes grievant had with his superiors, which he believed had prevented his promotion. The Secretary appointed two senior inspectors to conduct an investigation. The inspectors made grievant's "Notes" available to his supervisors and on January 8, 1969, the supervisors gave their comments on the "Notes" to the Secretary. The inspectors furnished their report¹ to the Secretary on January 15. The submissions led the Secretary not to take any action to stop the separation.

On September 26, 1969, after receiving several extensions of his employment, grievant requested a hearing under 3 FAM 1820 ("Grievances"), becoming the first

¹ "[Grievant], FS0-4, Review of Operation of Foreign Service Selection System in His Case"

Foreign Service employee to do so. He charged that his supervisors' comments introduced untrue, slanderous and misleading statements into the agency's records.

Grievant was separated on October 4, 1969. He was not eligible to retire and collect an annuity because he did not meet the age requirement.² The Department helped him secure an immediate civil service position on October 5, 1969 with the Department of Defense.

Following a period during which grievant sought information to support his case, a three-member Grievance Committee commenced hearings on March 3, 1971. On September 27, 1972, the Committee found generally in grievant's favor. With one member voicing exceptions to some of its eleven recommendations, the Committee recommended, *inter alia*, that the agency appoint grievant to FSO Class 3, credit the time he spent in government service since his separation towards Foreign Service retirement, and pay his legal expenses. The Committee submitted its report to the Director General instead of the Deputy Assistant Secretary of State for Personnel, because the latter had appeared as a witness and disqualified himself. The Committee suggested that the Deputy Secretary be the final reviewing officer.

The reviewing officers decided not to accept the recommendations. In 1977, grievant filed an appeal³ with the Foreign Service Grievance Board requesting reinstatement, which request was denied because the Board found the appeal untimely.⁴ On October 13, 1993, two Senators wrote to the Secretary of State on grievant's behalf.

² To retire with an immediate annuity, employees must be age 50 with 20 years of service. Grievant was a veteran with a service computation date of September 7, 1945, but his birth date was December 24, 1927. The Grievance Committee noted that, subsequent to grievant's separation, the Department had acted to ameliorate the effects of expiring TIC on officers who had not attained retirement eligibility.

³ FSGB Case No 1977-405 dated February 14, 1978.

⁴ There is no record evidence that grievant took any further action to challenge the Board's determination at that time or thereafter.

Noting that grievant's claim was adjudicated in his favor by the Grievance Committee but never implemented, they suggested that grievant may not have been notified of his eligibility to pursue administrative and judicial remedies provided in legislation. They asked how their committee could be assured that the Department would implement the recommendations in grievant's case. There is no evidence of the Secretary's response in the record of proceedings (ROP).

Grievant wrote to the current Secretary of State on May 14, 2014, and again on May 28, asking that he implement the 1972 recommendations of the Grievance Committee. When he did not receive a response, grievant wrote to this Board on September 12 and October 16, 2014. He explained that he sought a negotiated settlement of retirement pay in lieu of enforcement of the remedies granted to him in 1972. The Board accepted his appeal with an effective filing date of October 22. On December 12, 2014, the agency asked the Board to make a preliminary determination that grievant's appeal should be dismissed, on the grounds that the Board lacked jurisdiction. Grievant responded on February 17, 2015, and the agency provided its rebuttal on March 3.

For relief, grievant requests retirement pay in lieu of the original remedies that were recommended but not implemented. He also seeks confirmation that his hearing was held completely within State Department regulations at the time.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant appeals the Department's failure to implement the 1972 recommendations of the Grievance Committee. He contends that he followed regulations in filing the first grievance ever filed by an FSO against the Department of State. The

agency participated in the Committee's hearings but, grievant asserts, the then Deputy Secretary refused to honor the Committee's recommendations in his favor.

Grievant declares that, five years later, another FSO followed the same procedures as grievant. When her hearing decision was rejected by the Department, she took her case to court, which rejected her claims at both the trial and appellate levels. Grievant further asserts that the U.S. Supreme Court subsequently found, in effect, that the recommendations of the Grievance Committee in her case became the decision of the Department.

Because many years have elapsed since the agency initially refused to implement the Committee's findings, grievant seeks a negotiated settlement. He asks that the agency grant him pension rights, instead of reappointing and promoting him in the Foreign Service. Grievant understands that the Board does not negotiate settlements but believes the Board can provide mediation leading to settlement if both parties request it. He also seeks confirmation that his hearing was held completely within State Department regulations at the time, so that he would not be required to argue before a court that the Department is improperly failing to recognize the legitimacy of its past responsibility for implementing the recommendations which resulted from his hearing.

THE DEPARTMENT

At the time of grievant's TIC separation, agency-level grievance procedures included a hearing before a Grievance Committee, a report to the Deputy Assistant Secretary for Personnel, a decision by the Deputy Assistant Secretary for Personnel, and a request for review by the Deputy Under Secretary for Administration, who issued the final decision. The procedures did not provide for appeal to the Foreign Service

Grievance Board. Grievant filed a grievance in 1969 under then-existing grievance procedures in 3 FAM 1820. Although grievant alleges that he "prevailed in his grievance hearing," and that the "original hearing decision calls for his reappointment and promotion in the foreign service," he has not provided the Board in this appeal the actual decisions of the relevant officials referred to in the agency's grievance procedure regulations. These documents would make clear that not all of the Grievance Committee's recommendations (including those related to grievant's requested reappointment to the Foreign Service) were accepted upon higher level review. Instead, grievant has provided the Board in this proceeding only parts of the Grievance Committee report. Further, grievant has not demonstrated that he has standing as a former member of the Service to file a grievance now. That issue already was considered by the Board in grievant's appeal filed almost 40 years ago. *See* FSGB Case No. 1977-405 (February 14, 1978).

IV. DISCUSSION AND FINDINGS

The issue before the Board is the agency's Motion for a Preliminary Determination dated December 12, 2014. If an agency asserts a jurisdictional objection, under Board regulations at 22 CFR § 904.2, the Board may make a preliminary determination on jurisdiction.⁵

Grievant's efforts to reverse the effects of his 1969 separation span 46 years and two separate legislative acts, the Foreign Service Act of 1946, as amended, and the

⁵ (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 unless the Board concludes that resolution of the question of jurisdiction should be deferred until the Board has compiled a record of proceedings or held a hearing on the merits of the case.

(b) The Board may also make a preliminary determination on any question raised by a Party concerning the timeliness of a grievance, the election of other remedies under § 904.3, or any other issue whose resolution might avoid the necessity of further proceedings.

Foreign Service Act of 1980, as amended. Grievance procedures available to members of the Foreign Service have varied considerably during this period.

1969 Grievance Committee

The 1946 Act, *inter alia*, introduced an "up-or-out" personnel system that forced mandatory retirement on officers who failed to be promoted within a specified time in class. Employees who, like grievant, faced this prospect could challenge their separation through the agency's grievance process. The Department's regulations at 3 FAM 1820 allowed employees to ask the Deputy Assistant Secretary (DAS) for Personnel to grant them either an administrative review or a formal hearing before an impartial Grievance Committee. Composed *ad hoc* of three active duty members, the Committee served as a fact-finding and advisory body⁶ that conducted a hearing and delivered a report with its findings and recommendations to the DAS. The report was not released to the grievant or to his office of assignment. The DAS then transmitted his decision to the employee. If the employee was not satisfied with the decision of the DAS, he could ask for review by the Deputy Under Secretary for Administration, who would make the final decision.

There is no dispute that the Committee, with one member dissenting, submitted a report favorable to grievant and that the Department, in its higher level review, did not accept the Committee's recommendations. While regrettable from grievant's point of view, nothing in the Record of Proceedings (ROP) shows the agency's decision to be prohibited or even unexpected, given that one Committee member objected to three central recommendations: reemployment, promotion, and payment of legal fees. The Department's regulations made it clear that the Committee's role was advisory, not directive, and 3 FAM 1820 neither required the agency to follow the recommendations

⁶ 3 FAM 1826.5 May 24, 1968.

nor provided further avenues for a grievant to pursue if the agency did not do so.

Grievant has not shown that the agency's decision not to implement the recommendations of the Grievance Committee violated any statute, regulation, published agency policy or collective bargaining agreement.

Under current Board practice, grievants who are dissatisfied with the Board's decision or with the agency's fulfillment of a Board Order may pursue a new grievance (*see, e.g.,* FSGB Case No. 1992-078, Order dated December 13, 1995). Grievant did file a new grievance in 1977. They may also file a court action (*see, e.g.,* *Salleh v. Christopher*, 876 F. Supp. 297 (D.D.C. 1995), *aff'd*, 85 F.3d 689 (D.C. Cir. 1996)). Grievant suggests that a similarly-placed officer appealed to the courts a few years later. By his own account, then, one recourse open to him could have been such an appeal.

We find that grievant has not shown that he was denied the full measure of due process available to him at the time. He has not demonstrated that his present grievance can be considered a continuation of his 1969 Grievance Committee hearing.

1977 Grievance

As he approached his fiftieth birthday, grievant appealed to the Board to be reinstated to the rolls for a period of at least one day in order to receive financial benefits, including an immediate annuity. The Department expressed jurisdictional objections, claiming that grievant lacked standing and that his involuntary retirement complaint had already been resolved in accordance with procedures in effect at the time. In FSGB Case No. 1977-405, the Board, operating under the 1946 Act, ruled against grievant on two grounds.

First, the Board noted that the 1946 Act was amended on November 25, 1975, to allow former officers to grieve their involuntary retirement if they were separated within six years prior to the date of the amendment. Because grievant's TIC separation occurred on October 4, 1969, he failed to be eligible by a matter of weeks. The Board found grievant's appeal untimely. The Board also found that he lacked standing to grieve because his request for reinstatement did not fall directly within the limited financial issues former members were permitted to grieve.⁷ The Board acknowledged that an annuity might qualify as a financial benefit but found that the annuity was a by-product of the actual remedy sought--reinstatement. The subject matter of the grievance, therefore, did not fall within the provisions applicable to former officers' grievances. There is no evidence in the ROP that grievant sought judicial review or asked the Board to reconsider its decision to dismiss his case for lack of proper standing. The Board's decision stands complete as issued and cannot be the basis for a new grievance at this time. We do not, however, find that the legal doctrine of *res judicata* applies since the 1977 grievance was decided under the 1946 Act, at least in part on grounds that have since been changed or removed. The differences between 1946 and 1980 Act procedures are stark. For instance, the Grievance Committee's members were agency employees; today's Board members may not be employed by the agency. The Committee's recommendations were simply advice, while this Board's decisions are, with few exceptions, directives that the agency must follow unless they are overturned by judicial review.

⁷ (C) except as provided in paragraph (D), when the grievant is a former officer or employee or a surviving spouse or dependent family member of a former officer or employee, 'grievance' shall mean a complaint that an allowance or other financial benefit has been denied arbitrarily, capriciously, or contrary to applicable law or regulations.

Current Grievance

The 1946 Act was replaced by the present Foreign Service Act of 1980, which made a number of changes to the personnel system. 22 CFR § 910.6 (Pending grievances) states: "Any grievance pending before the Board prior to February 15, 1981 shall be resolved under the provisions of the Foreign Service Act of 1946 as amended, and the regulations promulgated thereunder." Grievant's current appeal is subject to the provisions of the 1980 Act.

As a former member of the Foreign Service, grievant is, of course, entitled to file a grievance with this Board. The matter and time limitations of such a grievance are described by 22 U.S. Code § 4132, entitled "Grievances concerning former members or their survivors":

Within the time limitations of section 4134 of this title, a former member of the Service or the surviving spouse (or, if none, another member of the family) of a deceased member or former member of the Service may file a grievance under this subchapter only with respect to allegations described in section 4131 (a)(1)(G) of this title.

...

G) alleged denial of an allowance, premium pay, or other financial benefit to which the member claims entitlement under applicable laws or regulations.

...

22 U.S. Code § 4134, entitled "Time limitations" further provides:

(a) Limitations period

A grievance is forever barred under this subchapter unless it is filed with the Department not later than two years after the occurrence giving rise to the grievance. . . . There shall be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware of the

grounds for the grievance and could not have discovered such grounds through reasonable diligence.

We recognize grievant's unusual position in the history of this Board as well as his enduring dissatisfaction with the outcome of the hearing process. As noted earlier, our analysis today is limited to jurisdiction and does not address the merits of grievant's case. In accordance with 22 CFR § 904.2, the Board makes the following preliminary determination on jurisdiction: because grievant has not shown that his appeal was made "not later than two years after the occurrence giving rise to the grievance," nor is there evidence that grievant was "unaware of the grounds for the grievance," we find grievant's appeal untimely.

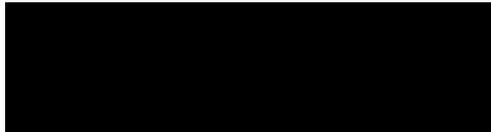
V. ORDER

The grievance appeal is dismissed.

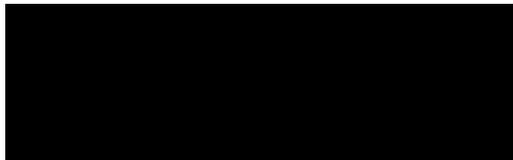
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