

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2014-048

April 17, 2015

ORDER: DISMISSAL OF APPEAL

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

William E. Persina

Board Members:

**Harlan F. Rosacker
J. Robert Manzanares**

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Kathryn Nutt Skipper
Attorney, HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: DISMISSAL OF APPEAL

I. THE ISSUE

This order addresses a request by the Department of State (Department, agency) that the Board make a preliminary determination regarding its jurisdiction on the grievance appeal (FSGB 2014-048) filed by ██████████ (grievant), an FS-01 officer. The issues for the Board in this case are: (1) whether the Board has jurisdiction over grievant's claim that the Department miscalculated his Time in Service (TIS) date; (2) whether the Board has jurisdiction over grievant's claims concerning certain aspects of his work assignments; and (3) whether the Board should grant grievant's request to reopen previous Board decisions. For the reasons that follow, we find that the Board does not have jurisdiction as to the first two issues, and that the request to reopen should be denied. Accordingly, we dismiss the appeal in its entirety.

II. THE GRIEVANCE

On November 29, 2014, grievant filed an appeal with the Foreign Service Grievance Board (FSGB, Board) of the Department's decision of October 2, 2014, on his agency-level grievance. He claims that the Department failed to promptly implement the total two-year extension of time-in-class (TIC) and time-in-multiclass (TIMC)¹ that had been granted as relief by the Department in his 1998 grievance (AGS 98-084) and by the Board in FSGB 1998-087 (April 4, 2002) as well as a subsequent one-year TIC extension for long-term training. He asserts that the Department's reevaluation and recalculation of his TIC/TIS from scratch in response to his September 2012 inquiries about missing data constituted a new action, thus

¹ Department regulations in 1998 provided that an officer would be retired mandatorily if not promoted from one class to the next class within a specified period of years (single class TIC) or not promoted into the Senior Foreign Service (SFS) within a specified total period of years in several mid-level classes (multi-class TIC). In 1999 the multi-class TIC limits were replaced by a maximum time-in-service (TIS) limit that an officer could serve after his/her initial FS appointment through Class 1. The Department adjusted the total relief granted to grievant by the Department in 1998 and later by the Board to reflect the new TIS limit -- i.e., grievant's TIS was extended by two years.

making his current grievance (filed on June 20, 2014) timely and permitting him to request that the Board's decision in FSGB 98-087 be reopened.

Grievant also claims that he was harmed by certain aspects of his assignments since 2013, including the Department's failure to place a down stretch letter² in his file concerning his November 2013 assignment.

Finally, grievant introduces an August 8, 1994, telegram from Diplomatic Security (DS) in the Department (94 State 211865) to the Regional Security Officer (RSO) at the U.S. Consulate in [REDACTED] (post), which he asserts warrants reconsideration of the Board's decision in FSGB 1998-087. He notes that this telegram could not be found by the Department after its production was ordered by the Board (FSGB Case No. 1998-087 (Order dated June 13, 2000)) and had not been taken into consideration by the Board in considering his 1998 grievance appeal. He asserts that it proves that the Board erred in concluding that discrimination based on his sexual orientation had not influenced his Employee Evaluation Reports (EERs) between 1994 and 1996.

Grievant requests all of the relief that he had requested from the Department and the Board in his 1998 grievance and appeal, the backdating of his 2000 and 2013 promotions, and additional TIC/TIS. He requests interim relief from separation during the pendency of his grievance appeal, extension of his current assignment until September 2016, and a hearing before the Board.

² Since the Foreign Service is a rank-in-person system, an officer may bid on or be assigned to positions that are not classified at his/her personal grade -- commonly referred to as up stretches and down stretches. Given the possible negative career implications of a down stretch, special efforts are made to ensure that officers are aware of those implications and accept them. These are described in Standard Operating Procedure (SOP) B-02.

III. BACKGROUND

In 1998 [REDACTED] grieved two EERs covering in combination the periods August 28, 1994, through April 15, 1996, while he was serving in the U.S. Consulate General in [REDACTED] [REDACTED] (post). He alleged that the EERs were inaccurate, falsely prejudicial, omitted “favorable” information and contained inadmissible comments; and he asserted that these flaws stemmed from anti-homosexual bias on the part of his rater and reviewer. He also grieved the fact that he had not received an EER for the subsequent 4.5-month period ending August 30, 1996. The Department denied his grievance of the two EERs but agreed to extend his “single class and multiclass TIC” by 4 months and 15 days to compensate for the lost period of evaluation. Grievant appealed to the FSGB on November 25, 1998, and requested additional relief for the missing EER. The Board found on April 4, 2002, that the grieved EERs were not inaccurate, falsely prejudicial or otherwise defective. While finding “weighty evidence” of a homophobic attitude at the post, it did not treat fully grievant’s claim of bias because it found adequate evidence otherwise to support the negative comments in his EERs. However, to compensate for the missing EER the Board extended grievant’s “single class and multi class Time-in-Class” by an additional 19 months and 15 days, bringing the total TIC extension to two years.

On July 7, 2002, grievant filed a complaint in District Court challenging the FSGB decision. The Court agreed in part with his arguments and remanded the case back to the Board, ordering it to consider whether anti-homosexual bias had unfairly tainted grievant’s EERs. In the Board’s final decision on remand, FSGB 1998-087 (November 7, 2005), it found grievant had not satisfactorily demonstrated that anti-homosexual bias tainted his EERs. On June 30, 2006, grievant appealed this decision to the District Court, which found on March 12, 2009, that neither the Board’s decision nor its procedures were arbitrary and capricious. 602 F. Supp.2d 93

(D.D.C. 2009). Grievant then appealed to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). In a judgment filed on February 22, 2011, the D.C. Circuit affirmed the District Court's decision finding that "[grievant] has failed to demonstrate that the Board acted arbitrarily and capriciously when it determined that the EERs he challenged were not falsely prejudicial."

The current grievance was filed with the Department on June 20, 2014; the Department's decision was issued on October 2, 2014; and grievant appealed the decision to the Board on November 29, 2014. On October 14, 2014, the Acting Director General set February 5, 2015, as the date for grievant's mandatory retirement for expiration of TIS, but he provided that his final separation date might be postponed until as late as September 30, 2015, "to allow for the orderly completion of [his] current assignment."

This order addresses the request by the Department on January 23, 2015, that the Board make a preliminary determination regarding its jurisdiction on this grievance appeal. Grievant submitted his response to the Department's request on January 25, 2015.

IV. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant joins the Department in requesting a preliminary determination on jurisdiction but urges that the Department's claims otherwise be rejected.

Department's Failure to Properly Credit Grievant's TIC/TIS Extensions and Absence of Data in Online Profile -- In June 2012 grievant's Career Development Officer (CDO) pointed out that the TIC/TIS field in his online profile was blank since July 9, 2010. The CDO provided information to the Office of Performance Evaluation (HR/PE) on the TIC/TIS extensions that had been ordered by the Department and the Board. Grievant contends that the Department's

efforts to correct his TIC/TIS records are a new action, and he is entitled to initiate a grievance concerning the manner in which the Department has handled it. In response to the Department's contention that his grievance was untimely, he pointed out that despite his own follow-up with HR/PE, by June 20, 2014, when he filed his grievance with the agency, HR/PE had still not recorded in his online profile the 4.5 months of additional TIC/TIMC that had been ordered by the Department in its grievance decision on September 30, 1998. In his appeal he asserts that inaccurate and incomplete TIC/TIS data in his profile "disadvantaged" him during the assignment process, including a down stretch. Grievant claims that the "Department's apparent unilateral action to cancel the TIC/TIS relief it granted in AGS-084" is a new act that provides "an opportunity to reopen the entire original grievance." He contends that this harm also warrants granting him additional TIC/TIS relief.

New Evidence Warrants Reopening Original Grievance Decision -- Grievant contends that the Department's telegram that he presents -- 98 State 211865 -- is new and previously unavailable evidence. Though its production had been ordered by the Board in 2000, it could not be found at the time. He did not receive it until October 2, 2014, when it was attached to the Department's decision on his current grievance. He requests that the Board reconsider its earlier decisions in light of this evidence. Grievant points out that he has consistently argued that the Regional Security Officer (RSO) at post sent a telegram ([REDACTED]) after grievant hosted a reception at which a G-rated film with a transvestite performer was shown. The post's telegram was signed by the Consul General, his reviewer. He argues that the Department's response confirms post's telegram to the Department regarding his homosexuality is evidence of sexual orientation discrimination and impeaches the statements made earlier by officials in the Department and at post. "It is a reasonable inference that those who falsely denied having the

telegram sent also falsely denied that there was discrimination or that discrimination affected [his] EER.”

Grievant asks to have a hearing before the Board, to which he is entitled as an officer facing mandatory retirement for expiration of TIC/TIS. He argues that it would enable him to “confront those same hostile witnesses with the contradiction between their original false written testimony back in 1998 and the documentary evidence”-- i.e., cables showing they were not telling the truth.

Absence of Down Stretch Letter in Grievant’s File/Extension to Complete Current Detail

-- The Department’s regulations require HR/CDA to place a signed down stretch letter in the file of an officer, like grievant, who is assigned to a position beneath his/her personal grade. He contends that the Department has made a procedural error and that since the Department elected to make the assignment without such a letter, it “must bear the consequences by extending [his] TIC/TIS.” Grievant argues that letting him complete his current detail to a U.S. military installation as a political advisor would be in the interest of the Department of State.

B. THE AGENCY

The Department requests that the Board make a preliminary determination as to jurisdiction, pursuant to 22 CFR § 904.2.³ It points out that the Board, in considering whether it has jurisdiction, must first determine whether the employee has raised an issue that is grievable under the Act. *See* FSGB Case No. 1997-098 (March 10, 1998). It must next determine whether

³ 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 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.

the grievant has suffered any harm, has been denied a right or entitlement that is grounded in law or regulation, or has demonstrated the clear threat of irreparable harm. The Board has held that it will not accept jurisdiction when it lacks the statutory authority. The Department asserts that grievant has not met his burden of proof as to the Board's jurisdiction over the claims in his appeal. The appeal should be dismissed in its entirety.

Grievant's Claims Regarding Calculation of His TIC are Moot -- The Department contends that [REDACTED] current grievance claiming inaccuracies in the Department's records about TIC/TIS relief ordered in 1998 and 2002 is untimely. Even if it were timely, these claims are moot, since by the time of his appeal to the Board the Department had ensured that he had been credited with all of the relief to which he could be entitled under decisions on his 1998 grievance. To ensure that he obtained all of the credit he had been granted under the old TIMC rules, the Department also extended his TIS (under new rules) by a full two years to January 8, 2015.

The Board is urged to reject grievant's claim that the Department's alleged failure to provide the initial 4.5 months of TIC in relief granted by the agency in 1998 constituted a repudiation of that decision and would thereby allow him to reopen the 1998 grievance on its merits.

Claims regarding original grievance -- The Department asserts there is no basis in grievant's appeal to re-open and re-litigate the claims in his 1998 EERs. They are barred by the doctrines of administrative collateral estoppel and *res judicata*. "Administrative collateral estoppel is a doctrine that bars re-litigation of an issue that has already been determined in a prior judgment involving the same parties." FSGB Case No. 2010-30 (February 14, 2011). The Department argues that:

Grievant's claims, including those related to the cable ([REDACTED]) and the Three Dollar Note, were considered on the merits, and neither the FSGB, nor the District

Court, nor the D.C. Circuit found that grievant's EERs were falsely prejudicial or inaccurate, even with the evidence of anti-homosexual bias grievant presented. As the District Court stated, "the critical question is not whether bias existed -- it did -- but whether the FSGB's decision was arbitrary and capricious when it determined that the EERs were not falsely prejudicial."

The Department also notes:

The production of the evidence to which grievant refers, 94 State 211865, only confirms what was already in the record in the Federal Court proceedings -- that a response cable was sent, that it outlined Department policy, including that the Department treats homosexuals and heterosexuals the same. *See Olson v. Clinton*, 602 F. Supp.2d 93, 98 (D.D.C. 2009). . . . In the end, grievant's 1998 grievance appeal was ultimately considered by the D.C. Circuit. The D.C. Circuit found that, as stated by the District Court, grievant "failed to demonstrate that the Board acted arbitrarily and capriciously when it determined that the EERs he challenged were not 'falsely prejudicial.'"

The Department requests that the Board dismiss immediately "all of grievant's claims related to re-litigating the merits of the 1998 grievance appeal."

Assignment-related claims/down stretch letter -- The Department notes that grievant has claimed that the alleged inaccuracies in his TIC/TIS records harmed him in his subsequent assignments: he had difficulties in securing an assignment in 2013; he was assigned to a down stretch position without a down stretch letter in his file; he was assigned to a position for only 11 months; and he will be unable to complete his current assignment because of the expiration of his TIS.

Under Section 1101(b)(1) of the Act, the Department contends, assignments are grievable only to the extent that they are contrary to law and regulation. Grievant has not shown that any of these assignment-related issues were contrary to law or regulation.

The Department asserts that evidence in the record shows that grievant accepted an assignment while being clearly aware it would be a down stretch position for an FO-01 officer, even if he did not submit a down stretch letter as the Department requested. However, it argues that the Board need not determine whether there was an error, since the key issue is whether

grievant was harmed by an alleged error. He “has not demonstrated that he has suffered any harm for which remedial relief he seeks -- additional TIC -- can be provided.” Having just been promoted to FO-01, he would not have been eligible for another promotion before the expiration of his TIS in January 2015.

The Department argues that since grievant cannot demonstrate harm, the Board should deny any claims regarding assignment-related actions.

V. DISCUSSION AND FINDINGS

The Board may take cognizance of and resolve this grievance only if it is within our jurisdiction. The Department has argued that it is not within our jurisdiction and has asked that it be dismissed. Grievant, who bears the burden of proof, contends that it is within our jurisdiction.

Grievant presents three complaints in his grievance and argues that they warrant additional TIC/TIS relief and allow for reopening the merits of the Board’s decisions in FSGB 1998-087 (April 4, 2002; November 7, 2005). We will address them individually.

Department’s Failure to Properly Credit Grievant’s TIC/TIS Extensions and Absence of Data in Online Profile -- Grievant contends that the Department failed to properly implement extensions of his TIC/TIMC/TIS that had been ordered by the Department in 1998 and by the Board in 2002. The Department responds that before grievant appealed his current grievance to the Board, the Department had corrected its records and his online profile, thereby granting him all of the TIC/TIS extensions that had been awarded by the Department and the Board in their decisions on his 1998 grievance.

The Board has long held that where the Department has provided a grievant with all the relief he has requested, his grievance appeal is properly dismissed as moot. FSGB Case No. 2012-056 (Order dated February 27, 2013); FSGB Case No. 2012-033 (Order dated November

19, 2012). We find that the record demonstrates that most of the corrections to grievant's TIC/TIS profile were made in 2012, shortly after his CDO provided information to HR/PE, and that the remainder were entered on October 8, 2014, implementing the Department's decision on his grievance. Since the Board cannot award grievant with any more relief than the Department has already provided him, we find his complaint moot.⁴ It is thus outside the Board's jurisdiction and is dismissed. We need not consider whether the grievance on his TIC/TIS history was timely or whether grievant was harmed.

New Evidence -- Grievant argues that reopening the merits of the Board's decision on his 1998 grievance is warranted because he is presenting new and previously unavailable evidence that proves that the Board erred in finding that discrimination based on his sexual orientation had not influenced his 1994-1995 and 1995-1996 EERs.

After considering the record, we find that, even accepting the telegram is new evidence that was unavailable to grievant at the time the earlier grievances were filed, it would not warrant reopening decisions made by the Board in 2002 and 2005 because it does not provide any evidence material to revising the Board's earlier rulings. *See* 22 CFR § 910.1. In responding to the post's request for guidance, the Department described its current policy: that the Department and DS are not interested in employees' sexual orientation; that homosexuals and heterosexuals are to be treated in the same way; and that defensive briefings for homosexuals solely because of their sexual orientation -- such as those envisioned by the post -- are inappropriate. The telegram that has been found and that grievant now presents only confirms a description of it that was

⁴ We note that grievant does not dispute that the Department has provided all the relief he has requested on the TIC/TIS issue. Rather, he says only that he had to file a grievance in order for the Department to provide the requested relief on the TIS calculation claim. This fact does not alter the conclusion that his TIS calculation claim is moot.

taken into consideration by the District Court in 2009.⁵ It provides no further evidence of the homophobic attitudes at post that the Board acknowledged in its decisions of 2002 and 2005. Moreover, it provides no evidence to challenge the Board's central finding: that it had found no evidence that anti-homosexual bias had unfairly tainted the two EERs that grievant had challenged. Grievant's request that the Board reopen for reconsideration its previous decisions on their merits is denied.

Assignment Claim -- Grievant makes two claims concerning his assignments in 2013 and 2014. First, he argues that his current assignment as a Foreign Policy Advisor to Special Operations ██████████, which began September 30, 2014, was to be for two years, and he will not be able to complete it due to the expiration of his TIS. However, as the Department correctly argues, this assertion is outside the Board's jurisdiction under Section 1101(b)(1) of the FSA, as amended, 22 U.S.C. § 4131(b)(1). That section excludes from a definition of a grievance cognizable by the Board an "individual assignment" of a member of the Foreign Service, "other than an assignment alleged to be contrary to law or regulation." We find that grievant's claim concerning his current assignment comes under this provision, and we are thus without jurisdiction to address it.⁶

Second, grievant argues that the Department violated a procedural requirement when, without a down stretch letter being in his file, he was assigned to a position that had become below his grade level at the time of the assignment. The requirement that a down stretch letter

⁵ "According to an August 23, 2000, memo from ██████████, then the Consulate's Regional Security Office Secretary, the Consulate received a response indicating that 'sexual orientation (homosexuality) was no longer considered an issue by the Department of State.'" In a footnote, the Court noted that "██████ indicated in the memo that she did not recall the exact date of the response but thought it was received soon after the initial cable was sent." ████████ v. *Clinton*, 602 F. Supp.2d 93, 98 (D.D.C. 2009)

⁶ Grievant did not in his appeal raise to the Board two other assignment-related claims he made in his grievance at the Department level, concerning his difficulty in obtaining a position after his ████████ assignment in 2013, and the relative brevity (11 months) of his assignment after ████████. Nor did grievant provide any evidence to support these claims. Accordingly, we do not address those arguments here.

be in an officer's file seeks to ensure that the officer has been informed of and accepted the possibility that a down stretch assignment might be disadvantageous in terms of promotions. The sample down stretch letter in Standard Operating Procedure (SOP) B-02 (page B-02.6) makes it clear that it is to be provided by the affected employee:

This is to confirm that I understand and accept the possible professional limitations that a down stretch to an FS-OX assignment in [office or post] could entail, including the potential negative effect upon promotion possibilities. At this time I feel that such a position would be [the best for me among the positions that are available] *or* [would be in my long-term best interest].

By telegram 13 State 13570 on September 28, 2013, the Department announced that the Under Secretary for Management had approved the promotions of officers from Class FS-02 to FS-01 -- including grievant -- and that they would be effective on November 3, 2013. The subject lines in email correspondence among grievant and various Department officials during the period October 25-29, 2013, make it clear that for assignment purposes he was already being treated as an FO-01 officer bidding on an FO-02 position, that it would be a down stretch assignment, and that he was pleased to accept the assignment under those terms. By the time the assignment was finally paneled on November 6 grievant had been promoted officially. Grievant does not dispute any of the facts as stated above.

We find that the absence of a down stretch letter stems from grievant's failure to respond to the Department's request that he submit one even though a sample with specific language was provided. He has offered no explanation for not having complied with this request after accepting the handshake for the assignment. The alleged error was entirely of his own making. Nor has he shown that he was harmed in any way. As the Board found in FSGB Case No. 1995-010 (August 22, 1995):

. . . An assertion of agency error not associated with or giving rise to some identified injury or denial of an entitlement does not constitute a claim susceptible to a grant of relief, and is thus not sufficient to vest jurisdiction in the Board.

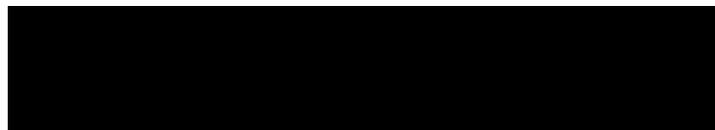
See also FSGB Case No. 1997-098 (March 10, 1998). In this case, grievant has not shown how the absence of a down stretch letter in his file has caused him any injury or denial of an entitlement. Accordingly we find that we do not have jurisdiction over grievant's claim.

However, even if we did have jurisdiction over the claim, we would deny it anyway, since we find it so wholly without merit that it borders on the frivolous.

VI. ORDER

The Board dismisses this grievance, finding that: on his claim concerning his TIS calculation, grievant has not shown that his appeal is within the Board's jurisdiction; on a second claim concerning homosexual bias he has not submitted evidence that would warrant reopening the decision made on his 1998 grievance; and that his third claim concerning assignment issues is outside of the Board's jurisdiction, since he has shown no harm. Since the Board dismisses his grievance, his requests for interim relief and a hearing are moot.

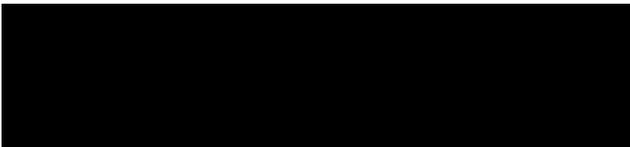
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