

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

State OCP Cohort

Record of Proceedings

Grievants

FSGB Case No. 2015-008

And

November 18, 2016

Department of State

Consolidated With

USAID OCP Cohort
Grievants

FSGB Case No. 2015-024

And

U.S. Agency for International Development

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

J. Robert Manzanares

Special Assistant

Katherine D. Kaetzer-Hodson

Representative for the Grievants:

Colleen Fallon-Lenaghan,
AFSA

Representative for the Department:

Melinda P. Chandler
Director, HR/G

Representative for the Agency:

Frank Walsh
USAID, GC/EA

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

Held: Grievants in each consolidated appeal failed to establish any violation of a statute, regulation, collective bargaining agreement, or official policy in the reduction of their Overseas Comparability Pay (OCP), or an abuse of discretion, where the Secretary of State and USAID exercised their discretion to make such reductions by a uniform percentage in order to forestall a violation of the Anti-Deficiency Act.

Summary: In both appeals, groups of individual Foreign Service Officers challenge the denials of their agency-level grievances, protesting the downward, across-the-board, percentage adjustments of their Overseas Comparability Pay (OCP) during one pay period in 2014. The adjustments were mandated by the Department of State (Department) and the U.S. Agency for International Development (USAID, Agency) to avoid violations of the Anti-Deficiency Act. The problem evolved due to Congressional legislation that reduced and capped the percentage at a rate lower than the rate already in effect earlier in that same fiscal year. The appropriations bill enacted in January 2014 capped the annual percentage at 16.14 percent. At the start of the fiscal year, the existing percentage had been 16.52 percent.

Both the Department of State and USAID chose the same approach to complying with the Anti-Deficiency Act, *i.e.* to invoke for all employees receiving OCP a reduction of such pay to the same percentage level of 9.1 percent for the pay period beginning on September 7, 2014 (PP18), followed by an adjustment to a new, permanent rate of 16.14 percent, as of the next pay period (PP19).

A group of employees in the Department of State and another group from USAID filed grievances to challenge the manner in which the reductions were implemented. Their arguments, essentially, were that the Department and the Agency violated the merit principles of the Foreign Service Act, as defined in the Civil Service Reform Act, because the Department and the Agency should have calculated reductions based on the amount that each employee exceeded the cap imposed by the 2014 budget authorization. In other words, they challenged the legality of using the across-the-board percentage formula to avoid illegal disbursements.

The Department and the Agency both denied the grievances for the same fundamental reasons: that since they have discretion to grant or not grant OCP at all, there was no proof that such discretion was abused, there had been no violation of any statute, regulation, collective bargaining agreement or published policy affecting the terms and conditions of employment or career status of the affected employees; that receipt of OCP does not constitute a legal entitlement, and that there was no violation of the “merit principles” incorporated into the FSA.

DECISION

I. THE GRIEVANCES

We summarize here the fundamental nature of the grievances filed with the Department and the Agency, as well as the procedural course of this litigation. To illustrate the identical nature of the two cases, we describe each one separately for ease of comparison.

The Department of State Cohort Group. By a memorandum of December 19, 2014, three Foreign Service Officers ([REDACTED]) (State OCP Cohort)¹ jointly grieved the downward adjustment of their Overseas Comparability Pay (OCP) for the pay period beginning on September 7, 2014 (PP18). Grievants acknowledge that the Department used the one-pay-period reduction to avoid a violation of the Anti-Deficiency Act, 31 U.S.C. §1341. The need to make reductions arose from a Congressional appropriations bill (enacted in January 2014) mandating for Fiscal Year 2014 a reduction of the percentage that had been in effect at the start of the fiscal year. Nonetheless, they specifically complained of the manner in which the Department determined how a reduction would be made.

Specifically, State OCP Cohort criticized what they termed the Department's "recovery of funds" through a "one size fits all" approach to reductions in pay for one pay period. The American Foreign Service Association (ASFA) formally represented State OCP Cohort as their legal counsel. It asserted that the Department had uniformly lowered the OCP rate for PP18 at 9.1 percent for all employees "without regard to length of time the employee spent overseas or the date of entry on duty for those who had entered the Foreign Service as newly hired employees during the relevant pay periods."²

¹ We utilize initials for the sake of grievants' confidentiality.

² Appeal Submission, Exhibit 1 at 2.

As relief, grievants demanded that the Department calculate the “correct amount that each Foreign Service employee should have been paid in PP18, taking into account the employee’s grade and step, actual service overseas and date of entrance on duty and repay each employee the difference between the actual amount of Overseas Comparability Pay s/he was overpaid from the beginning of the year and the amount s/he received in PP18,” as well as “all other appropriate relief.”³

Grievants’ definition of the “correct amount” was based exclusively on their theory that the Department had legal authority to reduce the OCP only by an amount necessary, “no more and no less – to stay within the OCP cap.”⁴

On January 29, 2015, the Department’s Deputy Assistant Secretary for Human Resources (DAS/HR) issued a letter denying the grievance (Decision Letter).⁵

The USAID Cohort Group. On February 25, 2015, these grievants filed an Agency-level grievance, challenging the Agency’s use of the uniform OCP adjustment of 9.1 percent for PP18.⁶ ASFA also formally represented these grievants, and their group consisted of two persons: [REDACTED]⁷ To distinguish between the two groups of grievants, we refer to this group as “USAID OCP Cohort.”

Just as the Department’s grievants had done, the officers in this group complained that the use of the 9.1 percent reduction of OCP for PP18 was “arbitrary and unfair.”⁸ For the sake of brevity, it suffices to say that USAID OCP Cohort tendered the same arguments made by State OCP Cohort, seeking the same relief.

³ Appeal Submission, Exhibit 1 at 5.

⁴ *Id.*

⁵ A copy of this letter is included in the Record of Proceedings (ROP) as Exhibit 2, attached to grievants’ Appeal Submission.

⁶ A copy of the agency-level grievance is in the ROP as Exhibit 1, attached to grievants’ Appeal Submission.

⁷ The full names appear in emails that comprise Attachment A to grievants’ Appeal Submission.

⁸ Appeal Submission, Exhibit 1 at 3.

II. BACKGROUND

The Board exercised its discretion to consolidate the instant appeals because of the identical legal issues raised by both sets of grievants, to promote consistency in the disposition of both appeals and to maximize the efficient use of the Board's resources. The following historical facts are the overlay for the contentions of the parties and the issues set forth in both appeals.

The Origins and Purpose of OCP. In the overall scheme of the federal workforce, all employees at the same grade and step receive the same salary. However, over time, Congress determined that the best interests of the government would be served by instituting higher salary ranges for federal employees in certain job markets where persons performing comparable work earn significantly more than civil servants. A classic example is Washington, DC. Thus, Congress enacted permanent legislation to create what is known as "locality" pay. The statute establishing locality pay is 5 U.S.C. § 5304 *et seq.*

Having first created locality pay, Congress subsequently confronted an anomaly in the Foreign Service. Foreign Service officers who happened to be assigned to Washington, D.C. were eligible for locality pay. However, those who were posted overseas were not eligible for locality pay. OCP was created by Congress as a remedy to address this disparity in the base pay of Foreign Service Officers.

As we explain further in our adjudication of the issues, Congress established OCP in 2009, in a law covering certain details of several, disparate federal agencies. This was known as Public Law 111-32., Operationally, OCP thereafter has been effectuated through budget appropriations bills. This is how Congress regulates the percentage of OCP that is legally allowed, but the Agency and the Department each have discretion whether to grant OCP at all, as long as they do not exceed the legal ceiling on the percentage.

In her Decision Letter, the DAS who denied the grievance of the State OCP Cohort recapitulated the process by which the Department phased in OCP. She wrote:

The Department began phasing in OCP in August 2009, beginning with the first of three expected tranches with a rate set at 7.7%. In January of 2010, the OCP rate was increased by 1.12% based on an equivalent statutory increase to Washington, D.C. locality, bringing OCP up to 8.82%. Then, in August of 2010, the second tranche was implemented by adding another 7.7%. This brought the OCP rate for those eligible employees serving overseas to 16.52%, or slightly above two-thirds of the Washington, D.C. locality rate. Due to the subsequent freezes on federal salaries and statutory restrictions, the third phase of OCP, originally intended to bring the total OCP rate to [*sic*] equal to the Washington, D.C. locality, was not implemented.

On January 17, 2014, the Department of State, Foreign Operations, and Related programs Appropriation Act of 2014 . . . was enacted. Although it continued the Secretary's authority to utilize appropriated funds for OCP, Congress limited OCP to no more than two-thirds of the Washington, D.C. locality payment of 24.22%, which is 16.14%. This capped rate was actually 0.38% less than the [then-existing] OCP rate of 16.52% that had been in effect since August 2010.⁹

These background facts give context to the challenge of how the Department and the Agency ultimately chose to comply with the Anti-Deficiency Act.

The Crisis Spawning the Present Appeals. The impact of this January 2014 appropriation was to place both the Department and the Agency in jeopardy of violating the Anti-Deficiency Act, 31 U.S.C. § 1341, which forbids a federal agency from disbursing funds beyond its Congressionally-defined authority. The Department and the Agency have stated that their initial way of dealing with the new cap on OCP was to attempt to obtain some type of legislative relief, so that no officers would suffer a reduction of OCP.¹⁰ By late August, however, such efforts had not been productive, and decisive action was necessary before the end of the fiscal year (September 30, 2014), scarcely more than a month away.

⁹ Decision Letter at 2.

¹⁰ Grievants do not dispute that both the Department and the Agency tried to forestall the onset of any reductions, though they complain about the effects of an 11th hour shift in strategy.

In late August 2014 both the Department and the Agency took the identical, two-pronged approach, in order to stay within their respective fiscal authorities. One, as to employees who returned from overseas locations between January and September of 2014 (prior to PP 18) and who were not eligible to receive any OCP in PP18 and later pay periods, the Department and the Agency were able to calculate precisely how much these employees had been overpaid, and they were subject to ordinary collections processes. Two, for all employees eligible for OCP as a component of the compensation earned in PP18, both the Department and the Agency issued notices by cables in late August 2014 stating that they would invoke an across-the-board reduction in the percentage of OCP to be paid that pay period to 9.1 percent. In addition, these affected employees were notified that for next pay period (PP19) a new cap of 16.4 percent would apply as “the new permanent OCP, barring further change in future legislation.”¹¹

The State OCP Cohort filed its appeal with the Board on March 26, 2015. The Department filed its Response to the Appeal Submission (Response) on September 16, 2015, and grievants filed their Reply to the Response (Reply) on September 30, 2015. The Record of Proceedings was closed on May 27, 2016.

The USAID OCP Cohort filed its appeal with the Board on June 17, 2015, without waiting for a ruling on its grievance, since the Agency did not adjudicate the grievance within 90 days. After the appeal commenced, the Agency filed on July 16, 2015 a document entitled, “USAID Position on OCP Cohort Grievance.” While the Agency did not ask us to do so, we treat this document (Position) as the functional equivalent of the Agency’s adjudication of the grievance. After completing discovery, grievants filed their Supplemental Submission on

¹¹ A copy of the cable announcing these reductions to Department of State employees is in the record as Attachment B to grievants’ Appeal Submission in FSGB Case No. 2015-008. A copy of the cable announcing the same OCP adjustments for USAID employees is in the record as Attachment B to grievants’ Appeal Submission in FSGB Case No. 2015-024.

November 3, 2015. The Agency filed its Response to the Supplemental Submission (Response) on November 19, 2015, and grievants filed their Rebuttal on December 3, 2015. The Record of Proceedings in this docket number was closed on May 27, 2016.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANTS

As to both groups of grievants, their positions are summarized under the following categories, identifying positions common to both and noting certain variations.

Abuse of Discretion. Both State OCP Cohort and USAID OCP Cohort argue that the Department and the Agency, respectively, each abused its discretion by using the across-the-board adjustment of 9.1 percent. Grievants contend that the adjustments – in every instance – were not “correct.” Their theory is that the only “correct” way that either the Department or the Agency could have made reductions was to calculate for each individual affected officer a specific amount of money that, subtracted from the officer’s pay, was only just enough to avoid a violation of the Anti-Deficiency Act. The grievants all argue that everyone who was subject to the reductions lost more in OCP than was necessary.

In both cases, the overall theme of the grievants’ complaint is that the Department and the Agency both waited too far into the fiscal year to figure out how to respond to the lower percentage rate that Congress had imposed. They criticize the fact that two different groups of OCP recipients were treated differently, observing that those who were no longer overseas by PP18 were not harmed in the way that occurred with grievants. The USAID OCP Cohort argues, “USAID had ample time and opportunity to produce a collection notice for each affected

employee and adjust the rate appropriately for each employee, as it did for those employees posted domestically. It chose not to do so, effecting disparate results for these employees.”¹²

Similarly, State OCP Cohort argues:

The Department was notified of the OCP cap in January of 2014. It had approximately seven months to adjust the amount of OCP in sufficient time to ensure that correct adjustments to individual paychecks were made based on the 16.14% rate. It did not. It waited until the end of the fiscal year was imminent and simply applied the 9.1% rate to all employees, regardless of length of time spent overseas or date of hire for new entrants to the Service. The manner in which the Department recovered OCP from these employees was inequitable.¹³

The grievants all believe that the government engaged in needless delay in charting a course to avoid violating the Anti-Deficiency Act; hence the alleged abuse of discretion.

Violation of Merit Principles. Grievants argue that the manner in which the Department and the Agency effectuated the necessary reductions created inequalities that conflict with the principles of “equal pay for equal work.” They rely on the Foreign Service Act, 22 U.S.C. § 3901(a) (5), which states that “the Foreign Service should be operated on the basis of merit principles.” Grievants link this admonition to the definition of “merit principles” set forth in the Civil Service Reform Act. That statute states in pertinent part:

Federal personnel management should be implemented consistent with the following merit system principles: . . . Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance . . . Employees should be – (A) protected against arbitrary action¹⁴

In support of its merit principles argument, State OCP Cohort also relies on 3 FAM 2633, which states:

It is the policy of the Department of State to administer a classification system that ensures: (1) the provision of equal pay for substantially equal work; . . . [and]

¹² Supplemental Submission at 4.

¹³ Reply to Agency Response at 2.

¹⁴ 5 U.S.C. §2301(b) (3), (8) (emphasis added).

(4) That equitable treatment in all aspects of human resources management is afforded to all employees and applicants for employment.

USAID OCP Cohort points to similar regulations that apply to USAID. They cite USAID's policy on merit principles as set forth in the Automated Directives Systems (ADS). In the regulation's overview, the Agency declares:

USAID is committed to sound management of this mandate through human capital planning (aligned with the Agency's strategic plan) and a rigorous HC accountability system that demonstrates results, promotes continuous improvement, and ensures adherence to the Federal merit system principles and laws. The HC Accountability System ensures that: . . . Its HC and human resources management (HRM) programs and practices are efficient, effective, and merit-based

ADS 401.1.

In addition, USAID OCP Cohort cites the ADS reference to the Civil Service Reform Act, as the ADS states:

The DAA/HR (CHCO) and the Deputy CHCO have special statutory authority to 'advise and assist' the Administrator and other Agency officials in carrying out the Agency's responsibilities for selecting, developing, training, and managing a high quality, productive workforce, in accordance with Federal merit system principles.

ADS 401.3.2.

Due Process and the Demand for Remedial Relief from the Board. In their Supplemental Submission in this appeal, the USAID OCP Cohort portrays their plight as one of denial of due process, *i.e.* an unconstitutional deprivation or taking of property. Since, according to the Foreign Service Impasse Disputes Panel (FSIDP), the Board has authority to "fashion appropriate remedies,"¹⁵ grievants ask the Board to "insure the fullest measure of due process"¹⁶ and to provide appropriate remedies. In their Reply, State OCP Cohort makes the same due process argument and the same demand that the Board "fashion" equitable relief.

¹⁵ FSIDP Case No. 83 at 10.

¹⁶ 22 U.S. §3601(4).

Both groups ask the Board to order the Agency and the Department “to calculate the adjustment of OCP for each affected employee and all other similarly situated employees on an individual basis to effect a consistent adjustment that treats all employees equitably.”¹⁷

B. THE DEPARTMENT

In its Response to grievants’ Appeal Submission, the Department elected to incorporate by reference the entirety of the January 29, 2015 Decision Letter on the Agency-level to present its position on appeal. To put the Department’s appellate arguments in context, we summarize the Decision Letter as follows.

One, as to the scope of the grievance, the DAS determined that it the scope of the grievance was limited to Foreign Service employees of the Department of State.

Two, Foreign Service employees are not entitled to OCP under the law, and the Secretary of State is not required to grant OCP at all, even though the Secretary’s use of appropriated funds for this purpose is permissible. Therefore, there could not have been any abuse of discretion in the manner of making the reductions.

Three, while the Department did indeed use a “blanket approach to recover funds” for OCP overpayment made prior to PP18, the adjustment of the percentage rate “was an administrative action within the Secretary’s sole discretion.” The DAS added,

He could have declined to utilize the Department’s appropriations to fund any OCP in 2014 or set it at a rate well below any previously implemented. Instead, the Secretary effectuated a rate adjustment during pay period 18 to ensure that the Department complied with the applicable statutory restrictions on OCP, thereby preventing employees receiving OCP during pay period 18 from being overpaid in FY 2014. Contrary to AFSA’s claim, the Department did not “institute a recovery of funds from every employee.” Nor did it “deduct” any money from the grievants’ pay. They continued to earn the salary to which they were entitled and received the amount of OCP authorized by the Secretary. Since these employees

¹⁷ Supplemental Submission at 5. The same demand for relief is stated in *Cohort B.*, Reply at 5.

were never overpaid OCP in FY 2014, no overpayment funds were collected from them.¹⁸

The DAS clarified how the Department dealt with a subset of OCP recipients who were different from State OCP Cohort, *i.e.*, those who had received OCP during the time covered by the new cap but who were no longer eligible for OCP as of PP18. For them, the Department was able to make retrospective calculations of how much had been disbursed in excess of the cap, and those employees were required to make discrete repayments of specific sums. For these officers, no action was possible or relevant to their pay in either PP18 or PP19.¹⁹ The Department had no choice but to resort to ordinary collections procedures in order to recoup overpayments.

Finally, the DAS explained why the general principle of “equal pay for equal work” was not the appropriate or lawful basis for making any Anti-Deficiency adjustments to OCP. She rejected ASFA’s argument that each employee should have had his or her OCP reduced in a dollar amount unique to that individual. In short, the individual determination model proposed by ASFA would have run afoul of 5 U.S.C. § 4304(c) (1) (relating to locality pay), which provides, “The amount of comparability payment payable within any particular locality during a calendar year – (A) shall be stated as *a single percentage*, which shall be uniformly applicable to [all eligible positions] within the locality.”²⁰ The Congressional definition of OCP references the percentage rate used for setting “locality pay” and contains a separate requirement that OCP be implemented as a percentage rate. *See* further discussion, *infra*, in our Discussion and Findings.

On appeal, the Department highlighted certain aspects of the Supplemental Submission that it believes are meritless.

¹⁸ Decision Letter at 5.

¹⁹ All officers receiving OCP for PP19 received the maximum allowable OCP percentage, as Congress had prescribed.

²⁰ *Id.* (emphasis added).

One, the Department charges that grievants mischaracterize the one-time reduction of OCP as an effort to “recover” overpayments. Rather, the Department states that the reduction was a pro-active measure to forestall a violation of law – not an attempt to reclaim money that was erroneously disbursed.²¹

Two, the Department emphasizes that there is no law requiring the Secretary to utilize the “equitable” formula suggested by grievants as a method for calculating each officer’s portion of the OCP reduction. In other words, the Department stresses the Secretary’s statutory obligation to use a percentage rate as the way of identifying and implementing each officer’s OCP amount.²²

Finally, the Department underscores the fact that OCP is not an entitlement.²³

C. THE AGENCY – USAID

We summarize here the essence of the Agency’s arguments, recapitulating the basic contentions in its position as well as the subsequent response to grievants’ Supplemental Submission. As a threshold matter, the Agency stated that because the statutory authorization for OCP is vested solely with the Secretary of State, USAID “matched” the Department’s rate change to avoid its own violation of the Anti-Deficiency Act.

The Agency emphasized in both its position and response that grievants have no entitlement to OCP²⁴ and that the adjustment of the rate in response to the Anti-Deficiency issue “was an administrative action within USAID’s discretion.”²⁵ Further, the Agency emphasized that grievants had failed to identify any basis for such an entitlement. The Agency pointed out, as did the Department, that the United States Code plainly requires OCP to be stated “as a single

²¹ Response to Appeal Submission at 1. Grievants did not file a Supplemental Submission.

²² *Id.* at 2.

²³ *Id.*

²⁴ Response to Supplemental Submission at 3.

²⁵ Position at 6.

percentage.” Since the law requires OCP to be applied as a single percentage, there could not have been any violation of law, regulations, *etc.*, or any abuse of discretion by declining to use some other formula or personalized algorithm.

The Agency confronted grievants’ demand for an “equitable” calculation of the reductions based on individualized determinations that look to time at post and other factors. Opposing this idea, the Agency stated that such approach would have resulted in “an unequal rate of OCP for employees performing comparable work at the same time and in the same location, a direct contradiction to AFSA’s professed goal of fairness and equitable compensation.”²⁶

Like the Department, the Agency rebuffed grievants’ demand for relief on behalf of “all FS-01 employees and below who had their paychecks adjusted by USAID to prevent the Agency from exceeding the Statutory Cap set in the FY14 Appropriations Act regarding OCP.” USAID treated the proper scope of the grievance to be only the named grievants.²⁷

On the subject of “equal pay for equal work,” the Agency declined to recognize this broad principle as a basis for granting any relief. The Agency noted that “those general principles do not override the controlling statutory authority governing the OCP. Moreover, the grievants’ suggested course of action is not consistent with the law.”²⁸

For all of these reasons, the positions of the Agency and the Department are the same.

IV. DISCUSSION AND FINDINGS

Based upon the following analysis of the salient facts and the applicable law, the Board concludes that neither group of grievants has satisfied its burden to prove that either the Department or the Agency violated a law, regulation, collective bargaining agreement, or official

²⁶ *Id.* at 4.

²⁷ Position at 3.

²⁸ Position at 7.

policy in applying the percentage reductions of OCP. They also failed to prove that either the Department or the Agency abused its discretion in applying the adjustment. The grievants' other arguments lack merit as well. The appeals are therefore denied.

Lack of Entitlement to OCP. We hold that since there is no right or entitlement to OCP, neither the Department nor the Agency violated any statute, regulation, collective bargaining agreement or published policy by reducing OCP payments in order to avoid a violation of the Anti-Deficiency Act. Several factors compel this conclusion.

First, there is no doubt that Congress vested with the Secretary of State the discretion to utilize appropriated funds for purposes of disbursing OCP. Congress created OCP in 2009, when it enacted P.L. 111-32. That law covers financial issues regarding a multitude of federal agencies, but Section 1113 of P.L. 111-32 expressly deals with the creation of OCP for Foreign Service Officers posted overseas. Section 1113 provides:

- (a) Subject to such regulations prescribed by the Secretary of State, including with respect to phase-in schedule and treatment as basic pay, and notwithstanding any other provision of law, funds appropriated for this fiscal year in this or any other Act may be used to pay an eligible member of the Foreign Service as defined in subsection (b) of this section a locality-based comparability payment (stated as a percentage) that would be payable to such member under section 5304 of title 5, United States Code if such member's official duty station were in the District of Columbia.
- (b) A member of the Service shall be eligible for a payment under this section only if the member is designated class 1 or below for purposes of section 403 of the Foreign Service Act of 1980 (22 U.S.C. 3963) and the member's official duty station is not in the continental United States or in a non-foreign area, as defined in section 591.205 of title 5, Code of Federal Regulations.
- (c) The amount of any locality-based comparability payment that is paid to a member of the Foreign Service under this section shall be subject to any limitations on pay applicable to locality based comparability payments under section 5304 of title 5, United States Code.²⁹

²⁹ Emphasis added. As USAID noted on page two of its Position, the terms of this legislation are that OCP is not permanent, but is subject to Congressional action to retain it each fiscal year.

The mere fact that Congress authorized discretion to grant OCP does not mean that the Secretary or USAID is required to disburse any OCP at all. The sole limitation on the Secretary's and USAID's discretion in the original enactment of OCP for the Foreign Service was that such disbursements had to comply with the limitations placed on locality pay for the Civil Service. The 2014 appropriation act added the explicit limitation that the percentage disbursed as OCP could not exceed 16.14 percent.

Second, having combed all of grievants' filings, we find that their entire challenge to how the Department and the Agency exercised their discretion is based upon a novel theory of their own, *i.e.*, an accusation that both the Department and the Agency should have used an "equitable" formula authored solely by grievants and their counsel.³⁰

Notwithstanding the grievants' formulation, however, we do not find that the agencies' implementation of the OCP for purposes of avoiding a violation of the Anti-Deficiency Act is an abuse of discretion. The Board accords the Department and the Agency the same deference that it granted to the IG previously in another OCP-related appeal. There, the Board declined to tamper with the IG's decision not to initiate OCP until several pay periods after the Secretary of State had done so, earlier in 2009. In denying the appeal of a USAID criminal investigator posted abroad, we stated, "The exercise of discretion to implement CP [comparability pay] by the USAID OIG is not subject to being second-guessed by this Board." FSGB Case No. 2010-022 (September 2, 2011) at page 11.³¹ Likewise, we will not second-guess the discretion of the Secretary and USAID to determine how to reduce OCP in order to avoid a violation of the Anti-

³⁰We agree with the Department and the Agency that the reductions for PP18 were not a "recovery" process or "collections" process for monies that had been "overpaid" or disbursed erroneously. Those terms are misnomers.

³¹ We noted therein the statutory and regulatory bases for the discretionary power of the IG over pay and staffing issues of Foreign Service Officers within USAID.

Deficiency Act. The Board would reject an exercise of discretion that represented an abuse, a situation not found in the instant grievances.

The mere fact that Congress authorized discretion to grant OCP does not mean that the Secretary or USAID is required to disburse any OCP at all. The sole limitation on the Secretary's and USAID's discretion in the original enactment of OCP for the Foreign Service was that such disbursements had to comply with the limitations placed on locality pay for the Civil Service.³² The 2014 appropriation act added the explicit limitation that the percentage disbursed as OCP for the fiscal year could not exceed 16.14 percent. The Department and USAID interpret these limitations as mandating a fixed percentage during each pay period, *i.e.*, the pay period during which it adjusted OCP to avoid an Anti-Deficiency Act violation. The grievants' alternative formula would have the agencies make individual adjustments that resulted in each employee receiving OCP at the rate of 16.14 percent for the fiscal year, while taking into consideration the amount of time each employee was overseas, as is the usual formula for OCP.

To be clear, we do not read the legislation as requiring the rigid application of a single percentage formula for each employee in each pay period, as the agencies argue. Rather, in our view, the legislation speaks in terms of percentage limitations covering the whole year. Thus, we do not find the agencies' argument on this issue to be reasonable. Nonetheless, we still conclude that neither agency abused its discretion. Realistically, the gravamen of both cases is how they chose to forestall a violation of the Anti-Deficiency Act, where time was of the essence.

The agencies acted reasonably by trying to achieve a legislative fix that would have benefitted all the employees by not reducing the percentage of OCP they received. When that did not work out, and when it was just over a month before the end of the fiscal year, it was

³² “The amount of the comparability payment payable within any particular locality during a calendar year – (A) shall be stated as a percentage, which shall be uniformly applicable to the General Schedule positions within the locality.” 5 U.S.C. §5304(c) (1) (emphasis added.).

reasonable to reduce the OCP of each employee by the same percentage in a single pay period, to avoid Anti-Deficiency violations. At this point in time, the Department and the Agency apparently had concluded that they were unable to use an ordinary collections process to bill 11,000 and 1400 employees, respectively, for overpayments, to satisfy any applicable due process rights attendant to such, and to capture the thousands of overpayments – all before September 30. The solution that the Department and the Agency utilized is not prohibited by the legislation, nor was it abuse of discretion under these unique circumstances. Other issues in these appeals are secondary to this.

We are well aware of the dismay of officers who received a one-time, sudden reduction in OCP. With more time to plot a strategy, it may have been possible for the Secretary and USAID to devise a more gradual or arithmetically elegant way to reduce OCP, but potential choices of that nature are not the business of the Board.

Equal Pay for Equal Work. The grievants also argue that applying a single percentage of OCP to all employees in a single pay period violates the concept of “equal pay for equal work,” as incorporated by the merit principles referenced in the Foreign Service Act of 1980. Essentially, the grievants argue that by applying a single OCP rate reduction to all employees in the one pay period, regardless of the amount of time each employee had spent overseas during the years, some employees received a larger benefit than others at the same grade and step. An employee who had been overseas a longer period of time would receive a higher effective rate of OCP for the period he/she was overseas during the year than an employee who had been overseas a shorter period of time.³³ The Board finds that argument to be legally unsupportable, based on abundant decisional law.

³³ For example, an FS-04/6 overseas since PP1 would receive OCP at the rate of 16.52 percent for the first 17 pay periods, 9.1 percent for pay period 18, and 16.14 percent for the pay periods thereafter. An FS-04/6 overseas only

Using the broad concept of “equal pay for equal work” as a platform for overturning the use of the single percentage would be legally unsupportable for several distinct reasons.

Federal courts have ruled that the generalized references to “merit principles” found in the Civil Service Reform Act cannot be invoked as a discrete basis for challenging a federal worker’s pay or job classification. Federal courts have ruled in a wide array of cases that employees can obtain relief from inadequate or inappropriate pay only by exhausting a grievance process under a specific statute; one that mandates a litigation process to match the particular type of claim. They cannot rest their lawsuits merely upon the generic language in 5 U.S.C. § 2301 (“equal pay for work of equal value”). For the sake of brevity, we will not repeat all of the case law on this subject. However, one particular appellate decision is a representative precedent: *Hinkel v. England*, 349 F.3d 162 (3rd Cir. 2003).

In *Hinkel*, the United States Court of Appeals for the Third Circuit affirmed the grant of summary judgment in favor of the Navy, where employees sought a writ of mandamus to compel the Secretary of the Navy to classify them at a certain level. Like grievants herein, those employees questioned whether they were receiving “equal pay for work of equal value.” The Third Circuit recognized that the exclusive legal process for challenging job classifications and seeking remedies for such is the Classification Act, 5 U.S.C. § 5101 *et seq.*

The Court in *Hinkel* wrote that a “prohibited personnel action” occurs where “the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.” *Id.* at 165 (quoting 5 U.S.C. §2302(b) (11) (emphasis added). The gist of the ruling in *Hinkel* is that the Classification Act is the actual legal premise for obtaining relief – not the merit principles

since PP18 would receive 9/1 percent for that pay period, and 16.14 percent thereafter, resulting in a lower effective rate of OCP for the time overseas in the same grade/step.

language of the Civil Service Reform Act by itself. The employees in *Hinkel* had not yet initiated any grievance with the Office of Special Counsel based upon the Classification Act, and their failure to do so foreclosed their civil action.³⁴

We are constrained to note that in one of our own decisions (independently in sync with *Hinkel*), FSGB Case No. 1997-090 (May 16, 2001), we concluded that the Civil Service Reform Act applies solely to GS employees. We found that “the equal pay levels for work referred to in this statute refers to equal levels between GS employees and non-federal employees. It does not apply to pay equality between GS and FS personnel.” *Id.* at 64 (emphasis added). Ergo, for this additional, bedrock reason, references in the Civil Service Reform Act to “equal pay” concepts certainly do not apply to pay comparisons between and among Foreign Service Officers.

Although 3 FAM 2633 (pg. 9, *infra.*) incorporates the general concept of equal pay for equal work in the Foreign Service context, it, too, lacks the specificity to overcome the court’s ruling in *Hinkel* and provide a basis for relief.

Due Process and the Demand for Remedial Relief. Grievants’ sweeping claim of a “due process” violation refers to the Due Process Clause in Section One of the Fourteenth Amendment to the Constitution, which forbids any state from depriving anyone of “life, liberty, or property, without due process of law” Consistent with the Constitution, federal case law has confirmed that due process rights in employment disputes only arise where there is a property right to be vindicated. Even assuming that we found some basis for criticizing the reductions in PP18, the Board has no authority to “fashion” any remedial relief because there is no property

³⁴ The decision in *Hinkel* was preceded by a similar ruling from the United States Court of Appeals for the District of Columbia Circuit, a federal appellate court with a rich history of interpreting federal personnel issues. That Court held that the general “merit principles” articulated in the Civil Service Reform Act cannot serve as the sole basis for a “legal action.” *Dept. of Treasury v. Fed. Labor Relations Auth.*, 267 U.S. App. D.C. 160, 164, 837 F.2d 1163, 1167 (1988).

right to OCP. Longstanding federal case law makes this clear. The Supreme Court has emphasized:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

The Supreme Court has stated that “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005) (emphasis added). In the present appeals, it is clear that neither agency is required to pay OCP at all. Thus, where there is no property interest or entitlement in OCP, the idioms of due process are misplaced. In any event, the real crux of these appeals is not an attempt to vindicate a property right. Rather, the heart of this case is a dispute concerning abuse of discretion.

V. DECISION

The Board finds that the Department and USAID were well within their discretionary authority to impose a uniform 9.1 percentage reduction in OCP during a single pay period in order to avoid violation of the Anti-Deficiency Act; that there was no violation of the merits principles of the Foreign Service Act; and that the remedial action selected did not violate due process.

Both appeals are denied in their entirety.

For the Foreign Service Grievance Board:



Cheryl M. Long
Presiding Member



J. Robert Manzanares
Member