

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[REDACTED]
Grievant

Record of Proceedings
FSGB Case No. 2015-018

And

March 16, 2016

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

**Mary H. Witt
Jeanne L. Schulz**

Special Assistant

Joseph J, Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Elizabeth Whitaker, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to carry her burden to prove that she was improperly curtailed from her one-year temporary duty assignment in ██████████, on January 27, 2013.

OVERVIEW

In August 2012, grievant, an FS-02 Economic Officer, arrived at the ██████████ in ██████████, to serve one year on temporary duty (TDY) as the Cultural Affairs Officer. Within a few days of arrival, she requested a second year on this TDY assignment, to which the Consul General (CG) and others tentatively agreed. She received a “handshake” from the Near Eastern Affairs (NEA) Bureau. In mid-September, while grievant was on TDY at the ██████████, protests erupted in ██████████ over a video that was viewed by ██████████ as anti-Muslim. Grievant was asked to remain in place until the situation calmed down. It did not, and later that day (September 20), orders were issued for all non-essential personnel in ██████████ and ██████████ to evacuate to ██████████ on the morning of September 21. Grievant repeatedly pleaded with the CG to be allowed to remain in ██████████ though she was not an “essential” employee. The CG eventually stopped taking calls or responding to messages from grievant.

Once in ██████████ grievant continued her campaign to return to ██████████ via ██████████ or to leave ██████████ early for additional TDY at the embassy, both of which were denied. About two weeks after returning to ██████████ the CG informed her that the “handshake” was to be withdrawn due to doubts that grievant could be trusted to evacuate quickly if the need arose in the future. When grievant returned from R&R leave on January 22, 2013, the CG informed her of the decision to curtail her from post for, *inter alia*, the same reason she had been denied a second year in ██████████. Grievant argues that the decision was based on erroneous assumptions that in a future evacuation she could not be trusted to leave on a “moment’s notice.” She was given the choice of involuntary curtailment or “no fault” voluntary curtailment. She opted for the latter.

Grievant argues that she was “constructively involuntarily curtailed” because the Department did not adhere to the conditions of an ALDAC cable¹ outlining the procedures for involuntary curtailment, and there was no reason to curtail her. She recited damage to her professional reputation, and emotional and financial repercussions.

The Board determined that the claim of constructive involuntary curtailment was without merit, that grievant was curtailed under SOP A-6, a no-fault curtailment offered to employees who do not adjust well to high danger posts. The grievance appeal was denied.

¹ 12 State 046266

DECISION

I. THE GRIEVANCE

Grievant is appealing the agency's denial of her grievance that she was constructively involuntarily curtailed from her one-year temporary duty assignment (TDY) in [REDACTED].

II. BACKGROUND

Grievant, an FS-02 Economic Officer, arrived at the [REDACTED] in [REDACTED] [REDACTED] on August 8, 2012, to serve as the Cultural Affairs Officer. Five days later she requested an extension of her tour for another year. The Consul General (CG) supported her request at that time, thinking continuity on the job would be beneficial to post. She was offered a "handshake" for a second year assignment on August 17, 2012.

In mid-September grievant flew to [REDACTED] for consultations at the embassy and to meet those serving in the Public Affairs Section. At that time, protests began in [REDACTED] and elsewhere in [REDACTED] over a video perceived to be anti-Muslim. After a series of communications between grievant and the CG, the nature of which is disputed by the parties, on September 21 grievant and colleagues from both [REDACTED] and [REDACTED] were evacuated to [REDACTED]. The evacuees from the [REDACTED] returned to [REDACTED] on October 1. In a meeting with the CG about two weeks later, grievant was informed that the "handshake" was being withdrawn and she would not be granted a second year in Lahore.

After grievant returned to post from R&R leave on January 22, 2013, the CG informed her that the Ambassador had agreed with her recommendation that grievant be curtailed. The stated reason was "due to what happened during the evacuation" and that

she wasn't sure that she could trust grievant to evacuate quickly if told to do so in the future. Grievant was given the option of involuntary curtailment or voluntary curtailment. She chose the latter and departed post on January 27, 2013.

On January 23, 2015, she filed a grievance with the agency asserting that she had been improperly curtailed from [REDACTED]. She claims that she was constructively involuntarily curtailed, and that the Department did not follow the requirements for an involuntary curtailment.

For relief she requested:

1. Reimbursement for Loss of Pay and Benefits for the time [she] should have served in [REDACTED]
2. Reinstatement of eligibility for a Future Linked assignment and assistance from HR with finding a linked assignment for the summer of 2016 or 2017 bidding cycle.
3. Reinstatement of lost Home Leave and the Right to use it.
4. Reimbursement for unnecessary housing costs in the Washington, DC, area.
5. Waiver of fees related to temporary evacuation in [REDACTED]
6. Onward assignment in [REDACTED] for the Summer of 2016 or 2017 bidding cycle.
7. All other appropriate relief.

The Department denied the grievance, and she appealed to this Board on May 28, 2015.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant asserts that although superficially she was given, and took, the option to curtail voluntarily, in fact she had no choice. The curtailment was therefore a constructive involuntary curtailment, which did not conform to the Department's policy on involuntary curtailments as stated in 12 STATE 46266. That cable addressed

involuntary curtailment in “exceptional cases of serious misconduct, criminal activity or actions that have serious security implications,” none of which applied to her. There was no valid reason to force her curtailment. She further asserts that she suffered emotionally and financially from the curtailment.

Grievant argues that the conditions for constructive involuntary curtailment include: 1) the agency imposing the terms of the employee’s decision; 2) there is no realistic alternative; and 3) the employee’s curtailment resulted from wrongful acts by the agency.² On her first day back at work after R&R the CG informed grievant that she was to be curtailed, thereby meeting the first condition of the referenced cable. She accuses the CG of searching for reasons to curtail her and providing her only one day to decide between voluntary “for family reasons” or involuntary curtailment. She argues she had no realistic alternative, that the Department improperly forced her curtailment based on the CG’s unfounded supposition that in the event of another evacuation, she could not be trusted to leave at a “moment’s notice.” Thus, her curtailment constituted punishment for some future possible action or inaction and was an abuse of power. The CG also mentioned that she had heard from another employee that grievant was “afraid to be in her [REDACTED] housing and that she believed [grievant] was too stressed to be in [REDACTED] and that there had been an incident of concern in which she had overreacted to a heat lamp shining in her face at a restaurant. She denied being afraid or that her request to lower the heat lamp were valid reasons for curtailment.

Grievant maintains that the CG misunderstood her in telephone conversations regarding evacuation to [REDACTED] leading to her “erroneous beliefs” about how grievant

² Citing FSGB Case No. 2006-056 (August 28, 2007), which in turn cited *Staats v. USPS*, 99 F.3d 1120, 1124 (Fed. Cir. 1996).

might react in any similar situation in the future. She had only asked to be allowed to stay in [REDACTED] to continue working at the embassy, as had other personnel, but she was the only one to suffer negative repercussions.³

Grievant claims that when she returned to [REDACTED] from [REDACTED] her supervisor, the Public Affairs Officer (PAO), began micromanaging her work, which she believes was at the behest of the CG, who was “setting the stage” for her curtailment. She cites as an example that the supervisor required her to arrive at work on the first shuttle each morning, a requirement not imposed on anyone else in her section and not in accord with instructions to vary times of arrival for security reasons. The locally employed staff (LES) reporting to her noted that the PAO was holding her to a higher standard than the other two Americans in the section, and in addition the PAO reacted hostilely toward an LES who had requested that the PAO speak to “someone higher up” about the higher standard. Grievant spoke to an EEO counselor several times in November-December 2012 about her belief she was facing a hostile work environment and fears that she would be “kicked out of post.”

Just before leaving post on R&R, grievant met with the CG in late December 2012, seeking advice on the above issues. She states that the CG told her “she was glad that I had come to her and gotten this off my chest.” But, upon return from R&R, on January 22, 2013, the CG informed her of the curtailment decision. The reason struck her as an “odd and subjective rationale . . . especially [for] an employee who was working

³ It is not entirely clear whether others who asked to remain at the embassy were assigned there or on TDY. What is clear is that only personnel who were deemed “essential” would be allowed to remain in [REDACTED] and to gain entry to the embassy. No Cultural Affairs officers, whether on TDY or assigned at the embassy, were deemed essential. The embassy was closed.

hard, performing well, loving their work, excelling in their job, and who was working harmoniously and collegially with all her colleagues in both [REDACTED] and [REDACTED]

Given the choice of voluntary curtailment for “family reasons” or involuntary curtailment, grievant reluctantly chose voluntary curtailment, thinking it would look better on her record, but stresses that there was no real choice when faced with being “expelled from post.” She was humiliated and claims that once back in the Department she was treated as a pariah because the CG had told the SCA Bureau that she had recommended curtailment, thereby damaging grievant’s reputation with key officials.

Grievant claims in her rebuttal submission⁴ that the curtailment continues to harm her “corridor reputation” throughout the Department. She had no assignment for the summer of 2015, despite good 360 degree references.⁵ She applied for positions in SCA on the [REDACTED] and [REDACTED] desk and the [REDACTED] and [REDACTED], but was not selected. Grievant was the only bidder for the [REDACTED] but was not selected. The Council chose instead to temporarily hire a civil service employee for that Foreign Service position. She also bid on domestic and overseas positions in EB, ECA, OES, EUR, and INL bureaus to no avail.

B. THE DEPARTMENT

The Department’s position is primarily a recitation of events as they occurred from the perspective of officers and employees in [REDACTED] in September 2012. The CG initially advised grievant to remain in [REDACTED] on September 18, but changed her mind on September 20, after learning from the [REDACTED] Acting Public Affairs Officer (PAO), who also was on temporary duty (TDY) in [REDACTED] that grievant appeared stressed and

⁴ October 14, 2015

⁵ Presumably assessments of abilities by fellow officers.

said she wanted to go to [REDACTED] with the other evacuees. The CG called grievant, who now said she preferred to remain in [REDACTED] in order to recover from a migraine and to go out in the city with newly made friends.

That same day the Acting PAO reported from [REDACTED] that anti-U.S. protests were growing in that city, as well, and that several thousand protestors were said to be moving toward the embassy. The Department, through the Regional Security Officer (RSO), ordered all non-essential personnel present at the embassy to depart from the embassy compound in armored vehicles and go to their assigned housing outside the compound. As reported by colleagues, grievant at that time appeared to be very stressed. She told the PAO that she didn't feel safe at the thought of staying in her assigned Ipod within the embassy compound when others were being told to leave; she was therefore invited to join some of her colleagues at their home. However, in the course of trying to do so, in a confused manner, with luggage in hand, grievant ran in a different direction from the armored vehicles.

In light of the protests, the Department then ordered the evacuation of all non-essential American employees in [REDACTED] and [REDACTED] to [REDACTED]. With the approval of the DCM, the CG called grievant again to inform her that the decision had been made for her to evacuate with the others to [REDACTED]. Grievant argued and pleaded to remain in [REDACTED]. She called, emailed and texted the CG so many times that day that at some point the CG stopped taking her calls, as she was occupied with evacuation arrangements and liaising with local officials. Once last-minute arrangements were made to ensure that grievant could evacuate with the others on September 21, she agreed to depart. At dinner that night on the embassy compound, grievant stated that she was relieved at being

evacuated, but also repeated several times that “we could lose our jobs and not be allowed to return to [REDACTED]

At approximately 3:30 a.m. on the morning of September 21, grievant and the other evacuees were taken to the airport and flown to [REDACTED]. During the nine-day evacuation, she repeatedly told others she was worried that they could lose their jobs and not be allowed to return to [REDACTED]. Her scheduled return to [REDACTED] raised additional issues. Two days after her arrival in [REDACTED] grievant messaged the Acting Management Officer in [REDACTED] asking if it were possible to be “routed through” [REDACTED] on her return to [REDACTED]. She was instructed to return to [REDACTED] with her colleagues. She replied, apologizing if her request was considered inappropriate, and stated, “I do understand the need to keep everyone together.” But, the next day she asked to leave [REDACTED] earlier than her colleagues in order to do a short TDY in [REDACTED]. “I truly believe I can be of greater benefit to the Mission as a whole supporting [PAO] [REDACTED] from the Embassy this week rather than from [REDACTED]. The CG instructed grievant to remain with her colleagues in [REDACTED].

The Department asserts that the above accounts show that this was not just a “misunderstanding” as grievant claims. She repeatedly disagreed with and second-guessed decisions made by the CG in concert with the DCM and the Department. In a post-grievance statement, the CG stated:⁶

[Grievant’s] actions in focusing only on herself despite the events occurring around her, her inability to grasp the situation in either [REDACTED] or [REDACTED] and her inability to take direction reinforced our decision that removing her from [REDACTED] was the correct course of action. We were concerned that if the situation deteriorated further we didn’t have the confidence that she would follow directions, possibly endangering herself and others.

⁶ February 16, 2015, statement in response to grievant’s January 15, 2015, grievance.

Grievant took other actions that raised concerns: at some point, grievant texted another consulate employee at 3 a.m. saying she felt unsafe in her house and asked if she could go to that employee's house; and she accepted rides in non-secured vehicles in violation of post policy, for which she was counseled by the RSO. She was counseled repeatedly for not informing her supervisor when she was arriving at work late or leaving early, which raised security concerns. Consulate officials acknowledged that none of these actions alone would necessarily have caused enough concern to merit curtailment, but cumulatively they indicated a level of stress that made it preferable for grievant not to remain in this very high threat post at that time. Another officer stated that the general feeling at post was that every day grievant was present, "she presented a security risk to herself and [others] in this very dangerous post."

The Department asserts that grievant was not involuntarily curtailed. She curtailed under Standard Operating Procedure (SOP) A-6, which provides: "For employees who choose to end their assignments in a [REDACTED] a no-fault curtailment will be applied. This option was created for [REDACTED] employees experiencing difficulties at 'extraordinarily challenging posts.'" Those not finishing a [REDACTED] tour would not be penalized. Grievant chose to follow this route for "family reasons" rather than be involuntarily curtailed.

The Department also disagrees with grievant's assertion that her curtailment met the criteria set forth in the *Staats* decision for a constructive involuntary curtailment (while acknowledging that *Staats* on its face applied to resignations and retirements, not curtailments). In its decision, the Department set forth the criteria established in *Staats*:

In order to overcome the presumption of voluntariness and demonstrate that a resignation or retirement was involuntary, the employee must satisfy a demanding legal standard. The two principal grounds on which employees have sought to show that their resignations or retirements were involuntary are: (1) that the resignation or retirement was the product of misinformation or deception by the agency . . . ; and (2) that the resignation or retirement was the product of coercion by the agency. . . . In order to establish involuntariness on the basis of coercion, an employee must show that the agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and that the employee's resignation or retirement was the result of improper acts by the agency. . . . *Staats v. USPS*, 99 F.3d 1120, 1124 (Fed. Cir. 1996).

The Department notes that grievant did not rely on the first element, misinformation, but rather the second, coercion. It argues that the Department did not impose the terms of curtailment, but rather gave grievant the choice between voluntary and involuntary curtailment; that she freely chose between those options; and that there was nothing improper in the Department offering grievant that choice, since the option of no-fault curtailment had been developed specifically for the circumstances grievant was encountering, i.e., difficulty adjusting to a high threat posting.

The Department also argues that grievant has offered no proof of her claim that the curtailment negatively affected her corridor reputation and competitiveness in securing assignments. Once back in Washington grievant was immediately assigned to [REDACTED] overcomplement and then in that same month assigned to [REDACTED].⁷ She is currently assigned to the [REDACTED] in the [REDACTED] [REDACTED]. She received two positive Employee Evaluation Reports (EERs) while in [REDACTED] in 2014 and 2015, and was recommended for promotion by her rater and reviewer in her April 2015 EER. She also received a Meritorious Honor Award from [REDACTED] in July 2015, and an individual and group honor award in May 2015 for impressive work while

⁷ Not further defined.

serving TDY on the [REDACTED] desk during the spring of 2014. While she did experience a delay in securing a permanent assignment after her tour in [REDACTED], other officers at that time in her grade also experienced delays. The Department concludes that grievant has demonstrated no harm in this regard.

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary action, the grievant has the burden of establishing by a preponderance of the evidence that the grievance is meritorious.⁸ For the reasons that follow, we find that grievant has failed to carry that burden.

Grievant claims that although she accepted the option to curtail voluntarily, in fact, she had no real choice, and was therefore constructively involuntarily curtailed. She claims that her curtailment met the tests set forth in the *Staats* decision for coercion. As such, she claims that it needed to conform to the requirements of the Department's 2012 ALDAC, providing that involuntary curtailment was applicable to "exceptionally serious cases of misconduct, criminal activity, or actions having serious security implications," none of which applied to her.

The Department has accepted the application of the *Staats* test to the circumstances of this case, even though *Staats* applied to resignations and retirements, not curtailment. For the purposes of this discussion, we will accept the Department's application of *Staats*, without ourselves deciding definitively if allegations of constructive involuntary resignation and constructive involuntary curtailment should be treated as equivalent.

⁸ 22 CFR Sec. 905.1(a)

The *Staats* principal on which grievant has relied is that the curtailment in this case was the product of coercion by the agency. The *Staats* decision elaborated on this further, stating:

In order to establish involuntariness on the basis of coercion, an employee must show that the agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and that the employee's resignation or retirement was the result of improper acts by the agency. . . .

The doctrine of coercive voluntariness is a narrow one. . . . As this court has explained, the fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make the employee's decision any less voluntary." *Staats v. USPS*, 99 F.3d 1120, 1124 (Fed. Cir. 1996)

It is clear to this Board that grievant elected to curtail under a no-fault, voluntary curtailment under SOP A-6 rather than be subjected to involuntary curtailment. The Department did not coerce her decision or impose the terms of her curtailment. The fact that she reluctantly chose the no-fault option, which she believed would have less of a stigma, over involuntary curtailment, in no way diminished her freedom of choice. The Department was fully prepared to implement involuntary curtailment, and to follow the requirements entailed by that option, had grievant not elected to curtail under SOP A-6.

Nor do we find any improper acts by the Department, cited by the *Staats* decision as an indicator of coercion. Shortly after grievant's arrival in [REDACTED] she experienced rapidly changing and potentially dangerous conditions to which she did not respond well. While the issues recited in the ROP do not reflect a calendar progression of events, the Board has discerned a pattern of resistance in grievant's ability to take direction from those in higher authority while in a stressful environment. Within weeks of arrival in [REDACTED] she repeatedly resisted clear instructions from the CG to evacuate with other

employees in [REDACTED] to [REDACTED]. The [REDACTED] officials assessed the situation as a whole, including grievant's apparent stress when she returned to [REDACTED] within the context of a highly dangerous and unpredictable situation at post, and determined that it was in both grievant's interest and that of the Consulate for grievant not to remain at post. It gave her the choice between the two options that could be applied in these circumstances.

Because we have found the grievance appeal is without merit, it is unnecessary to address grievant's allegations of harm and her various relief requests for alleged financial and emotional hardship, such as reinstatement of home leave, reimbursement of housing costs in the D.C. area, and onward assignment to [REDACTED].

V. DECISION

The grievance appeal is denied.

For the Foreign Service Grievance Board:

[REDACTED]

John M. Vittone
Presiding Member

[REDACTED]

Jeanne L. Schulz
Member

[REDACTED]

Mary A. Witt
Member