BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

and

United States Agency for International Development

Record of Proceedings
FSGB No. 2015-031

December 28, 2015

ORDER: Request for Hearing and Motion to Dismiss

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	William Persina
Board Members:	William Nance Mary Witt
Special Assistant	Joseph J. Pastic
Representative for the Charged Employee:	Daniel S. Crowley Associate Hannon Law Group
Representative for the Office of the Inspector General:	Lisa Goldfluss Legal Counsel to the Inspector General
Employee Exclusive Representative:	American Foreign Service Association

ORDER: Request for Hearing and Motion to Dismiss

I. The Issue

The case is before the Board at this time based on grievant's request for a hearing on the merits of his appeal; and the motion of the United States Agency for International Development ("AID" or "the Agency") to dismiss grievant's appeal based on its alleged untimeliness and for the Board's alleged lack of jurisdiction in the matter. For the reasons that follow, the Board denies grievant's request for a hearing without prejudice to his renewing the request after any discovery in the case is completed. The Board also denies in part and grants in part AID's motion to dismiss the appeal on timeliness and jurisdictional grounds.

II. Background

Grievant joined the Agency in 2004. His first assignment was in [redacted] as Deputy Regional Controller. In 2007, his superiors encouraged grievant to accept a reassignment in [redacted] Grievant declined this assignment. His superiors then proposed him for an assignment in the [redacted]. However, at about this time grievant bid on and received a posting to [redacted]

Around the time of grievant's assuming his post in [redacted] one of grievant's supervisors submitted a complaint to the Office of Inspector General (OIG), claiming that grievant had submitted fraudulent vouchers for reimbursement. Grievant claimed that this referral to OIG was in retaliation for his having opposed his supervisors' efforts to reassign him. Grievant was cleared of any wrong doing.

In 2009 one of grievant's supervisors initiated another complaint with OIG, arising from a different set of facts, concerning an allegation of grievant's having submitted another false expense voucher. This OIG complaint again did not result in action being taken against grievant.

However, grievant's supervisor proposed to remove grievant from his position based on the second false voucher allegations, and that proposal was sustained. Grievant appealed this disciplinary matter to this Board.

Prior to a Board decision on the Agency's disciplinary action, grievant and the Agency entered into a settlement agreement in December 2010. Among other things, the agreement stated that grievant would be returned to pay status as a Foreign Service (FS) officer at the Agency and assigned to an over-compliment position in Washington; that grievant would be "interviewed and approved for a position in the Contract Specialist backstop by a (assignment) panel"; that he would be interviewed to determine whether his requested acceptance to this backstop is approved; and that if it was approved, he would be appointed to a position in the Agency's Office of Acquisition and Assistance (OAA), or receive training for an OAA position. If his request for a Contract Specialist position was not approved, grievant was to be trained for an Executive Officer position. Also as part of the agreement, grievant agreed to accept a letter of reprimand. The agreement further specified that the parties waived all claims for relief against each other "arising out of [grievant's] work on behalf of the Agency up to and including the Agreement Date."

Grievant was approved for the OAA backstop and was appointed to OAA positions. Starting in 2013, while still designated in the OAA backstop, grievant applied for Controller positions in various overseas posts. He was not, however, selected for any of these positions. Grievant filed the subject grievance with the Agency in April 2015, alleging that in not selecting him for these positions the Agency failed to apply merit principles; retaliated against him for having grieved his prior disciplinary action; discriminated against him based on race; violated

the 2010 settlement agreement; and improperly subjected him to employment double jeopardy. The Agency denied the grievance, and grievant then filed his appeal with the Board.

III. Discussion

A. Grievant's Hearing Request

Grievant requests a hearing based on his contention that credibility determinations will be required in order for him to receive a full hearing on his claims. Thus, he asserts, without providing specific examples, the Board will need to observe witness demeanor in order to resolve expected conflicts in witness testimony.

We are authorized under 22 CFR § 906.2(b) to conduct a hearing if, in our judgment, the matter can best be resolved thereby. We believe it is premature at this time to grant grievant's request. In this connection, we conclude that the parties should first engage in discovery. If grievant continues to believe after discovery is completed that a hearing is still necessary, then he may renew his hearing request. Thus, without suggesting how the Board will rule on any renewed motion, his request is denied without prejudice to its renewal when discovery is completed.

B. Agency's Motion to Dismiss

The Agency advances two grounds for dismissal of the appeal. First, it argues that the grievance was untimely filed. Second, it argues that the Board is without jurisdiction because the grievance concerns challenges to grievant's assignments, a matter that is removed from the Board's jurisdiction under 22 U.S.C. § 4131(b)(1) unless the assignment is alleged to be contrary to law or regulation. We note in this connection that the grievant bears the burden of establishing the Board's jurisdiction. 22 CFR § 905.1(a).

The Agency argues that the grievance is time barred because it is articulating an argument "along the same lines of (alleged) prior Agency Misconduct, which was already addressed" in the 2010 settlement agreement. We find, however, that the grievance in this case was timely filed, and we therefore reject AID's argument on this point.

Section 1104(a) of the Foreign Service Act, as amended (FSA), 22 U.S.C. § 4134(a), provides in relevant part that a grievance must be filed with the Agency within two years "after the occurrence giving rise to the grievance." Section 1104(c) further states that in cases involving a claim of unlawful discrimination, the time limit on filing with the Agency in such circumstances is 180 days. This is further modified, however, where the alleged occurrence giving rise to the grievance occurred while the grievant was assigned to a post abroad. In that case, the 180-day period does not begin until either the date as of which the grievant is no longer assigned to such a post, or 18-months from the date of the occurrence or the last such occurrence, whichever is earlier.[1]

Applying the time limits set out in section 1104 of the Act, we note that grievant filed his grievance with the Agency in this case on April 8, 2015. His grievance concerns his non-selection for Controller positions that he submitted bids for in August 2013. Thus, his non-selection for these positions occurred within the two year period set out in the FSA.[2] Further, we agree with grievant that the Agency erroneously argues that the present grievance is "along the

[1] The Agency erroneously refers to the time limits in 22 CFR § 903.1(b), which deal with filing an appeal with the Board after the Agency has denied a grievance. That provision requires that an appeal be filed with the Board within 60 days after the Agency's denial. Grievant has clearly satisfied this requirement in this case, as his appeal to this Board was filed less than a week after the Agency denied his grievance.

[2] We find that the 180 day filing period for discrimination claims under section 1104(c) of the FSA is not applicable to grievant's claim of racial discrimination in this case. In this regard, the record contains an e-mail dated March 18, 2015 from grievant to a work colleague stating that "I am back stateside for the next few months." Thus, although the record is not entirely clear as to the locations of grievant's postings during the relevant time period, and in the absence of AID's offering any argument on this point, it appears to us that the record supports the conclusion that grievant was serving in overseas post(s) during the relevant time period. Accordingly, the 180 day time period set out in section 1104(c) does not apply.

same lines" as the previous grievance, and therefore the time to begin calculating the FSA's two year time limit should begin several years prior to 2013. As grievant points out, although his present grievance makes similar allegations as did his earlier grievance, the events that form the basis for his present grievance, i.e., his non selection for Controller positions, had not occurred when the previous grievance was settled. We therefore deny AID's motion to dismiss for lack of timeliness.

Turning now to the Agency's assertion that the appeal should be dismissed for lack of the Board's subject matter jurisdiction, we first consider the language of section 1101(b)(1) of the FSA, 22 U.S.C. § 4131(b)(1). That section states in relevant part that the term "grievance" does not include "an individual assignment of a member . . . , other than an assignment alleged to be contrary to law or regulation." There is no dispute in this case that grievant's non-selection for several positions he bid on comes within the scope of "assignments" referenced in this section. The issue is therefore whether grievant has raised claims that the Board can address on the merits because they allege that his non-selections were "contrary to law or regulation." *See, e.g.,* FSGB Case No. 2011-057 (Jan. 25, 2013).

We find that two of grievant's claims come within the scope of the Board's jurisdiction under section 1101(b)(1), specifically: (1) "continued and current retaliation against [grievant] for exercising his grievance rights" in connection with the 2010 disciplinary case; and (2) racial discrimination. A claim of retaliation for engaging in protected activity, such as filing a grievance under the procedures set out in the FSA, is actionable under section 1103(a) of the FSA, 22 U.S.C. § 4133(a). Further, personnel actions, including assignments of Foreign Service officers, cannot be influenced by, among other things, racial discrimination. 42 U.S.C. § 2000e-

16(a); 22 U.S.C. § 3905(b). Accordingly, we hold that these two claims are properly before the Board for consideration on the merits.

We do not find, however, that grievant's remaining claims are properly before the Board, and we therefore dismiss them from the case. First, grievant alleges that his non-selection for Controller positions violates merit system principles as set out in 5 U.S.C. § 2301(b)(1) and (b)(8)(A).[3] These merit system principles are generally made applicable to the FSA under 22 U.S.C. § 3905. In FSGB Case No. 2011-069 (May 3, 2012), though, the Board held that they cannot serve as a law that can form the basis for finding jurisdiction in an individual assignment case such as the present one. The Board in essence held that allowing these general merit principles to form a basis for its jurisdiction would have the effect of circumventing the specific statutory prohibition on the Board reviewing individual assignment decisions by the Foreign Service agencies. That is, a grievant dissatisfied with an assignment could always claim that it was contrary to merit principles and thus obtain Board review on the merits despite the statutory ban under the FSA on such actions. We therefore cannot use these statutory merit system principles as a basis for finding jurisdiction in this case.[4]

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[3] These provisions state in relevant part that:

> (b) Federal personnel management should be implemented consistent with the following merit system principles:
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> (1) . . . selection and advancement should be determined solely on the basis of relative ability and skills, after fair and open competition . . . .
>
> * * * * *
>
> (8) Employees should be –
> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.

[4] Grievant cites to FSGB Case No. 2010-003 (July 6, 2010) to support a finding of jurisdiction. That case is inapposite. It involved a grievance alleging that the agency was estopped from correcting an erroneous starting salary level it had communicated to the grievant. He alleged that agency personnel had the authority to deviate from the appropriate salary level. The Board found that there was no basis for finding such authority, and to hold otherwise would violate merit principles concerning fair competition.

Grievant's next claim is that the Agency's non-selection of him for Controller positions is a violation of the 2010 settlement agreement, in that the only penalty he agreed to accept in connection with the false voucher charge was a letter of reprimand. He contends that his non-selection constitutes a further penalty against him beyond what was authorized in the agreement. It is true as a general proposition that the Board has the authority to enforce a settlement agreement. *See, e.g.*, FSGB Case No. 2003-035 (March 10, 2006). However, in the particulars of the present case, we do not find that this states a claim over which the Board has jurisdiction. For one thing, the only exception to the statutory bar on the Board reviewing individual assignment decisions is if the grievance alleges that an assignment action is contrary to "law or regulation." We find no basis, and grievant offers none, to conclude that a settlement agreement fits within the rubric of "law or regulation" as stated in section 1101(b)(1) of the FSA. Moreover, as with his argument concerning merit system principles, we view this claim as merely an attempt to evade the statutory bar to the Board reviewing Agency individual assignment decisions. Moreover, not being selected for a position does not appear to us to be a "penalty" or the type of action forbidden by the settlement agreement. As a result, we dismiss this claim from the case as well.

Finally, grievant advances the claim that his non-selection constitutes "employment double jeopardy," that is, he is again being punished for the same alleged misconduct that was at issue in the settlement agreement, for which he already received a reprimand letter. This seems to us to be nothing more than a variant of the agreement breach claim just discussed, and we therefore reject it as a viable claim before the Board. In addition, we note that it does not state a case of employment double jeopardy. In *Adamek* v. *United States Postal Serv*., 13 M.S.P.R. 224 (1982), cited by grievant on this point, the MSPB stated that this double jeopardy principle bars

imposing discipline or adverse action more than once for the same conduct. In that case, the employing agency removed an employee from his position based on misconduct for which he had already been suspended. In the present case, there has been no disciplinary or adverse action imposed for the false voucher misconduct allegation, other than the reprimand letter. The Agency's non-selection of grievant for Controller positions for which he applied does not constitute an adverse or disciplinary action and the claim is therefore dismissed for failure to state a viable issue for the Board to consider.

IV. Order

Based on the foregoing, we deny grievant's request for a hearing without prejudice to its being renewed upon completion of discovery by the parties. We further deny the Agency's motion to dismiss as to grievant's retaliation and race discrimination claims; and we grant the Agency's motion to dismiss as to the merit system principles, settlement agreement breach, and employment double jeopardy claims. The Board exercises jurisdiction in this appeal under section 1101 (b)(1) of the FSA, based on grievant's remaining claims: 1) continued and current retaliation for having exercised his grievance rights, and 2) racial discrimination. Time limits for discovery are to run from the date of issuance of this order.

For the Foreign Service Grievance Board:

[redacted]

William E. Persina, Presiding

[redacted]

William B. Nance
Member

[redacted]

Mary H. Witt, Member