

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████

Grievant

And

United States Agency for International
Development, Office of Inspector General

Record of Proceedings

FSGB No. 2015-038

July 25, 2016

ORDER: Show Cause

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Jeanne L. Schulz

Mary H. Witt

Special Assistant

Andrew D. Large

Representative for the Grievant:

Michael Macomber

Representative for the Department:

Harmony Wade
USAID/HR/ELR

Employee Exclusive Representative:

American Foreign Service Association

ORDER: SHOW CAUSE

I. THE ISSUE

This order requires the grievant to show cause why this grievance appeal should not be dismissed for want of jurisdiction on or after July 31, 2016, given the representation by the United States Agency for International Development (USAID) and grievant's agreement that he has not passed the minimum mandatory language requirement and must be mandatorily separated from the Foreign Service by July 31, 2016.¹

II. BACKGROUND

Grievant, [REDACTED], joined USAID in January 2008 in a Foreign Service Limited Appointment. In 2011, he converted to a career candidate position in the rank of FP-02 with a backstop as an Executive Officer (EXO). Grievant's limited career appointment ends on July 31, 2016.

As a career candidate, grievant has served several tours overseas, including one tour in [REDACTED]. He is originally from [REDACTED] and his native language is French. He has a Bachelor's Degree in Forensic Studies, a Master's Degree in International Relations, and a Doctorate in Psychology.

In April 2013, grievant was placed on the Complement as an EXO in the Management Bureau, Office of Management Services, in the Overseas Management Division (M/MS/OMD). Grievant's immediate supervisor in this position was EXO, Penelope Thomas. On November 17, 2013, Ms. Thomas conducted a formal mid-point progress review with grievant, writing that grievant "was making excellent progress toward accomplishing all of his work objectives." (Emphasis added).

¹ USAID argued in a recent filing that the end of grievant's limited career appointment is July 30, 2016. However, in previous filings, the Board understood that the end of the appointment is July 31, 2016.

In April 2014, grievant received an Annual Evaluation Form (AEF) from his rater for the year ending March 31, 2014. In the 2013-14 AEF, grievant's rater revised her earlier mid-point review, removing the word "excellent," made numerous negative comments about grievant's performance, and prepared a very negative Skills Feedback Worksheet (SFW) in which she stated that grievant needed to improve in many skill areas, including "professional and technical skills."

By letter, dated August 19, 2014, grievant received notice from the Chief Human Capital Officer in the Office of Human Resources (CHCO/HR) that his 2013-14 AEF had been reviewed by the Foreign Service Performance Board (FSPB) that gave him a "C" rating and referred his file to an agency Tenure Board (TB) that determined that his performance did not meet the standards of his class. As a result of the decision of the TB, grievant was advised that he would soon receive notice of his separation from the Service in a letter that would follow.

Grievant then filed a "grievance action" with the agency on September 22, 2014, challenging alleged inaccuracies in the AEF and SFW, claiming that his rater was biased against him and stating that he had not been properly counseled, nor given sufficient time to improve. Two days after filing the grievance, USAID sent grievant a termination letter, dated September 24, 2014, advising that his separation date was scheduled for November 29, 2014.

USAID never issued a final written decision on the agency-level grievance. Instead, agency counsel requested that grievant agree to additional time to complete her review of the grievance. On November 28, 2014, USAID counsel sent grievant an email stating:

[Y]our termination has been temporarily rescinded pending further action. Therefore, you will not be taken off the employment rolls effective November 29, 2014.

The agency thereafter voluntarily reconstituted the 2014 FSPB and TB boards and submitted to each board a modified 2013-14 AEF with the word “excellent” restored in the mid-year review section. The reconstituted FSPB met in February 2015 and reached the same conclusion as the first FSPB – that grievant’s performance merited a “C” grade.

Grievant next received verbal notice from the Director of ELR on March 2, 2015 that “a [Performance] Board had convened and affirmed the decision to process the termination.”

Grievant responded by sending numerous requests for information, asking when the TB would meet, who would be involved in its decision-making process, and what the results were. On March 11, 2015, he filed a second grievance, challenging the anticipatory 2015 separation decision. Grievant supplemented the second grievance on May 26, 2015.

On June 17, 2015, a reconstituted TB met and reviewed grievant’s performance folder, containing the revised AEF, and affirmed the February decision of the reconstituted FSPB to recommend grievant’s separation. On August 13, 2015, the CHCO/HR issued a letter to grievant advising him of the results of the reconstituted FSPB and the subsequent meeting of the TB that again determined that he did not meet the skill standards of his class. Grievant was advised that he would soon receive a “C” rating and a newly issued termination letter.

On August 17, 2015, grievant filed the instant grievance appeal in which he sought the following relief: an order rescinding the proposed separation action, expunction of the original 2013-14 AEF, extension of his time in class, an award of an “A” rating, and attorney’s fees. In his appeal, grievant requested interim relief (IR), which USAID did not oppose through the end of his limited career appointment on July 31, 2016. In an order, dated March 1, 2016, the Board granted grievant’s request for IR, by consent, through July 31, 2016.

Despite a number of requests by the FSGB for additional information and a number of additional filings by both parties, the Board noted that there was yet no pending termination letter issued by the agency, or a termination date or final agency action that would be appealable. There was also confusion about which AEF document (the original or the revised) was reviewed by the two 2015 reconstituted boards.

The FSGB, therefore, scheduled a status conference with the parties on May 16, 2016, in order to determine whether the instant appeal was ripe; whether USAID intended to issue a termination letter; and precisely which AEF was reviewed by the reconstituted boards. During a colloquy with counsel for the parties, agency counsel advised that regardless of the propriety of the 2013-14 AEF (original or revised), the relationship between grievant and his rater, and whether grievant had been properly or timely counseled, because grievant had not passed the mandatory language requirement, for that reason alone, he would have to be separated from the Foreign Service by the end of his limited career appointment on July 31, 2016.

At the status hearing, grievant countered that he had not been given a fair opportunity to pass the language requirement. USAID counsel responded that grievant had been given every possible opportunity to pass the language (French) test, including being assigned to a French-speaking country (██████) to assist him with immersion language learning. Counsel for the agency stated that literally every option to assist grievant in preparing for the language test had been offered to him and there was no other untried option available to him.

Following the status conference, USAID issued two terminations letters. The first letter, dated May 27, 2016, stated that based on the actions of the reconstituted boards, grievant would be terminated effective no earlier than June 28, 2016. In this letter, grievant was advised that his separation would take effect “as close as possible to the date shown in the first paragraph above

... but in no case ... earlier than that date.” Grievant has not been separated to date. The second letter, dated June 29, 2016, advised grievant that because of his failure to pass the mandatory language requirement, he would be separated from the Service, effective July 30, 2016 unless he was able to receive a 3/3 score on the French language test.

Grievant subsequently filed a second amended appeal on July 18, 2016. In it, he repeats all of his previous claims and adds a challenge to the termination proposal based upon his failure to pass the language requirement. Grievant also requests an extension of IR.

Given the very short time between the filing of the second amended appeal and the end of grievant’s limited career appointment, the Board determined to act expeditiously as noted below.

III. DISCUSSION AND ANALYSIS

22 USC § 4131(b)(2) of the Foreign Service Act states:

For purposes of this chapter, the term “grievance” does not include –
... (2) the judgment of ... a tenure board established under section 306(b)

ADS chapter 450.3.5.4 provides in relevant part:

Separation of Career Candidate Employees for Failure to Meet Language Requirements or Medical or Security Clearances for Tenure

To be eligible for tenure, employees must attain a minimum Foreign Service Institute tested language proficiency level of S-3/R-3 in a USAID Category A language (French, Spanish, or Portuguese) or S-2/R-1 in any of the other languages qualifying for conversion to a Career appointment in USAID. In addition, employees must satisfactorily meet medical and security clearance requirements. Employees who fail to meet these requirements are subject to termination.

ADS chapter 414.3.2.1 also provides:

Career Candidate Appointments Effective Date: 02/07/2014

Career candidate appointments are time-limited, must not exceed five years, and may not be extended or renewed except as provided in Section 309(b)(3) of the Act and Chapter 43 of Title 38, United States Code,

which pertains to employee rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

The above provisions mandate that when a Foreign Service Officer at USAID fails to pass the mandatory language requirements – in this instance a 3/3 in French – the officer is not eligible for tenure and, therefore, must be separated from the Service at the conclusion of his limited career appointment. The provisions further state that the separation is not grievable because it is based on a decision of a tenure board. Grievant concedes that he has not, to-date, passed the French examination and that his limited career appointment ends on July 31, 2016.

IV. CONCLUSION

Given the state of the record of proceedings in this case, the FSGB orders grievant to show cause by no later than the close of business on Friday July 29, 2016 why the Board should not dismiss this grievance appeal for lack of jurisdiction based upon grievant's impending mandatory separation from the Service, on or after July 31, 2016, due to his failure to meet the language requirements prior to expiration of his limited career appointment.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



Jeanne L. Schulz
Member



Mary H. Witt
Member