

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

and

Department of State

Record of Proceeding

FSGB No. 2015-049

April 12, 2016

ORDER: Interim Relief

EXCISED

For the Foreign Service Grievance
Board:

Presiding Member:

John M. Vittone

Board Members:

Gregory D. Loose
William B. Nance

Special Assistant:

Joseph J. Pastic

Representative for the Grievant:

Pro Se

Representative for the Department:

Margaret E. McPartlin
HR/G

Employee Exclusive
Representative:

American Foreign Service
Association

ORDER: Interim Relief

I. THE ISSUE

This Order responds to grievant's motion to this Board seeking interim relief, pending consideration of his grievance appeal from mandatory separation from the agency due to expiration of time-in-class (TIC). The Department opposes Interim Relief in this case. Section 1106(8) of the Foreign Service Act, U.S.C. § 4136(8), gives the Board discretionary authority to determine whether the separation of a grievant should be suspended pending a Board decision.

II. BACKGROUND

Grievant is an FS-02 Economic Officer who has been advised that his TIC has expired and that he is to be mandatorily retired from the agency. He has recently completed a series of domestic assignments at State Department headquarters following the suspension of his security clearance during his last overseas assignment.

In 2009 grievant was in his third year of service as Information Officer at the U.S. Embassy in a South American country when his security clearance was suspended and he was reassigned to the U.S. Since then, grievant has been assigned to General Service (GS) positions in the Bureau of Administration, Office of Directives Management (A/GIS/DIR); and most recently completed a six-month Y-Tour¹ in the Bureau of Economic and Business Affairs. Grievant was low-ranked by the 2014 Selection Board that reviewed his EER, and he was issued a Low Ranking Statement. Since he failed to be promoted to FS-01 during the 2015 review cycle, grievant's TIC has expired, and he has been informed that he is subject to mandatory separation from the agency.

¹ The Short Tour (Y-Tour) Program is available to assist with domestic assignments for Foreign Service personnel for periods of 4-12 months.

III. POSITIONS OF THE PARTIES

A. GRIEVANT

Grievant requests interim relief (IR) pending resolution of his grievance appeal. He states that the Board should consider the following factors in determining whether to grant IR: the harm to grievant if IR is denied; ;whether grievant sought IR at the “eleventh hour” to maximize his time on the agency’s rolls; and whether the substance of his appeal is manifestly without merit.

Regarding harm, grievant contends that: denial of IR will cause significant harm to his career; deny him due process (he claims he has been in limbo since 2009 when his security clearance was suspended, and he has had no opportunity to restore his clearance); and, if separated – even should he prevail later –render it nearly impossible for him to re-establish his standing within the agency, and even more difficult to obtain “meaningful employment” after having left the Department.

Grievant argues that the record shows he did not file his appeal at the last minute. He filed as soon as it was clear that he was not recommended for promotion by the 2015 Selection Boards and that his TIC would expire. One of his requested remedies on the merits is that his TIC be extended by an additional two years.

Finally, grievant contends that his grievance appeal has merit. Specifically, on the merits he argues that the Department failed to address his claim that it was negligent in not assigning him to suitable positions during the last several years in which he could demonstrate his competitiveness with his peers in the Economic cone. He contends further that both his 2013 and 2014 EERs were procedurally flawed and led to the 2014 Selection Board’s decision to low rank him, and that the Selection Board violated its own Procedural Precepts in reaching its decision to

low rank him. All these claims are meritorious, argues grievant, and he should be granted interim relief from separation while the Board considers his appeal.

B. THE DEPARTMENT

The Department contends that grievant's Time-in-Class has expired, and he is to be mandatorily retired.² The Department also argues that grievant has not demonstrated during the agency-level grievance or in his pleadings on appeal that the Board should grant IR.

Specifically, the agency claims:

- Grievant's circumstances do not reveal the type of potential negative consequences the Board's grant of IR is intended to avert, since if he is separated and prevails on appeal, his career would be re-established. Also, if successful on appeal, he would be made whole for any financial loss sustained as result of his separation.
- Although grievant technically did not file at the "eleventh hour," he waited until May 2015 to file, and did not request IR until mid-August – barely more than two months before his TIC expired, although he knew that the expiration of his TIC was fast approaching, a point that was reinforced once he was low-ranked by the 2014 Selection Board.
- The grievance appeal is not meritorious, and it is impossible to discern the basis from evidence in the record for grievant's appeal or his request for interim relief from separation.

² 3 FAM 6213.3-4 limits certain Career Foreign Service Generalists (including grievant) to a single-class TIC of no more than 13 years. While the ROP does not show when grievant was promoted to FS-02, grievant does not contest the Agency's calculation that his TIC expiration is on or about October 20, 2015, and that, in the absence of receiving a promotion to FS-01, he is subject to mandatory retirement.

IV. DISCUSSION

Board regulations (22 CFR Section 905.1 (a)) provide that, except in disciplinary grievances, the grievant has the burden of proving by a preponderance of the evidence that the grievance is meritorious. As this Order constitutes a threshold decision, addressing only the question of whether interim relief should be granted, grievant carries the burden of showing by a preponderance of the evidence that the Board's exercise of its discretionary authority to suspend separation of grievant pending the outcome of his appeal is warranted. Based on the examination of the issues below, we hold that grievant has met this burden, and interim relief is granted during the pendency of this appeal.

Section 1106(8) of the Foreign Service Act, 22 U.S.C. Section 4136(8), reads in relevant part:

If the Board determines that the Department is considering the involuntary separation of the grievant³ . . . which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the date which is one year after such determination or until the Board has ruled upon the grievance, whichever comes first.

In exercising its broad discretionary authority under this statute, the Board has adopted the policy of making an independent decision based on the particular circumstances in each case, as the agency points out, citing FSGB Case No. 1995-063 (October 14, 1999).⁴ The Board has previously articulated a framework within which decisions to grant interim relief can be considered. FSGB Case No. 1995-004, *id.*, and FSGB Case No. 1997-104, (Order dated February 24, 1998).⁵

³ This does not apply to involuntary separation for cause under § 610(a) of the FSA [22 USC § 4010(a)].

⁴ Agency Opposition to Interim Relief, ROP, p. 53. The Board first set out this policy in FSGB Case No. 1995-004 (Order dated March 1, 1995).

⁵ In FSGB 1997-104, the Board pointed out that IR had generally been denied to career members only in special circumstances, such as when a grievant appeared to take advantage of IR authority by filing only at the last minute, as in FSGB 1997-091 and FSGB 1992-083; or in cases in which the grievance was manifestly without merit or frivolous [such as FSGB 1996-099 (Order dated Feb. 3, 1997)].

The relevant factors in the instant case – consistent with the way the Board considered such cases – are: (1) whether grievant’s career would be irrevocably damaged were he to be separated, and later prevail on the merits of his claim; (2) whether the grievance was filed only a few days before grievant’s long-scheduled separation date as merely a tactic to extend his time on the Department’s rolls; and (3) whether a grievance is manifestly without merit on its face or frivolous. We assess grievant’s request for IR taking these three factors into account.

Harm to Grievant

The Department argues that it is unclear how the granting of IR would avert “any potential negative consequences” that grievant might encounter as a result of separation. Grievant claims that the Department’s view is not accurate, and cites several consequences he considers to be negative. Principal among these negative consequences is grievant’s assessment that denial of IR would make it less likely that he would be afforded the opportunity to address circumstances that led the agency to suspend his security clearance six years ago. He argues that denial of IR “would have a perverse and pernicious effect of eliminating [his] opportunity for obtaining . . . due process.” We agree that due process is better served if grievant remains on the active employee rolls during the pendency of his grievance. The broader question – which we hold can best be addressed while grievant is still active in the Service – is whether, and if so, to what extent, the agency has an obligation to place grievant in positions where he can demonstrate his worth and that allow him to remain competitive with his peers in the same professional cone.

We also find persuasive grievant’s argument that denial of IR would have a financial impact on him, since his retirement income would be less than his salary while remaining an active employee. In addition, we do not discount that denial of IR could have an adverse impact

on what grievant describes as his “professional trajectory” (which essentially has been on hold for the last six years), and on his morale.

Timing of Filing for IR

We find it reasonable that grievant delayed requesting IR until after the results of the 2015 Selection Boards were known. Given his own assessment of the competitiveness of the positions in which he served during the 2015 promotion cycle – regardless of how well he might have performed, he could not have been under any illusions about his prospects of promotion. Nonetheless, we believe it was entirely understandable – and prudent – that he chose to wait until the Selection Board results had been announced, and he had been informed officially of his TIC date, before formally requesting IR. The Department concludes, and we agree, that grievant did not file his agency-level grievance or his request for IR at the “eleventh hour.” There is no evidence that the grievance, or the request for IR, was solely an attempt to remain on the Agency’s employment rolls.

The Merits of the Grievance

The Department argues that the grievance appeal is “manifestly without merit.” We disagree. Grievant claims that rating officer statements in his two most recent EERs contain generalized descriptions of his performance without concrete or specific examples, and do not address his potential for career advancement. He asserts that the Department has failed to place him in meaningful assignments in which he can be competitive with peers and demonstrate his full potential. Grievant also contends that the 2014 Selection Board violated the Procedural Precepts and Low-Ranked him by relying on secondary considerations, such as type or pattern of assignment, and concluding that he had performed below levels of performance expected at his grade level. While we do not address the merits of the appeal at this point, grievant makes

colorable claims that both his 2013 and 2014 EERs are procedurally flawed, that the Department has a responsibility to place officers into positions in which they can demonstrate potential for career advancement, and that the 2014 Selection Board may have violated its own procedural precepts.

V. ORDER

Interim Relief is granted for the pendency of the grievance appeal, during which period the Agency will stay separation action against grievant.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



Gregory D. Loose
Member



William B. Nance
Member