

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2016-011

September 9, 2016

ORDER: Dismissal

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

William B. Nance

Mary H. Witt

Special Assistant

Andrew D. Large

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda Chandler
Director, HR/G

Employee Exclusive Representative:

American Foreign Service Association

I. THE GRIEVANCE

This appeal concerns the denial of a grievance based upon an Employee Evaluation Report (EER) for the period of August 2009 to April 2010. The Department filed a Motion to Dismiss the grievance as time-barred because grievant did not file it within two years of his receipt of the EER.

II. BACKGROUND

Grievant, an FS-02 Foreign Service Officer with the Department of State (Department, agency), began a three-year economic reporting tour in ██████████, in August 2009. In November 2009 he responded to a Department immediate vacancy cable soliciting volunteers to serve in the newly opened post in ██████████. The Department selected him for the ██████████ assignment in January 2010. The agency offered grievant the choice of being assigned to ██████████ as a Temporary Duty (TDY) employee, which would allow him technically to encumber a ██████████ employee position while he was away in ██████████ or of breaking his ██████████ assignment and being directly assigned to the ██████████ as a member of that Embassy's regular personnel complement.

Grievant opted to undertake the ██████████ assignment as a TDY member of staff, in large part to avail himself of the Department's 'safe-haven' provision for this form of assignment. 'Safe-haven' is a recruitment tool that allows the eligible family members of employees who volunteer for a TDY assignment at designated posts to remain at the losing post's location and receive the same benefits (housing, education, medical, etc.) enjoyed by all other eligible family members at the losing post.

Grievant remained assigned to [REDACTED] but departed on his TDY to [REDACTED] in April 2010. In July 2012, upon completion of his TDY assignment to [REDACTED] grievant received a domestic assignment, and his family departed [REDACTED] at that time.

Grievant filed a grievance with the Department on December 18, 2015, alleging that his Employee Evaluation Report (EER) for his time in [REDACTED] from August 11, 2009, to April 15, 2010, was “misleading, inaccurate and unfair.” He also claimed that the rating officer failed to provide sufficient counseling and drafted a “false EER” in retaliation because he volunteered for the [REDACTED] position. Grievant requested that the EER be expunged from his file, and that his Time-in-Class/Time-in-Service be recalculated to exclude the time the 2010 EER was present in his Official Performance Folder.

The Department denied the grievance in a letter issued on February 1, 2016 (Decision Letter), concluding that the grievance was untimely filed, as grievant did not file within two years of the date he received the contested EER. The Deciding Official declined to accept grievant’s proffered excuse for the late filing, *i.e.* that he delayed filing the grievance to limit his family’s exposure to alleged retaliation by his rater and reviewer in [REDACTED] and because grievant anticipated obtaining a promotion after his assignment in [REDACTED]. Grievant appealed the Department’s decision to this Board on February 29, 2016, and completed his transmittal of required exhibits on March 2, 2016. The agency filed a Motion to Dismiss on March 4, 2016, to which grievant replied on April 27, 2016. The Department filed a final response on May 9, 2016.

This order addresses the threshold decision of whether the appeal is time-barred.

III. POSITIONS OF THE PARTIES

A. The Department

The Department argues that grievant has not demonstrated that his underlying grievance was timely filed. The Department relies upon Section 1104 (a) of the Foreign Service Act of 1980, as amended, which provides in relevant part:

A grievance is forever barred under this subchapter unless it is filed with the Department not later than two years after the occurrence giving rise to the grievance or, in the case of a grievance with respect to the grievant's rater or reviewer, one year after the date on which the grievant ceased to be subject to rating or review by that person, but in no case more than three years after the occurrence giving rise to the grievance. There shall be excluded from the computation of any such period any time during which, as determined by the Foreign Service Grievance Board, the grievant was unaware of the grounds for the grievance and could not have discovered such grounds through reasonable diligence.

22 U.S.C. §4134(a) (emphasis added).

The Department argues further that in this instance neither the rater nor reviewer of the challenged EER supervised or reviewed grievant's performance since his departure from █████ in April 2010, and therefore the two-year limitation from the date grievant received the EER must apply. Grievant did not file his grievance until December 2015—five years and six months after he received the EER.

In its Motion to Dismiss, the Department acknowledges grievant's claims that he "delayed submission of this grievance" for two reasons: to prevent retaliation against his family while they were safe-havened in █████ and because he "hoped to be promoted without having to resort to grievance." The Department also notes grievant's claim that the "lingering damage of the 2010 EER" could be responsible should he not be promoted before the anticipated expiration of his time-in-class in October 2016. Nevertheless, the Department argues that none of grievant's stated reasons for his conscious choice not to grieve the content of his 2010 EER at an

earlier date amount to permissible exceptions to application of the deadlines mandated for filing a grievance. Thus, this appeal should be dismissed as untimely filed.

B. The Grievant

Grievant claims he did not file his grievance while his family was safe-havened in [REDACTED] primarily because he feared retaliation by his rater and/or reviewer against his family, based on what he believed to be the personal animus of these officials. He cites various instances of what he describes as “malicious measures” that began to be taken against him in 2010 and continued against his family until 2012, when he and his family relocated to the U.S. For example, he claims that during the time he was assigned to [REDACTED] and his family remained safe-havened in [REDACTED] his rater and reviewer caused his family to be placed in possible physical danger by leaving them off the early notification lists when other families were being alerted to possible evacuation plans as a result of the [REDACTED]. He asserts they were excluded from security/accountability notices provided to all other families, leaving them isolated from Embassy support during a time of civil unrest, before being notified the night before they were to be evacuated to the U.S. along with other dependent families. Grievant’s theory is that the rater and reviewer engaged in this approach to grievant’s family as a way to strike back at him for refusing his reviewer’s demands that he either remove his [REDACTED] bid (and continue his assignment in [REDACTED] or voluntarily curtail the [REDACTED] assignment. This would have resulted in grievant’s family being removed from the safe-haven program and moved back to the United States or to another location. He accepted the [REDACTED] TDY assignment and elected to leave his family safe-havened in [REDACTED]

IV. DISCUSSION AND FINDINGS

Pursuant to 22 CFR § 905.1, grievant has the burden to demonstrate that the grievance was timely filed. Based upon the following analysis of the pertinent facts of record and applicable legal authorities, we are convinced that the grievance was not timely filed and that the Motion to Dismiss must be granted.

To organize our analysis, we consider (1) what constitutes the “occurrence giving rise to the grievance” in this case; (2) whether applicable regulations or the Foreign Service Act provide a basis for excluding any period from the timeline; and (3) whether grievant’s stated reasons for delaying the filing of his grievance are legally cognizable exceptions to the statutory filing limitations.

First, the “occurrence giving rise to the grievance” in this case is rather straightforward. The “occurrence” is the receipt of the 2010 EER. Although grievant was working in [REDACTED] [REDACTED] by the time the EER was completed, he acknowledged on May 20, 2010, the receipt of his completed 2010 EER. Using the date grievant acknowledged receiving the EER—May 20, 2010—as the date of the “occurrence giving rise to the grievance,” the two-year filing deadline would have been May 20, 2012.

To be clear, the Board cannot accept as the triggering “occurrence” the relocation of grievant’s family out of [REDACTED] in July 2012. The Foreign Service Act defines a “grievance” as:

Any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States . . . of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member. . . .

22 U.S.C. §4131(a) (1).

¹ Grievant traveled to [REDACTED] in April 2010 on TDY; his official detail to the [REDACTED] post began on September 12, 2010.

Since the grievance filed by grievant is specifically based upon his dissatisfaction with the 2010 EER, the “occurrence” most certainly had to be some act, omission or condition that existed no later than grievant’s receipt of the EER.

Second, we have considered whether any provisions of the Foreign Service Act (FSA) or the FAM afford grievant any basis for extending the two-year deadline. We find none. While the FSA would exclude from the timeline any period during which grievant was “unaware” of the grounds for the grievance, he certainly does not make any such claim. Grievant was under no misunderstanding about the basis for pursuing a grievance. When he received the EER, he was faced only with deciding if he wanted to file a grievance, and if so, when to file.

3 FAM 4427 permits up to a one-year extension of the two-year filing deadline, but establishes a maximum three-year limit – in two other situations, neither of which applies to grievant, as we explain below. That regulation provides as follows:

- a. A grievance under these regulations is forever barred unless it is presented to the grievant’s agency within two years of the occurrence(s) giving rise to it, except that:
 - (1) In the case of a grievance which challenges portions of a performance appraisal prepared by an employee’s rater, and only insofar as those portions are concerned, the two-year period may be extended by up to one year from the date on which the rater ceased to supervise the employee;
 - (2) In the case of a grievance which challenges portions of a performance appraisal prepared by an employee’s reviewer, and only insofar as those portions are concerned, the two-year period may be extended by up to one year from the date on which the reviewer ceased to review the work of the employee;
 - (3) In the case of a grievance which challenges portions of a performance appraisal by both an employee’s rater and reviewer, the two-year period may be extended by up to one year from the date on which the rater ceased to supervise, or from the date on which the reviewer ceased to review the work of the employee; and
 - (4) The maximum time for filing a grievance of a type described in 3 FAM 4427 paragraph a., subparagraphs (1), (2) or (3) above may not exceed three years from the date of the issuance of the appraisal.

b. Notwithstanding 3 FAM 4427 paragraph a. above, a grievance concerning a performance appraisal or other document in an employee's performance file may be filed beyond the applicable two- or three-year limit, provided:

- (1) In the case of material of any age in an employee's performance file, the material is cited by a Performance Standards Board as a basis for determination that the employee should be separated for having failed to meet the standards of performance of the employees class; or
- (2) In the case of material no more than five years old in an employee's performance file, the material is cited by a Selection Board as a basis for low-ranking the employee, and is alleged to be false and prejudicial.

As grievant challenges statements made by both his rater and reviewer for his 2010 EER, the facts in his grievance easily support a basis for applying paragraphs (a)(1),(a)(2), and/or (a)(3) to his situation, and create a strong basis for extending the two-year filing deadline for "up to one year from the date on which the rater ceased to supervise, or from the date on which the reviewer ceased to review the work of" grievant. Yet, since grievant was not subject to additional evaluation by either the rater or reviewer after he left ██████ for ██████ in April, 2010, this FAM provision gives him no relief.²

In addition, the FAM subsections of (b)(1) and (b)(2) do not help the grievant, because the Record of Proceedings in this appeal does not show that grievant was ever referred to a Performance Standards Board (PSB) or that a PSB has ever cited material of any age to order grievant's separation. Likewise, the record file makes no mention of a Selection Board referring to material in grievant's file that was no more than five years old, alleged to be false and prejudicial, and used as a basis for low-ranking him. In fact, there is no indication in the record

² We do not interpret this particular FAM regulation to lengthen an ordinary two-year deadline by one year. Rather, this regulation presupposes that the officer is still under the supervision or review of either the rater or reviewer, or both, when the basic two-year deadline date falls. In that event, the officer would have one year to file the grievance once he or she was free from both the rater and the reviewer, or whichever one of them was the official whose actions were to be challenged in the grievance. Thus, this FAM provision could only have helped the grievant if he had still been under the supervision or review of either his rater or reviewer as of May 20, 2012. These are not the facts. The filing deadline of May 20, 2012, easily elapsed more than a year after the reviewer and rater were no longer in those official relationships to the grievant.

file that grievant was ever referred to a PSB or low-ranked by a Selection Board, so this Board finds no basis in these FAM regulations on which to extend the two-year deadline.

Statutorily, without any regulatory exceptions to the FSA, the outside filing deadline for this grievance was May 20, 2013. However, even if applicable legal authorities somehow allowed grievant a three-year filing window from the time his family left ██████ -- which they do not -- he should have filed his grievance by July 12, 2015, in order to be timely. Yet, he did not actually file his grievance for several months past that date. Thus, he offers no theory (however novel) by which he can escape dismissal of this appeal.

It is not clear to this Board why grievant waited until December 18, 2015, to file his grievance – more than five and a half years after he acknowledged receipt of his 2010 EER, and nearly three and a half years after he removed his family from ██████ away from any perceivable influence that his ██████ rater and reviewer might bring to bear on him or his family. The only plausible explanation offered by grievant is that he believed he was possibly in line for promotion based on his performance in ██████ and he did not want to file a grievance that might interfere with his chances to receive a promotion. While choosing not to file a grievance in order potentially to maximize one's promotion possibilities may have seemed to be a good idea to the grievant, it is not a legally recognized basis for extending a filing deadline established by statute or Department regulations. Regardless of the scenario, personal strategizing or personal agendas cannot be a legally sufficient reason for ignoring a filing deadline.

V. DECISION

The Motion to Dismiss is hereby granted. The record of proceedings is hereby closed.

The appeal is dismissed, as untimely filed.

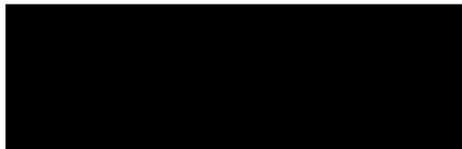
For the Foreign Service Grievance Board:



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