

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2016-024

And

August 25, 2016

Department of State

ORDER: Motion to Dismiss

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

William Persina

Board Members:

J. Robert Manzanares

Harlan F. Rosacker

Special Assistant

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

Pro se

Representative for the Department:

Thomas M. Lipovski
Attorney Adviser, HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER

I. THE ISSUE

This order addresses the Department of State's Motion to Dismiss the instant appeal, contending that the agency-level grievance filed on December 22, 2015, was untimely, since the grievable event had occurred more than two years before. Grievant contends that he is grieving a decision that was made on June 12, 2014, less than two years earlier. The Board finds that grievant has not met his burden of proving that his grievance was timely. His grievance appeal is dismissed.

II. BACKGROUND

██████████ (grievant) entered the Foreign Service in 1988, and he faces retirement for expiration of his time-in-service (TIS) limit if he is not promoted into the Senior Foreign Service (SFS) in 2016. After he was promoted to FS-01 in October 2008, he was precluded from opening his window to be considered for promotion into the SFS because he had not met the requirement (established in 2006) that an officer must have served a significant portion of a full tour in a post with combined hardship differential/danger pay of 15 percent or higher.

In a message to his Career Development Officer (CDO) in October 2010, grievant sought to have his three-and-a-half years of service (1994-1997) with the United Nations ██████████ ██████████ (██████████) credited as a hardship assignment. Although he had been assigned to ██████████, a non-hardship post, grievant argued that his duties required spending significant time in ██████████ and ██████████, both of which were hardship posts.

On May 26, 2011, grievant's CDO informed him that the Office of Career Development and Assignments (HR/CDA) had denied his request. Grievant appealed to Nancy Powell, Director General of the Foreign Service (DG), who in an email message on July 8, 2011, agreed with the HR/CDA recommendation that she deny his request. After grievant presented more information, the DG said in an email message to grievant's CDO and others that the added material did not give her reason to overturn her previous decision. The CDO forwarded this email message to grievant on July 11, 2011, and in it informed him that it was the DG's "final answer."

On December 28, 2011, grievant told his new CDO that he had never received a reply to an earlier, separate request that additional time be added to his time-in-class/time-in-service (TIC/TIS) clock based the fact that his assignment to [REDACTED] (a hardship post) had been broken by the DG so that he could go to the [REDACTED] [REDACTED] and that he volunteered believing it would qualify as a hardship assignment. In a February 8, 2012, email message to HR/CDA he acknowledged that his TIC/TIS request had apparently been refused and stated that he "should obtain this decision in writing from the DG . . . in the event [he sought] formal redress." Later he also acknowledged that he had been advised to file a grievance at the time but had not done so.

Grievant applied in 2011 to be considered for promotion into the SFS despite the fact that his CDO vetted his clients and determined that grievant was ineligible to compete. Through a series of errors, the Performance Evaluation (HR/PE) staff placed his name on the competition list, subsequently took it off, and then put it on again. After HR/PE realized that it had failed to take it off a second time -- following the DG's denial of his request for a waiver of the hardship

requirement -- it again removed his name. During this period, however, his name was never on a list that was forwarded to a Selection Board.

Grievant continued to pursue the hardship service issue with his CDO, who in turn consulted with HR/Performance Evaluation (HR/PE). Ultimately, in 2013, grievant was assigned to [REDACTED], a hardship post where his tour of service would enable him to meet the hardship service requirement.

On June 3, 2014, grievant sent an email to DG Direct¹ requesting that his [REDACTED] assignment be credited as hardship service and that time be added to his TIC/TIS clock because this assignment had been directed by the Department after it broke his assignment to [REDACTED], a hardship post. Grievant also had understood at the time that his secondment to [REDACTED] qualified as a hardship assignment. In an email to grievant on June 12, 2014, Acting DG Hans Klemm denied the request, finding that grievant had not met the hardship service requirement and that his service with [REDACTED] would not justify the granting of a TIC/TIS extension.

After grievant completed a hardship tour in [REDACTED], and thus became eligible to compete for promotion into the SFS, he opted to compete in 2015.² By that time, however, he had only two remaining opportunities to compete before the expiration of his 27-year TIS limit,³ rather than the maximum six.

[REDACTED] grieved the DG's decision on December 22, 2015. The grievance was denied on March 1, 2016, for being time-barred, in that it had not been filed within two years of

¹ DG Direct is an email address to which employees may send questions, concerns, and suggestions about human resources matters to the Director General. Employees are assured that the DG will personally review these messages.

² After meeting certain requirements – including service in hardship posts – a Class 1 officer may open his/her Senior Threshold Window and begin to compete for promotion into the SFS. The officer may then be considered for promotion up to six times or until reaching time-in-class/time-in-service limitations, whichever comes first. See 3 FAM 6213.8.

³ 3 FAM 6213.3-4

the 2011 event that the Department asserted had given rise to his grievance. Grievant filed a grievance appeal with the Foreign Service Grievance Board (Board) on April 26, 2016. On May 11, 2016, the Department filed a Motion to Dismiss with the Board.

III. DISCUSSION

Under 22 CFR 905.1(a) grievant bears the burden of demonstrating, by a preponderance of the evidence, that his grievance is meritorious, FSGB Case No. 2007-023 (June 27, 2007). In this instance he thus bears the burden of showing “initially that his grievance was timely filed.”

Id.

Per 22 U.S.C. § 4134(a) Limitations Period:

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. . . . 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.

Further, “[u]nder 22 CFR 905.1(a) 22 CFR 904.2(b), the Board may reach a preliminary decision concerning the issue of timeliness of a grievance because resolution of that issue may make further proceedings unnecessary.” FSGB Case No. 2005-052 (January 30, 2006.)

In response to the Department’s Motion to Dismiss, grievant asserts that what he was grieving was not an event in 2011 or decisions made in 2012. He avers that the Department had taken conflicting actions and that the issues addressed at that time had continued to be in dispute. He asserts that the Department admitted its confusion about opening his window and acknowledged in internal emails that it had been “flipping and flopping” on the issue. Moreover, he contends that HR’s preparation of a decision memo for the Acting DG in 2014 is “further proof that the Department did not itself consider the 2011 correspondence cited in the motion to

dismiss as definitive.” Had the Department been certain of its position, he asserts, “no further action or reply would have been required.”

Grievant claims that he had continued trying to resolve these issues and the conflicting actions taken by the Department until he finally appealed to Acting DG Klemm on June 3, 2014. He contends that what he grieved was Klemm’s June 12, 2014, denial of his request that he be permitted to open his window and be granted a TIC/TIS extension. This date, he asserts, was well within the statute of limitations specified in 3 FAM 4427.

It is clear, grievant avers, that he had not let the matter lapse and that there was no dereliction in his actions to resolve the issue. He cites FSGB Case No. 2005-052 (January 30, 2006) in which the Board noted, “Grievants may not rest passively unaware or indifferent of their rights and then seek to toll the running of the filing period.” He insists that the exact opposite had occurred in his case – that he had in fact been diligently, actively, and persistently involved in fighting for a fair resolution to what he believed was a grave error by the Department in not granting him hardship credit for his [REDACTED] service.

In the email grievant sent to DG Direct on June 3, 2014, grievant emphasized that he was not requesting approval of time served on the ground in two war zones (as he said he had in “previous questions to CDA.”) Rather, he asked that the DG:

Restore the time served at the [REDACTED] to [his] TIC/TIS clock so that I am not disadvantaged in terms of promotion reviews; as such service was undertaken at the direct request of the Secretary and the officers who performed this service were informed that this service qualified as a hardship assignment and was the Department’s “highest priority.”

Continuing, he stated that “I am requesting that my service with [REDACTED] be accepted as qualifying service as this service was directed by the Department in lieu of [REDACTED]. . . I certainly don’t feel I should be penalized by my service which was ordered by S.”⁴

In grievant’s April 26, 2016 appeal to the Board and in his response to Department’s Motion to Dismiss he also insists that his December 22, 2015 grievance raising these claims was timely. He requests accordingly that the Board deny the Department’s Motion to Dismiss and consider his grievance appeal and its merits at its earliest convenience.

In the Department’s Motion to Dismiss and in its responses to grievant’s arguments the Department contends that even though there was confusion within HR/PE as to whether grievant should be on the SFS competition list, the matter had been cleared up by January 9, 2012. It also maintains that there had been no confusion about DG Powell’s denial of his request for a waiver. In an email message on February 8, 2012, grievant’s CDO noted that while he might still believe his time in [REDACTED] should be credited as hardship service, the DG had denied his request and he had been informed of that. Moreover, grievant had acknowledged that such was the case. His CDO informed him on February 15, 2012, that senior levels within HR/CDA had confirmed that there had been no change in the Department’s conclusion that he had not met the hardship requirement.

The Department avers that grievant’s assertion that he is entitled to equitable tolling with respect to the limitations period for filing a grievance appears to be based on an argument that he “never let the issue lapse and there was no dereliction in [his] actions to try to resolve the matter.” It asserts that this is not pertinent to the Board’s determination. Rather it must examine initially whether he was “unaware of the grounds for the grievance[,]” *see* FSGB Case No. 2005-

⁴ S is the Office of the Secretary.

055 (February 15, 2006), until sometime within the limitations period. The Department maintains that grievant cannot establish that he was unaware of the grounds for his grievance until December 22, 2013 – *i.e.*, two years before the date on which he filed the grievance. He acknowledged in 2011 that the DG had denied his request to have his [REDACTED] assignment credited as meeting the hardship requirement. On January 9, 2012, he claimed that time should be added to his “TIC/TIS clock” based on the same grounds that he presented in his DG Direct message in June 2014 – *i.e.*, that his hardship assignment to [REDACTED] was broken at the request of the Secretary’s office and that if he had not volunteered for [REDACTED] he would have met the hardship requirement. His CDO informed him on February 15, 2012, that her inquiries at senior levels in HR/CDA confirmed that DG Powell’s denial of that request “remains the answer.”

The Department avers that approximately three years and 10 months before he filed his grievance, he was aware of all the grounds for it. Moreover, he had been advised to file a grievance on DG Powell’s denial of his request to open his window more than two years before he appealed on the same issues to Acting DG Klemm. The Department contends that the fact that HR staff raised issues and decisions made earlier in a memorandum to the Acting DG in connection with the 2014 DG Direct inquiry does not mean that the Department was reconsidering those decisions. The Department also notes that there are no time limitations on when issues may be raised in a DG Direct message.

The Department requests that [REDACTED] grievance be dismissed, arguing that:

A grievant cannot resurrect an untimely grievance by simply articulating a different theory in support of his complaint regarding the occurrence that gave rise to the action – here the Department’s refusal to deem his service at [REDACTED] sufficient to satisfy the hardship assignment requirement for promotion consideration – or by requesting a different remedy to cure the alleged harm that resulted from that occurrence. To hold otherwise would be to effectively

eviscerate the limitations period established by statute and regulation. (Agency Motion to Dismiss, ROP p. 53)

After reviewing the parties' arguments, the correspondence, and decisions that were reached in this matter in 2011 and 2012, the Board concludes that for well over two years grievant had been aware of all of the grounds for the grievance he filed on December 22, 2015. While he claims to be addressing a new issue, the issue is unchanged: *i.e.*, that the Department had denied his request to have his detail to [REDACTED] credited as a hardship assignment. In his communications with his CDO and other HR officials beginning in 2011, he had also requested that time be added to his TIC/TIS clock and claimed that the cancellation of his assignment to [REDACTED] and his secondment to [REDACTED] were directed by high level officials in the Department. The Department was not addressing these matters for the first time when grievant made his 2014 appeal to Acting DG Klemm.

The Board finds that grievant has not met his burden of showing that his grievance was timely. His grievance appeal is dismissed.

For the Foreign Service Grievance Board:

[REDACTED]

William E. Persina
Presiding Member

[REDACTED]

J. Robert Manzanares
Member

[REDACTED]

Harlan F. Rosacker
Member