



United States Department of State

Washington, D.C. 20520

August 22, 2011

Via E-Mail

MEMORANDUM

TO: S/FSB – [REDACTED]

FROM: HR/G – [REDACTED]

SUBJECT: FSGB Case No. 2011-021: Van Buren, Peter M.
Department's Response to Grievant's Motion for a Stay of the
Proceedings

Background

On August 2, 2011, the Grievant filed a second grievance (AGS 2011-062) with the Office of Grievance Staff, which he then supplemented on August 8, 2011. In AGS 2011-062, Grievant submits that the Department's Office of Civil Rights (S/OCR) issued a Report of Inquiry (ROI) which formed the basis of the discipline proposed against Grievant by the Bureau of Human Resources, Office of Employee Relations. He claims that the ROI contained discriminatory statements regarding his [REDACTED]. Grievant further contends that the ROI was further relied upon by the Deciding Official who decided to mitigate Grievant's proposed two-day suspension to a Letter of Reprimand. In addition, Grievant claims that the ROI was also relied upon by the Grievance Staff in its investigation and eventual decision to deny his first grievance, AGS 2010-035. AGS 2010-035 is now the subject of his present appeal before the Board. At the August 4, 2011 Pre-hearing Conference before the Board, Grievant indicated to the Board that he had filed a second grievance with the agency and that he intended to submit a Motion to Stay the present appeal before the Board (FSGB No. 2011-021) until his second agency-level grievance was investigated and decided. The Department files this Response to Grievant's Motion.

The Grievant Has Not Shown that Good Cause Exists For Postponement of the Proceedings

The Merit Systems Protection Board (MSPB) requires that the moving party show why good cause exists for a postponement of the hearing.¹ “Whether good cause exists for postponement of a hearing is determined by unique circumstances of each case and rests with the sound discretion of the administrative judge.” *Thomas v. Department of Veteran Affairs*, 51 MSPR 218, 221, (1991). Although the rules and regulations of the Foreign Service Grievance Board do not specifically address the requirements involved in postponing a proceeding², the rules and regulations and the Foreign Service Grievance Board (FSGB) Handbook all indicate that it is the Board’s custom to process cases in an expeditious manner. The Board may, however, agree to a change in schedule proposed by any of the parties where appropriate, or may lengthen the schedule in its discretion. *See* FSGB Handbook Chapter IV, p. 17.

Grievant has not shown that “good cause exists” to stay the proceedings. Grievant asserts that the ROI which he received on September 28, 2010 “included discriminatory statements regarding [REDACTED]; which discredited the reliability of witnesses and biased the Department’s decision regarding the appropriate disciplinary action.”³ In AGS 2011-062, he requests that the Department discard or significantly redact the ROI. Grievant contends that if he receives this relief, the Department will remove the Letter of Reprimand and expunge the November 24, 2010 disciplinary action or at the very least the Department will reduce the action to an admonishment. Grievant maintains that his success in his second grievance will obviate the need to continue his appeal of FSGB 2011-021.

In support of his request Grievant submits only the unsupported statement that neither party will be prejudiced by a stay. He states in his motion, “[S]hould the second grievance be successful, a stay in proceedings will save the parties from unnecessarily expending valuable time and resources to engage in a substantial discovery process, which includes request for documents, interrogatories and depositions of numerous witnesses located across the world . . . the cost is zero and

¹ 5 C.F.R. §1201.51

² 22 C.F.R. §901 *et seq.*

³ Grievant raised this same claim of an incomplete ROI and an ROI which contained discriminatory statements concerning his disability in AGS 2010-135/FSGB 2011-021. The Agency Decision shows that his claim was investigated and responded to. *See* Grievant’s January 21, 2011 Supplemental Submission to Grievance p. 7 and May 9, 2011 Agency Decision pp. 4-5.

the benefit potentially significant.” The Department contends that since Grievant raised the ROI as an issue in his initial grievance he will be able to fully explore his allegation that the discipline action was based on a ROI replete with discriminatory statements about his medical disability. At hearing Grievant will be able to cross-examine the Deciding Official and the Department’s other witnesses about the ROI. Grievant will also be able to call his own witnesses and present documentary evidence regarding his allegation. Thus, a hearing will provide Grievant with a forum to explore and present his ROI claim.

The Department submits it will suffer harm if the proceedings are stayed. The incidents which form the basis of the two specifications of the charge of Improper Personal Conduct occurred almost two (2) years ago. The first specification occurred on November 6, 2009. The second specification occurred on November 24, 2009. The Department, with the Board’s permission, intends to present the testimony from over ten (10) witnesses. The Department is concerned that if the Board postpones the proceedings, the witnesses’ recollections of the events which occurred in 2009 will fade. If the Department cannot present clear and unequivocal witness testimony, this would put the Department at an enormous disadvantage in proving its case. The Department submits that Grievant’s showing that he may be successful in Grievance AGS 2011-062 does not constitute “good cause” to postpone the proceedings of FSGB No. 2011-021.

Conclusion

In summary, the Department requests that the Board deny the Grievant’s Motion for a Stay of the Proceedings.

cc:

