

United States of America

BEFORE THE FOREIGN SERVICE IMPASSE DISPUTES PANEL

In the Matter of

U.S. AGENCY FOR INTERNATIONAL
DEVELOPMENT
WASHINGTON, D.C.

and

AMERICAN FOREIGN SERVICE
ASSOCIATION

Case No. 04 FSIDP 1

DECISION AND ORDER

The U.S. Agency for International Development, Washington, D.C. (Employer or USAID) filed a request for assistance with the Foreign Service Impasse Disputes Panel (Panel) to consider a negotiation impasse under the Foreign Service Act of 1980 (Act), 22 U.S.C. § 1010, between it and the American Foreign Service Association (Union or AFSA).

After investigating the request for assistance, the Panel determined that the dispute, which concerns USAID's proposal to revise its policy regarding eligibility requirements for promotion into the Senior Foreign Service (SFS), should be resolved through an informal conference with Panel Chairman Peter W. Tredick. They were advised that if no settlement was reached during the informal conference, Chairman Tredick would report to the Panel on the status of the dispute, including the parties' final offers and his recommendation for resolving the impasse. After considering this information, the Panel would take whatever action it deemed appropriate to resolve the impasse, which could include the issuance of a binding decision.

Pursuant to this procedural determination, Chairman Tredick conducted an informal conference with the parties on March 17, 2005, at the Panel's offices in Washington, D.C. Voluntary settlement of the dispute was explored, but the matter remained unresolved. At the conclusion of the meeting, the parties

provided their final offers on the issues at impasse. Subsequently, the parties submitted written statements in support of their respective positions.^{1/} Chairman Tredick has reported to the Panel, which has now considered the entire record, including the parties' post-conference statements.^{2/}

BACKGROUND

President Kennedy, through an Executive Order under the Foreign Assistance Act, established USAID on November 3, 1961. It is an independent federal government agency that receives overall foreign policy guidance from the Secretary of State. Its work supports long-term and equitable economic growth and advances U.S. foreign policy objectives by supporting economic growth, agriculture and trade, global health, and democracy, conflict prevention and humanitarian assistance. AFSA represents approximately 1,050 Foreign Service Officers (FSO), or half of USAID's 2,000 employee "direct hire" workforce.^{3/} The employees have expertise in many different areas, such as agriculture, the economy, health care, democracy, the environment and education. The parties are governed by the terms of a basic collective bargaining agreement that went into effect on January 19, 1993.

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- 1/ In its supporting post-conference statement of position, the Union revised the offer it made at the conclusion of the informal conference.
- 2/ On April 13, 2005, the Union filed a motion to exclude the Employer's post-conference written statement from the record in the case because it was single rather than double-spaced and, therefore, did not comply with the instructions given to the parties at the conclusion of the informal conference. The Employer submitted a response essentially conceding its error but arguing that the Union was not harmed thereby, and noting that its single-spaced submission had a smaller word count than the Union's. The Panel agrees with the Employer on this issue and, accordingly, the Union's motion is hereby denied.
- 3/ The remaining employees are either in the Civil Service, represented by the American Federation of Government Employees, or in Foreign or Civil Service management positions. The USAID also has a large number of contractors throughout the world to assist it in performing its mission.

ISSUES AT IMPASSE

The parties essentially disagree over: (1) whether there should be any exceptions to the current requirement that employees have 8 years of overseas experience before they are eligible for promotion into the SFS; and (2) if so, whether the individual ranked number 2 by the 2004 Senior Threshold Promotion Board (STPB) should be promoted retroactively into the SFS.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer's final offer is "to implement the proposal as written in its July 15, 2004 letter to AFSA. This revision would become effective for the 2005 STPB. Further, USAID seeks the retroactive promotion of the individual ranked number 2 by the 2004 boards and who met the proposed criteria in 2004." The proposal in its July 15, 2004 letter to AFSA is the following:

Where an employee 1) is ranked for promotion, 2) falls within the number of promotions to be granted, and 3) does not meet the 8 year overseas requirement for promotion into the [SFS], that employee is passed over for promotion and the promotion line drops down one name. If after review by [Human Resources] it is determined that this employee 1) served the Foreign Service **overseas** for between 6 and 8 years based on existing periods of creditable overseas service, 2) opened his/her window for promotion consideration into the SFS, 3) previously bid on **overseas** assignments, 4) did not bid on a Washington assignment, and 5) was assigned to a Washington position by the Administrator or the Director of [Human Resources] based on agency needs, the employee will be promoted into the SFS. The promotion of this employee is automatic if each of the above 5 facts is established. The promotion of this employee will NOT result in the removal of any Foreign Service Officer from the rank order list nor will it result in the loss of any promotion based on rank order. [Emphasis in original.]

An exception to the 8-year overseas rule is appropriate "in circumstances where an FSO [is] prevented from meeting this requirement as a result of a management need to assign the FSO to a position in Washington, D.C." In this regard, the Employer

has always acknowledged that the initial impetus for its proposed exception was the fact that an FSO, who had been ranked number 1 for promotion into the SFS by the 2003 STPB, was ineligible because he did not meet the 8-year overseas requirement based on management's decision to assign him to Washington, D.C. Nevertheless, the proposed exception "was not developed to provide a benefit to a specific SFO," but "to address the broader organizational issue" of protecting the rights of all FSO's competing for promotion into the SFS "while not disadvantaging any FSO based on a decision by management to direct a Washington, D.C. assignment." The Employer's pursuit of this systemic interest is demonstrated by the fact that it rejected AFSA's offer during negotiations of applying a one-time waiver of the 8-year overseas rule to the operations of the 2004 STPB. It did so because it did not want to repeat the one-time waiver approach "if and when another FSO was similarly situated." A narrowly drawn exception incorporated into USAID regulations would clearly define how the exception is to be implemented and also "better insulate both AFSA and USAID from charges of favoritism."

The Union's willingness at the conclusion of the informal conference to accept USAID's proposed exception "in its entirety without any change," but only if implementation is delayed until 2006, "can only be based on AFSA's continued desire to prevent the application of the proposed exception to the FSO ranked number 1 in 2003 and number 2 in 2004 "in the event he is again highly ranked by the 2005 [STPB]." Thus, it is apparent that AFSA "has personalized its position by clearly focusing on a specific SFO."

The Employer's proposal to apply its exception retroactively, which would result in the promotion of the SFO ranked number 2 by the 2004 STPB, is "based on the principle of fundamental fairness." Its proposed exception was developed and presented to AFSA "months before" the 2004 STPB announced its recommendations for promotion. At that time neither party knew who the STPB would recommend for promotion, nor was USAID's consistently held position during negotiations advocating retroactivity "influenced by the 2004 [STPB]." The history of the negotiations over this matter also reveals, however, "AFSA's repeated unwillingness to reasonably consider the USAID's proposed exception or to offer any meaningful counterproposal." The Employer consistently has separated the two issues in this case, i.e., the need for a consistent exception to its current policy designed not to disadvantage any employee competing for promotion into the SFS, and its desire to ensure that the SFO

who was previously disadvantaged because he was required to serve in Washington, D.C. is not disadvantaged again. In its view, the Employer was not showing favoritism towards a specific SFO nor attempting to carve out an exception solely for the FSO. Rather, "USAID sought to apply the tightly drafted exception criteria to him in 2004." Given these circumstances, there is no "reasonable basis for further disadvantaging this SFO."

2. The Union's Position

The Union proposes that the 8-year overseas service requirement be continued "without exception." In the alternative, the Panel should implement USAID's proposed exception only following the 2006 promotion cycle. Although the Employer argues that there is a "systemic need" for the exception it is proposing, applying it in 2005 would "assure promotion in such a narrow circumstance as to apply to only one person." Moreover, "the circumstance has never arisen before" and, as the Employer admitted at the Panel's informal conference, "is highly unlikely to arise again." Thus, AFSA opposes a change in the promotion regulations either prospectively or retroactively "that is systemically unnecessary, that its membership adamantly opposes, and that will have the designed result of promoting someone publicly known to be ineligible for promotion."

By way of background, the parties mutually agreed to change the overseas service requirement for promotion to the SFS from 6 years to 8 years in 1999. This occurred because "some SFS employees who lacked sufficient experience with the operations of embassies and USAID missions abroad" were having performance and supervision problems. After considering "all the variables," the parties also deliberately decided, "no exceptions were warranted." The Employer has failed to demonstrate the need to change the previous considered judgment of the parties. That the Employer's supposed "systemic" justification is really a "guise" to "cloak its true goal," the promotion of the FSO rated number 2 by the 2004 STPB, is amply shown by the history of the negotiations that led the parties to the Panel.

There also is no merit to the Employer's view that a unique exception is warranted when an employee "allegedly" is prevailed upon by USAID management to serve in Washington, D.C. In this regard, there are a number of legitimate reasons why employees who deserve to be promoted into the SFS may fall short of the required 8 years abroad. While it is true that an employee who

does not meet the requirement, for example, because of family circumstances or a medical condition, is different from one who is required by management to serve in Washington, D.C., the Union does not believe that the "basic reason for needing 8 years abroad" - greater seasoning and experience - "is fundamentally altered by this distinction." In addition, there are overseas time thresholds for promotion at lower grade levels as well, yet the Employer is not proposing to change these, even where it involves management requiring an employee to work in Washington, D.C. Once again, this shows that the Employer's real motivation in proposing its exception is to benefit only the individual rated number 2 by the 2004 STPB.

AFSA maintains that its position is overwhelmingly supported by its membership. Both "are united in opposing rule breaking and favoritism by the agency with respect to promotion [] retroactively and prospectively." The Union also finds "reprehensible" the collusion that took place during the negotiations between management and the employee rated number 2 by the 2004 STPB. Information regarding the 2004 STPB's promotion-list rankings and AFSA's bargaining position was "leaked" to the individual, who "undertook an intense lobbying campaign" with senior level management and AFSA "to plead his case for separate treatment." By these actions, "USAID engaged in bad faith negotiations." Its actions during the informal conference, where it "refused to budge from its maximalist position and continued to insist on retroactivity" also lead to the conclusion that it did not "negotiate with sincerity" before the Panel. In conclusion, the Employer's attempt to "manipulate" established rules is "neither fair nor transparent," and should be rejected because it would be "corrosive to morale and trust in the agency."

CONCLUSIONS

Having carefully reviewed the evidence and arguments presented in support of the parties' positions, we shall order the adoption of the Employer's proposed exception to the 8-year overseas requirement for promotion to the SFS, effective for the 2005 STPB. In our view, the proposed exception is reasonable because it is narrowly tailored to ensure that employees do not suffer adverse career consequences based on a management decision to direct a Washington, D.C. assignment. In addition, we are not persuaded on the basis of the record that the rationale behind the parties' adoption of the 8-year rule in 1999 is so compelling that exceptions, particularly in the limited circumstances involved in this case, should be

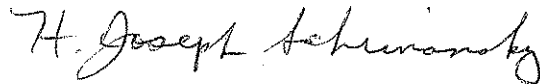
completely prohibited. Application of the criteria for granting exceptions starting in 2005 also would ensure the transparency of the promotion process, since the results of this year's STPB determinations are not known at this time. Finally, the proposal the Employer made in its July 15, 2004 letter to AFSA also appears reasonable because it would have no adverse impact on the rest of the candidates for promotion to the SFS.

ORDER

Pursuant to the authority vested in it by the Foreign Service Act of 1980, 22 U.S.C. § 1010, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 22 C.F.R. § 1471.5(b), the Foreign Service Impasse Disputes Panel under its regulations, 22 C.F.R. § 1471.10(a), hereby orders the following:

The parties shall implement the Employer's proposal as written in its July 15, 2004 letter to AFSA, effective for the 2005 Senior Threshold Promotion Board, and for subsequent Boards unless and until modified.

By direction of the Panel.



H. Joseph Schimansky
Executive Director

July 15, 2005
Washington, D.C.