

UNITED STATES OF AMERICA
BEFORE THE
FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

AMERICAN FOREIGN
SERVICE ASSOCIATION

Union

and

Case No. FS-AR-1

DEPARTMENT OF STATE

Agency

DECISION

This case is before the Foreign Service Labor Relations Board (the Labor Relations Board) on exceptions to the action of the Foreign Service Grievance Board (Grievance Board) in resolving an unsettled implementation dispute between the Union and the Agency under 22 U.S.C. § 4114(a)(3). The exceptions have been filed by the Union pursuant to 22 U.S.C. § 4114(b) and part 1425 of the Labor Relations Board's Rules and Regulations, 22 CFR part 1425. The Agency filed an opposition.

The implementation dispute submitted to the Grievance Board concerned the Union's claim that the Agency denied an employee a promotion and subjected him to other reprisals and discrimination because of his activities as a union representative. The Grievance Board and the parties agreed to the following statement of issues:

- A. Did the Agency violate the collective bargaining agreement on labor-management relations by discriminating against [an employee] because of his union activities? (Discrimination took the form of nonpromotion and other reprisals, including tenure and assignment problems.).
- B. Did the Agency violate the 1983 Selection Board precepts through partiality in the promotion process?

With respect to the issue of promotion, the Grievance Board ruled that members of selection boards are presumed to perform with honesty and integrity and in accordance with the precepts governing their deliberations and that this presumption may only be overcome by "clear and convincing evidence." In terms of the employee's failure to be promoted, the Grievance Board found that although there was antagonism toward the employee in the Agency's security division, the record did not support the necessary causal connection between that antagonism and the actions of the selection board or its individual members, and the Grievance Board further found no other evidence of arbitrary or discriminatory action that would support a presumption of reprisal by the selection board. Accordingly, the Grievance Board held that the Union had not overcome the presumption that the selection board applied its precepts in a just and nondiscriminatory manner and that the Union had not shown that the employee's failure to be promoted by the 1983 Selection Board was a reprisal for his union activities.

The Grievance Board additionally held that the Union had failed to substantiate any discrimination against the employee with respect to tenure or assignment. In particular, the Grievance Board specifically determined that although the Union claimed wrongdoing in not providing the employee with an employee evaluation report (EER) while on a temporary duty assignment, "it has not been established that such an EER was required by regulation or was improperly withheld." The Grievance Board additionally commented in view of the employee's promotion in 1984 that it did not appear that the absence of such an EER, even if it could be considered a procedural deficiency, was a serious omission in his performance record.

As its determination the Grievance Board accordingly found in favor of the Agency.

The question before the Labor Relations Board is whether the Union's exceptions provide a basis for finding the action of the Grievance Board in resolving the implementation dispute deficient because it is contrary to any law, rule, or regulation or deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations cases. The scope of this review by the Labor Relations Board is the same as the scope of review by the Federal Labor Relations Authority under section 7122(a) of the Federal Service Labor-Management Relations Statute of an arbitration award, and the decision of the Labor Relations Board on review must be consistent with decisions rendered by the Authority under the Statute unless the Labor Relations Board finds that special circumstances require otherwise. 22 U.S.C. § 4107(b); H.R. Rep. No. 96-992, Part 2, 96th Cong., 2d Sess. 105 (1980).

In its first exception the Union contends that the action of the Grievance Board is deficient because the Grievance Board applied an improper standard of proof when it required the Union to prove discrimination by "clear and convincing evidence." The Union concedes in its exception that neither the Foreign Service Act of 1980, 22 U.S.C. §§ 3901-4173, nor the rules and regulations of the Grievance Board, 22 CFR chapter IX, expressly prescribe the standard of proof required to make a showing of discrimination in implementation disputes. Nevertheless, the Union in support of this exception argues that because this issue could have been raised in accordance with section 4115(d) as an unfair labor practice, where the lesser standard of preponderance of the evidence would have been applied, the Grievance Board for purposes of consistency and uniformity should have applied the preponderance standard. The Union further maintains that in the past the Grievance Board has applied the preponderance standard and its departure from that practice without articulation is therefore deficient.

The Labor Relations Board concludes that this exception fails to establish that the Grievance Board action is deficient under section 4114(b). As noted, the Labor Relations Board under section 4114(b) will review a Grievance Board action, in the same manner as the Authority does an arbitration award, to determine if an exception to the action provides a basis for finding the Grievance Board action deficient on grounds similar to those on which Federal courts in private sector labor relations cases will find arbitration awards deficient. Federal courts in private sector labor-management relations cases have consistently ruled that unless a specific standard of proof is expressly prescribed, an arbitrator may establish whatever standard of proof that the arbitrator considers appropriate and the award is not subject to review on that basis. E.g., General Drivers Local No. 120 v. Sears, Roebuck & Co., 535 F.2d 1072 (8th Cir. 1976); Meat Cutters Dist. Local No. 540 v. Neuhoff Bros. Packers, 481 F.2d 817 (5th Cir. 1973). This principle applied by Federal courts in private sector cases has been determined by the Authority to be likewise applicable to the review of arbitration awards under section 7122(a) of the Statute. Department of Defense Dependents Schools, Europe and Overseas Education Association, 4 FLRA 412 (1980). Accordingly, on the basis of section 4114(b) and the legislative history equating the scope of review by the Labor Relations Board to that of the Authority, the Labor Relations Board finds this principle likewise applicable to review under section 4114(b) of Grievance Board actions resolving implementation disputes. In terms of this case, as has been noted, the Union concedes that no specific standard of proof is expressly prescribed. Furthermore, the Labor Relations Board finds contrary to the Union that section 4115(d) deals solely with election of remedies and in no manner prescribes that the preponderance standard must be applied in implementation disputes that could have been raised as an unfair labor practice. The Labor Relations Board likewise finds that no practice of the Grievance Board required application of the preponderance standard. To the contrary, with no

specific standard of proof prescribed, the Grievance Board was free to establish whatever standard of proof it considered appropriate and is not subject to review on that basis. In this respect the Authority has consistently denied similar exceptions under section 7122(a) of the Statute. See, e.g., DODDS, Europe, 4 FLRA 412; Director of Administration, Headquarters USAF and AFGE-GAIU Council of Headquarters, Locals, AFL-CIO, 6 FLRA 139 (1981). Thus, in accordance with section 4114(b) and consistent with decisions of the Authority, in a matter where special circumstances do not dictate they not be followed, the Labor Relations Board finds that this exception provides no basis for finding the action of the Grievance Board deficient.*/

In its second exception the Union contends that the Grievance Board action is deficient because the Grievance Board considered and relied on irrelevant and immaterial evidence outside the record. Specifically, the Union essentially maintains that the Grievance Board found no wrongdoing by the Agency in failing to provide the employee with an EER during his temporary duty assignment because the Grievance Board ruled that the procedural deficiency was harmless in that the employee was promoted by the 1984 Selection Board. Thus, the Union argues that this determination is deficient because the Grievance Board was prohibited under the Foreign Service Act and its own regulations from considering the employee's promotion since it was not a part of the record of proceedings.


The Labor Relations Board concludes that this exception fails to establish that the Grievance Board action is deficient under section 4114(b). As noted, the Grievance Board specifically and unequivocally determined that the Union had not established that the EER was required by regulation or was improperly withheld, and the Union does not argue that this determination was based on irrelevant or immaterial evidence or on evidence prohibited from consideration by the Grievance Board. Consequently, the Labor Relations Board finds that the Grievance Board's separate comment, which merely assumed without deciding that the failure to provide an EER constituted a procedural deficiency, does not alter or diminish the independent and unequivocal finding by the Grievance Board,

*/ In denying the exception, the Labor Relations Board has only determined that because no standard of proof was prescribed, no basis is provided for finding the action of the Grievance Board deficient under section 4114(b) and the Labor Relations Board has not addressed the appropriateness of the standard applied by the Grievance Board.

as to which no exception has been filed, that the EER was not improperly withheld. Therefore, this exception provides no basis for finding the Grievance Board action deficient under section 4114(b).

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C. January 31, 1986


Jerry L. Calhoun, Chairman


Arnold Ordman, Member

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CERTIFICATE OF SERVICE

Copies of the Labor Relations Board's Decision in the above-entitled case were sent upon issuance to the following:

Ms. Susan Z. Holik
General Counsel
American Foreign Service Association
2101 E Street N.W.
Washington, D.C. 20037

Mr. Raymond L. Perkins
Executive Secretary
Foreign Service Grievance Board
Department of State
SA-6, Room 430
Washington, D.C. 20520

Ms. Michele E. Truitt
Director
Grievance Staff
Department of State
Room 1830, N.S.
Washington, D.C. 20520

Mr. Paul M. Coran
Acting Assistant/Legal
Advisor for Management
United States Department of State
Room 4427A, N.S.
Washington, D.C. 20520