

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-184068

DATE: AUG 22 1975

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MATTER OF: William H. Baumann - Remedial Order Issued by
Foreign Service Grievance Board

- DIGEST: 1. Foreign Service Grievance Board created special retention category for employee separated in reduction in force (RIF) and directed his reinstatement with backpay. Agency regulations provided that matters subject to final review outside of agency or for which other review machinery was provided were not within Board's jurisdiction. Although Board had authority to ensure correctness of employees' records, its order may not be implemented since employee's retention category was necessarily part of RIF procedure, employee had right to appeal RIF action within his agency and to Civil Service Commission, and such appeal rights removed matter from Board's jurisdiction.
2. Incident to grievance filed by employee concerning reduction-in-force action, Foreign Service Grievance Board issued remedial order requiring Agency for International Development (AID) to: establish new retention register limited in competitive area to Saudi Arabia instead of world-wide area; place grievant on such list; and reinstate him with backpay. Remedial order may not be implemented since AID regulations require competitive area to be worldwide and head of agency may not waive such regulation.

This matter involves a request on May 30, 1975, by the Assistant Administrator, Bureau for Program and Management Services, Agency for International Development (AID), for a decision as to whether the agency has authority to implement a remedial order issued by the Foreign Service Grievance Board in view of a decision by the Civil Service Commission's Federal Employee Appeals Authority on the same matter. Both decisions were issued as a result of proceedings instituted by Mr. William H. Baumann incident to his separation from AID by reduction-in-force (RIF) action.

Mr. Baumann was a Foreign Service Reserve officer, FSR-3, holding an Agency Occupational Specialty Code (AOSC) of 0083.05

(Public Safety Advisor) when he was separated from employment with AID on August 31, 1974. Prior to separation, Mr. Baumann, on August 12, 1974, filed a grievance with the Foreign Service Grievance Board pursuant to AID Manual Order No. 452.2 (August 12, 1971), "Grievances (Uniform State/AID/USIA Regulations)," in connection with a RIF notice dated July 29, 1974. Mr. Baumann also filed an appeal on August 29, 1974, with the Civil Service Commission (CSC) pursuant to 5 C.F.R. § 351.901 (1974), following unsuccessful appeals within the agency.

On December 23, 1974, the Foreign Service Grievance Board issued a remedial order which held that Mr. Baumann was properly assigned AOSC 0083.05 as of June 12, 1974, but that due to special facts inherent in the Public Safety Program in Saudi Arabia, the agency should have set up a "special AOSC 0083.01 [Public Safety Officer] Saudi Arabian retention register" on which Mr. Baumann's name should have been listed. Apparently, he would not have been subject to RIF action if he was on this special retention register. Accordingly, the Board directed AID to establish such a register, remove Mr. Baumann's name from the AOSC 0083.05, FSR-3 world-wide retention register, and place his name on the newly created AOSC 0083.01 Saudi Arabia retention register effective July 26, 1974. Furthermore, the Board directed that Mr. Baumann be reinstated with payment of backpay to the date of his separation.

On January 18, 1975, the CSC's Federal Employees Appeal Authority issued a decision pursuant to Mr. Baumann's August 29, 1974 appeal to the Commission. The Appeal Authority held that Mr. Baumann's competitive level was correctly determined by AID as AOSC 0083.05; that he was properly listed on the FSR-3 retention register for AOSC 0083.05 and was within reach for release from his competitive level; that he had no RIF rights with respect to the position in Saudi Arabia; and, that there was no violation of his rights under the CSC's RIF regulations. Mr. Baumann appealed this decision to the Appeals Review Board of CSC but subsequently withdrew the appeal.

The Foreign Service Grievance Board, in a letter dated June 20, 1975, furnished us with the Board's views concerning the propriety of the AID submission to our Office, reviewed the merits of the employee's case, and discussed the jurisdictional

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aspects involved. We have carefully considered the various points in the Board's letter and, in the discussion which follows, we will cover pertinent matters which were not outlined in the statement summarizing AID's position.

We have at various times, under the provisions of 31 U.S.C. § 74 (1970), considered the legality of proposed payments to employees in connection with improper personnel actions. While our more recent decisions in this area have generally concerned employee grievances submitted to binding arbitration pursuant to union-management agreements, the principles involved in those cases are applicable to determinations of agency grievance boards. In this connection we have stated that binding arbitration awards may only be implemented if found to be consistent with applicable laws, regulations, and decisions of this Office. 54 Comp. Gen. 312 (B-180010, October 31, 1974); 54 *id.* 435 (B-180010, December 2, 1974). Accordingly, the Foreign Service Grievance Board's decision herein must be analyzed to determine whether it is in accord with the above requirements.

The Board was established by section 663.1a, Volume 3, Foreign Affairs Manual (FAM). The jurisdiction of the Board is outlined at 3 FAM 663.3 as follows:

"The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law and these regulations."

"Grievance" is defined at section 662.1 as follows:

"Except as provided in section 662.2, a grievance is any matter of concern or dissatisfaction to an employee which is subject to control by the employee's employing agency. * * *"

Section 662.2 provides, in pertinent part:

"Formal grievances will be considered under this procedure except with respect to the following: personnel assignments (unless the grievance relates to an alleged violation of a specific regulation) * * * matters subject to final

administrative review outside * * * A.I.D. * * * or
for which other review machinery which adequately
protects employee rights has been established * * *."
(Emphasis added.)

Under the foregoing regulations, therefore, the jurisdiction of the Foreign Service Grievance Board does not extend to matters subject to final administrative review outside the agency or to matters for which other adequate review machinery has been established. Since RIF actions are subject to review both within AID and by the Civil Service Commission, we conclude that the Board lacked jurisdiction over the Baumann case. Our conclusion is reached as follows.

AID Manual Order No. 476.2, "Reduction in Force--A.I.D. Foreign Service" (December 1, 1968), section XIII permits an employee who is notified of his proposed separation under RIF procedures to appeal at two levels within AID and also to appeal to the Civil Service Commission. Section 3502 of title 5, United States Code (1970), directs the Civil Service Commission to prescribe regulations for the release of competing employees in a RIF. The Commission's regulations concerning RIF actions are contained in 5 C.F.R., Part 351 (1974). Subsection 351.901(a) states that "[a]n employee who has received a notice of a specific action and who believes this part has not been correctly applied may appeal to the Commission." Subsection (d), added September 9, 1974, 39 F.R. 32537, states "[t]he decision of the office of the Commission having appellate jurisdiction is final."

It is thus apparent from the regulations of both AID and the CSC that RIF actions are subject to review within the agency and by the CSC and that final appellate jurisdiction rests with the Commission.

The Board states that it is cognizant of the Commission's jurisdiction in RIF matters, but argues that it has limited jurisdiction to ensure the accuracy of the grievant's personnel file. However, we believe that in the instant case the Board exceeded this limited jurisdiction. While the Board has jurisdiction to ensure the accuracy of a grievant's personnel file, we believe that the Board, in creating a new retention register based on a limited geographic area and requiring that Mr. Baumann's

name be placed thereon, encroached upon a matter that is integral to the RIF action in question here. The area of competition and the establishment of a retention register are covered by subpart D of Part 351. On appeal under section 351.901, the commission has jurisdiction to determine whether employees were placed on the correct retention register and whether the competitive area on which such register was based was correctly determined. In the Baumann case, the CSC exercised this jurisdiction and found that Mr. Baumann was placed at the proper competitive level; that he was properly listed on the retention register; and that he was within reach for release from his competitive level. Accordingly, in our view, the Board's attempt to correct Mr. Baumann's personnel file was beyond its jurisdiction because the matters involved were necessarily for consideration in the RIF appeals.

The Board, in its letter to us dated June 20, 1975, states that it has previously ruled on 29 AID cases involving RIF cases involving the accuracy of an employee's AOSC or the retention register on which he is carried. We believe that the Board's jurisdiction cannot be enlarged in the present case beyond that contained in pertinent regulations by acquiescence on the part of AID in other cases.

Furthermore, even if the Board was acting within its jurisdiction, it exceeded its authority by granting relief that constituted a waiver of agency regulations. It is a well-established rule that an administrative regulation, promulgated within the authority granted by statute, has the force and effect of law, and will be given full effect by the courts, and that the violation of a valid administrative regulation, even by the issuing authority, constitutes in legal effect a violation of the statute. Service v. Dulles, 354 U.S. 363 (1957). In 51 Comp. Gen. 30 (1971), we held that administrative regulations may not be waived in individual cases, but are binding on the agency. Also, see 3 FAM 667.2a, which gives the Board authority, within the limitations of the agency head's authority, to grant certain remedial action, and 3 FAM 663.3, which requires that the Board review grievances consistent with existing law and regulations.

The remedial order issued by the Board pursuant to Mr. Baumann's grievance required AID to create an entirely new retention register based in part on a competitive area limited to a specific geographic area--Saudi Arabia. This is in direct contravention to

AID Manual Order 476.2 (December 1, 1968), "Reduction in Force—A.I.D. Foreign Service," which provides in subsection B of section V that the competitive area for FSR or FSS employees is worldwide. The Board's order, therefore, constitutes a waiver of a valid administrative regulation and is outside the authority of either the Board or the head of the agency. 51 Comp. Gen. 30, supra. Therefore, it follows that the Board could not establish such a geographically limited retention register.

The Board also determined that Mr. Baumann was qualified for placement on the special AOSC 0083.01 retention register and ordered that his name be placed thereon. The Board's action, in effect, assigned Mr. Baumann an AOSC on the basis of the Saudi Arabia position, which position he did not hold and had never been appointed to. The assignment of an AOSC on such a basis is in contravention of subsection G of section V of AID Manual Order No. 476.2, as amended June 12, 1974, which states that:

"The employee's occupational category is identified by the six-digit occupational code * * * of the position occupied in Washington or overseas, including Viet-Nam. Washington positions occupied by Foreign Service employees are assigned Foreign Service occupational codes, based upon an analysis of the duties and responsibilities of such positions. The occupational code of employees on a complement is that of the last permanent position, either overseas or in the United States. * * *"

Accordingly, the Board's action in this respect also represents a waiver of a valid regulation, and, therefore, is not an available remedy for the Board to grant.

The remaining portion of the remedial order, which required that Mr. Baumann be reinstated with backpay to the date of his separation, was necessarily dependent on the creation of the special retention register and the placement of his name thereon. Therefore, since there was no proper basis for placing Mr. Baumann's name on a special retention register, the remaining portion of the remedial order may not be implemented.

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In view of the above, and since the action of AID was sustained by the CSC, there is no basis for payment of backpay to Mr. Baumann.

R. F. KELLER

Acting

Comptroller General
of the United States