

United States of America

BEFORE THE FOREIGN SERVICE IMPASSE DISPUTES PANEL

In the Matter of

DEPARTMENT OF STATE

And

AMERICAN FOREIGN SERVICE ASSOCIATION

Case No. 17 FSIDP.001

**DECISION AND ORDER**

The Department of State (Foreign Service (FS) or Department of Management) filed a request for assistance with the Foreign Service Impasse Disputes Panel (Panel) to consider a negotiation impasse over a change in the Service Need Requirement for promotion to the Senior Level under the Foreign Service Act of 1980 (Act), 22 U.S.C. §1010, between it and the American Foreign Service Association (Union).

Following an investigation of the request for assistance, the Panel determined that the parties' impasse should be resolved through an Informal Conference with a Panel representative, Chairman Mark Carter. The parties were informed that if they were unable to reach a complete settlement of the dispute during the Informal Conference, the representative would notify the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the impasse. The Panel would then resolve the dispute by taking whatever action it deemed appropriate, which could include the issuance of a binding decision.

Accordingly, Panel Chairman Mark Carter conducted an Informal Conference with the parties at the Panel's offices in Washington, D.C., on September 19, 2017. Voluntary settlement of the dispute was explored, but the matter remained unresolved. At the conclusion of the meeting, the parties were instructed to submit written statements in support of their final offers on the issue at impasse. Subsequently, the parties submitted written statements in support of their respective positions.

## BACKGROUND

The mission of the Department of State is to create a more secure, democratic, and prosperous world for the benefit of the American people and the international community. The Department of State was established in 1789 to advise the President on formulating and conducting foreign relations; the Department is the oldest and most senior cabinet agency. The American Foreign Service Association represents approximately 8100 employees, including Foreign Service Officers (FSO) and Foreign Service Specialists (FSS). The parties do not have a master Collective Bargaining Agreement. They operate under a framework agreement that was established in 1987.

Prior to passage of the Foreign Service Act of 1980, the Rogers Act<sup>1</sup> and subsequently the Foreign Service Act of 1946 had established a grade system from FSS-22 up to FSO-1. A single "senior" grade, Career Minister, was established for Foreign Service Officers who had served with noteworthy distinction in ambassadorships or other equivalent positions (usually as Assistant Secretary or Under Secretary of State). The Career Ministers were paid at the same rate as senior FSO-1s, therefore, the "promotion" was primarily titular.

With the reform of the Civil Service in 1949, the General Schedule, with its three "super grades" (GS-16 through GS-18), was created, followed by the creation of the Senior Executive Service (SES) in 1978. The Foreign Service Officers in senior policy positions found themselves regularly equated to mid-level counterparts in the Civil Service. The Foreign Service Act of 1980 and Executive Order 12293 sought in part to address the imbalance in perceived status of the Foreign Service senior leadership. The Senior Foreign Service (SFS) was to be a cadre of senior, policy-level foreign affairs professionals on a par with the senior, policy-level officers of the SES.

The 1980 Act provides that for promotion into the Senior Foreign Service, the precepts or qualifications that guide the Promotion Selection Boards' (the bodies responsible for recommending promotions and involuntary separations of underperformers) consideration of candidates shall emphasize performance which demonstrates the strong policy formulation capabilities, executive leadership qualities, and highly developed functional and area expertise.

In order to be promoted into the Senior Foreign Service, an FS-1 FSO must "open his/her window", that is, must formally request in writing consideration for promotion into the Senior Foreign Service. By regulation, this application starts a 6-year

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<sup>1</sup> The Rogers Act of 1924, 22 U.S.C. 52 §3901 et. Seq., often referred to as the Foreign Service Act of 1924, is the legislation that merged the United States diplomatic and consular services into the United States Foreign Service. It defined a personnel system under which the United States Secretary of State is authorized to assign and rotate diplomats abroad.

time limit for consideration for promotion into the SFS. If the FSO is not promoted into the Senior Foreign Service within a specific time frame, the officer is mandatorily retired. This time-in-class stipulation ensures flow-through of the senior ranks of the service, a specific goal of the Foreign Service personnel system.

The Department of State created a Career Development Plan (CDP) in 2005 that mapped out a path for FSOs to follow when seeking consideration for promotion into the SFS. The CDP policy lays out the qualifications/precepts, along with other minimum requirements (e.g., type of completed assignments or courses) that a FSO must develop and demonstrate over the course of his or her career.

In 2009, the Government Affairs Office (GAO) did a report on the Department and found that there were experience gaps at key hardship posts.<sup>2</sup> The GAO report recommended that the Department take steps to minimize the issues. To meet this recommendation, the Department of State proposed changes in three areas: 1) Bidding privileges (redefining the criteria for eligibility for "stretch"<sup>3</sup> bidding privileges); 2) the Fair Share Policy<sup>4</sup>; and 3) the Career Development Program (CDC), now to be called the Professional Development Program (PDP).

As for the criteria to be eligible for consideration for a "stretch" assignment, the Department proposed to raise the threshold for eligibility for consideration requirement from a "15% or greater differential" to a higher threshold for conferring bidding privileges to those serving at posts with 30% or greater differential or 25% of greater differential plus danger pay. The parties were able to reach agreement on that change.

As for the Fair Share Policy requirements, in order for an employee to be considered to have met their fair share requirement, the employee must have served at least 20 months at a post, with at least a 20% differential, sometime within 8 years prior to their upcoming transfer eligibility date. The parties were able to reach agreement on that change.

At issue in the negotiations over the new PDP is the introduction of a more rigorous Service Need Requirement into the promotional consideration process. The Union has proposed the maintenance of status quo with regard to the mandatory service requirement (with agreement to implement the other changes agreed to prior to this impasse).

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<sup>2</sup> GAO-09-874

<sup>3</sup> Stretch assignments are broadly defined as any assignment above or below a bidder's grade. Such an assignment is only made after a full review of the availability of eligible in-grade bidders.

<sup>4</sup> The Foreign Service Act of 1980, as amended, 22 USC §3901, requires all Foreign Service employees to serve a substantial portion of their careers overseas, including being available for a fair share of hardship assignments. The Fair Share Policy is the Department's effort to ensure that the burden of service at high hardship posts is shared equitably among all employees. The Fair Share Policy includes the bidding requirements and how to calculate one's fair share status.

## ISSUE AT IMPASSE

The parties disagree over the change in the Service Need Requirement for consideration for promotion into the Senior Foreign Service.

## POSITIONS OF THE PARTIES

### Department's Final Offer and Position

- A complete tour at a 25% or greater hardship differential post<sup>5</sup> from entry into Foreign Service OR a completed tour at an unaccompanied post<sup>6</sup> from entry in the Foreign Service,

AND

- Another completed tour at a 20% or greater (hardship) differential post after tenure.
- Waivers
- 8-year phase in

The Department is attempting to address a number of concerns with the changes that they have introduced into the new PDP program, including changes to the Service Need Requirement. The changes would promote more equitable burden sharing<sup>7</sup> among FSOs in the less desirable posts. The changes would expand the pool of qualified bidders at those posts that have been historically difficult to staff in a timely fashion. And, the experiences gained through service at the higher differential posts would enhance the abilities of the FSOs to lead effectively once they cross over the

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<sup>5</sup> A post differential (also called a hardship differential) may be granted on the basis of conditions of environment, such as pollution, disease, crime, and other factors which warrant additional pay as an incentive. *See 5 USC §5925.* A danger pay allowance may be granted on the basis of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well-being of the employee. *See 5 USC §5928.* A greater hardship post is defined as having a combined differential of 20% or higher.

<sup>6</sup> No family members are allowed at the post.

<sup>7</sup> 22 USC §3901 requires all FS employees to serve a substantial portion of their careers overseas. In conjunction with such assignments, the FS employees are expected to be available for their "fair share" of hardship assignments. The parties reached agreement in 2017 regarding the Fair Share Policy (to increase the requirement of posts employees must bid for from 15% to 20% hardship posts). The Department argues that the Fair Share Policy falls short of meeting the need to increase service at hardship posts because the Fair Share program only requires FSOs to BID on hardship posts; it does not require that they actually get selected and SERVE at one of the hardship post in order to fulfill the Fair Share Policy requirement.

Senior Threshold. Additionally, the Department is proposing to put into place expanded waiver provisions for those FSOs who are unable to serve at such posts due to health, family, or other extraordinary circumstances. The Department would also allow for an 8-year transition period before this requirement would become mandatory. It is the Department's stated goals with changing the Service Need Requirement: 1) to eliminate or minimize the "crisis/panic mode" when the Department is attempting to fill high differential posts by ensuring there are numerous candidates to consider; 2) to change the mindset among the SFOs to expect to serve in high differential posts; 3) to ensure that all FSOs actually serve in higher differential posts, not just bid on them; and, 4) to develop a stronger cadre of senior leaders by ensuring that the SFOs, having served at the more challenging posts, are more prepared to lead effectively when they become Senior FSOs.

#### Union's Final Offer and Position

- That the Department implement the Professional Development Program (PDP), incorporating all the changes to its forerunner, the Career Development Plan (CDP), with the exception of the proposed changes to the "service needs" requirement.
- That the PDP incorporate only the mandatory portion of the service need requirement from the CDP (i.e., one tour after tenure or two Entry Level tours at 15% or greater differential posts).
- That the parties sign a Memorandum of Agreement (MOU) with a term of two years from the effective date, with the opportunity for either party to request negotiations regarding the MOU between 90 and 60 days from the expiration of the MOU. If neither party timely requests to renegotiate, the MOU will roll over in one year increments.

The Union is seeking to ensure that the Service Need Requirement remains at 15% or greater (hardship) under the new PDP. The Union is not convinced that there is a problem with filling hardship positions. The data provided to the Union and to the FSIDP indicates that the hardship posts have the lowest vacancy rates compared to other posts. Both parties admit that posts do not go un-filled in the Department because the employees are all committed to fulfilling the mission. The Union offers that the changes that have already been agreed to in the Fair Share Policy and other agreed upon provisions of the PDP will address the concerns offered by the Department. Further, the Union offers that if the data bares out shortages in applicants after the negotiated changes have been allowed to take effect, the Union is willing to return to the bargaining table after 2 years (which would be 2 open window cycles), and annually thereafter, to discuss and negotiated further changes.

The Union's overarching concern with the changes proposed by the Department is that the Department's (or specifically Human Resources) attempt to define

expectations will erode the statutorily intended power and importance of the Promotion Selection Boards. The Union believes that the proposed change by Management is not based upon challenges with filling hardship positions or any of their other unsubstantiated concerns, but, instead, is an attempt by Management to usurp the power and impact of the Promotion Selection Boards. The Promotion Selection Boards are made up of selected Foreign Service members (bargaining unit and non-bargaining unit employees) and are critical to the careers of the Foreign Service Officers in the up-or-out system. As the employees must compete for promotions throughout their career or retire, the Promotion Selection Boards play a critical role in evaluating the promotion eligibility of the Foreign Service Officers. The Union believes Management is trying to transfer the power of the Boards by pre-determining the qualifications for consideration at such a granular level. The Union believes such a transfer of power is in direct contravention of the Foreign Service Act.

## CONCLUSION

Having carefully considered the evidence and arguments presented in support of the parties' positions, the Panel finds that the Department's proposal is the better alternative to resolving the impasse. In our view, the increased Service Need Requirement for senior leadership is appropriate to address the experience gap in senior leadership and to ensure that the leaders of the Department have the demonstrated skills and experience that will serve to be critical in leading other FSOs in the field. We agree with the Department that experiences in high hardship posts will provide the crisis management and leadership experiences that will strengthen the ability of the Department's senior leaders to better manage people and lead teams, particularly in the more challenging posts. The dynamics of foreign diplomacy has changed over recent time. The Department's data supports the conclusion that there are more high hardship posts, with an increased need for leadership that is experienced in managing in more challenging environment. It serves to reason that Officers that have served in the more challenging posts are more competent and confident leaders. The need for those skills and experience is only increasing.

We believe that the requirement to serve abroad is consistent with 22 USC §3984 and, therefore, should be the expectation of the career members of the Foreign Service. The employees know when they come aboard with the Foreign Service that they are expected to serve abroad a substantial portion of their careers and enter into the Foreign Service only by being "worldwide available." But, while FSOs are required to be "worldwide available" when they first join the Foreign Service, developments throughout the course of their career (e.g., medical) may preclude them from being able to serve at higher hardship differential posts. To address the impact on the FSOs, the Department has offered a waiver policy that allows those who are legitimately unable to serve in those hardship posts to not be harmed by the absence of service in their bid for Senior FSO. The Department has also offered to phase in the increased Service Need Requirement over 8 years. That provides a reasonable amount of time for those who may be currently going through the consideration process to be insulated from impact

by the change, while also proving those who are in the earlier phases on their career sufficient time to gain the experiences before they open their window of consideration.

The Union expressed concern that the Promotion Selection Boards would be losing their power with this change, and that loss of power is inconsistent with the authorizing Statute. The Promotion Selection Boards, in their consideration of candidates for the Senior FSO opportunity, must be guided by the precepts negotiated between the parties and prescribed by the Secretary of the Department<sup>8</sup>. There is no reason to believe that the role of the Boards will change with this change to the Service Need Requirement. The Boards must operate pursuant to the needs of the Department, as defined by the Secretary. The Performance Boards will continue to exist and play the critical role of identifying the leaders of the Department, from among those candidates that demonstrate the skills and experiences that are essential to leadership. What remains unchanged by this proposal is that consistent with the Statute, the Boards must make decisions based upon the clear and transparent criteria established by the Secretary.

Based on the foregoing, we shall impose the Department's proposal concerning the change in the Service Need Requirement for consideration for promotion into the Senior Foreign Service.

### 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 Dispute Panel, under its regulations, 22 C.F.R. §1471.10 (a), hereby order the parties to adopt following to resolve the impasse:

- A complete tour at a 25% or greater hardship differential post from entry into Foreign Service OR a completed tour at an unaccompanied post from entry in the Foreign Service,

AND

- Another completed tour at a 20% or greater (hardship) differential post after tenure.
- Waivers
- 8-year phase in

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<sup>8</sup> Section 602 of 22 USC §4002.

By direction of the Panel.



Mark A. Carter  
FSIDP Chairman

November 8, 2017  
Washington, D.C.