

ANNUAL REPORT

OF THE

**FOREIGN SERVICE
GRIEVANCE BOARD**

FOR THE YEAR

2010

FOREIGN SERVICE GRIEVANCE BOARD

ANNUAL REPORT FOR THE YEAR 2010

RECIPIENTS

Committee on Foreign Relations
United States Senate

Committee on Foreign Affairs
United States House of Representatives

Director General of the Foreign Service
U.S. Department of State

FOREIGN SERVICE GRIEVANCE BOARD

ANNUAL REPORT FOR THE YEAR 2010

Composition and Operation of the Board

It is my privilege to transmit the Annual Report of the Foreign Service Grievance Board for 2010. The report provides information on the operations and responsibilities of the Board during calendar year 2010 and is intended to satisfy the reporting obligations created by Section 1105(f) of the Foreign Service Act (22 U.S.C. §4135(f)). The Report includes information as to the number and types of cases decided and their disposition and narrative regarding the current and historical operation of the Board.

The Board's operations in 2010 continued in a manner similar to prior years. We operate through a combination of in person and virtual interactions with the grievants, with the Foreign Affairs Agencies under our jurisdiction, with the American Foreign Service Association (AFSA), and with the public. Given the fact that the Board Members are all contractors who work on an as needed basis, typically remotely, we have relied as in prior years upon a variety of means to facilitate our review of the Records of Proceedings (ROP) and decision of the grievance appeals based upon those ROPs. We have obtained a state of the art video conferencing system to facilitate more personal interactions with the grievants and agencies and their representatives and among Panel Members.

Ira F. Jaffe, who has served as Chairperson since October 1, 2007, is a full-time impartial labor and employment arbitrator and mediator. He has served as a neutral in the

field for over 30 years and presided over more than 4,000 disputes. He will be completing his second two-year term on the Board, effective September 30, 2011, and has decided not to seek reappointment. Gail M. Lecce, a retired USAID Foreign Service Officer and Member of the Board since 2005, continues to serve as Deputy Chairperson. E. Charles Ash, a Foreign Service Officer with 28 years of State Department service, has been Executive Secretary since June 20, 2010. Two Special Assistants, Margaret Sula (a career Foreign Service Officer with the Department of State) and Joseph Pastic (a retired USAID Foreign Service Officer) provide case management and research support to the panels. We also employ two permanent support staff members, F. Elena Cahoon (a career Civil Service employee of the Department of State) and Kathy L. Cox (a career Foreign Service Specialist with the Department of State). Jeremiah A. Collins, a partner with the law firm of Bredhoff & Kaiser, continues to serve as outside Counsel to the Board.

The Board itself is a unique organization in the labor relations arena, consisting of two groups of individuals with complementary backgrounds and experiences. One pool consists of seasoned, dedicated individuals retired from one of the Foreign Service agencies. The second pool consists of individuals, currently all of whom are attorneys, whose background includes significant experience presiding over and deciding labor relations and employment disputes. Members are appointed by the Secretary of State based upon recommendations made by the various foreign affairs agencies and AFSA, the exclusive representative of Foreign Service members. Members work on an “as needed” part-time basis and serve two year terms.

Customarily, cases are heard and decided by three-member panels. The Chairperson is vested by statute with the authority to appoint Members to panels and to determine the number of Panel Members in a particular case. Typically, two Members from the Foreign Service retiree pool and a third Member, who serves as the Presiding Member, from the pool of Members who are professional dispute resolvers, are appointed to the panel. As in prior years, the Chairperson has delegated to the Executive Secretary the authority to assign individual Members to the panels. Case assignments take into account the experience, availability, and workload of each Member. While cases are decided solely upon the Record of Proceedings developed in connection with each grievance, this blend of experience leads to a decision-making process that attempts to integrate applicable legal and personnel principles and an appreciation of the unique practices, culture, and environment present in the Foreign Service.

As of October 1, 2010, the Board consisted of the following 15 Members:

Ira F. Jaffe (Chairperson)

Gail M. Lecce (Deputy Chairperson)

James E. Blanford

John Campbell

Garber A. Davidson

Lois E. Hartman

Alfred O. Haynes

Arthur A. Horowitz

Arline Pacht

Jeanne L. Schulz

Nancy M. Serpa

Elliot H. Shaller

Richard J. Shinnick

John M. Vittone

Susan R. Winfield

Most of the Members live in the Washington, D.C. area. Members report to the Board's headquarters in Arlington, Virginia, for Board meetings (which are held quarterly) or as needed to participate in hearings. Most day-to-day interaction among Board Members, however, takes place electronically – by telephone, video conference, facsimile, and/or e-mail.

The majority of cases are decided on the documents submitted for the record, without hearings, in keeping with the general preferences of the parties. The Board does hold hearings, however, in appropriate cases. Two hearings lasting a total of six days were held in 2010. In certain categories of cases, hearings are mandatory. In others, the decision to hold or not to hold an in-person hearing rests in the discretion of the Panel.

Recently, in appropriate cases, we have increased our use of conferences to better focus issues at earlier stages of the process, to minimize and expedite discovery disputes, to clarify material ambiguities in the record, and to decrease unnecessary paper filings. Our planned improvements to our website have not taken place, as a result of budgetary and logistical considerations, but implementing those improvements, if possible, remains a goal for 2011. We have also shortened our rulings, where appropriate, to enhance the readability of the decisions and better highlight the analysis that forms the basis of our holdings.

2010 Case Load

The number of new cases docketed at the Board in 2010 was 56, a 30% increase over 2009, but in line with the number of cases filed annually in the prior four-year period. As in the past, the vast majority of cases were filed by Foreign Service Officers with the Department of State, a fact that mirrors the relative number of Foreign Service employees at the State Department when compared with those employed by other foreign affairs agencies. There was a significant increase in filings by employees at USAID, but given the small number of cases, one must be careful not to infer too much from a single year's data.

Cases that settle do so at all stages of the process. Approximately 30% of the cases are settled or withdrawn prior to decision by the Board. The proportion of cases settled and/or withdrawn remains high, which is desirable. There was no significant change in the mix of grievance appeals filed with the Board in 2010 as compared to the mix of grievances appealed to the Board in recent prior years. The bulk of the cases filed in 2010 involve challenges to Employee Evaluation Reports (EERs), disciplinary action, or financial claims (consisting either of objection to debts claimed by the agency or claims for pay, including allowances or differentials). There was an increase in the number of grievances protesting separation from the service over the past few years, but once again, the single year nature of the increase and the small numbers of total appeals cases caution against reaching any conclusions prematurely as to the significance, if any, of that increase. The average time between filing and issuance of a final decision by the Board increased slightly in 2010 over the comparable 2009 figure, but this is largely the

result of a few outlier cases that for a variety of reasons took significantly longer than usual to decide.

Judicial Decisions Involving Board Rulings

In 2010 there was only one reported judicial decision addressing the substance of actions taken by the Board.

In Richard Lubow, et al. v. United States Department of State, 2010 U.S. Dist. LEXIS 80830 (D.D.C. 2010), the Court vacated in part the decisions of the Department of State and the General Services Administration Contract Board of Appeals that denied pay claims by five individuals who were initially compensated for overtime hours worked in Iraq and then had those payments recouped on the grounds that to the extent that the pay exceeded the maximum pay that was permitted to be paid pursuant to 5 CFR Part 550, for 2004, it was paid contrary to law. The Department demanded repayment of the overpayment of wages and further declined to waive repayment of that debt.

The Court found that neither the Department nor the GSA Contract Board of Appeals had considered whether the provisions of the Emergency Supplemental Act for Defense, the Global War on Terror, and Tsunami Relief of 2005 (“Appropriations Act of 2005”), which permitted federal agencies to waive the pay cap for certain federal employees in calendar year 2005, up to a maximum of \$200,000, applied to payments made to the plaintiffs (grievants) during pay period 25 of 2004, which sums were actually paid in January 2005. The Board of Contract Appeals did not consider the legislation because it had not yet been passed when it reached its conclusions. The court further found that there was no indication on the record that the State Department had taken the 2005 pay cap waiver into account when it determined whether and how much debt the

plaintiffs owed the Department. The FSGB did not rule upon the issue because the argument was never asserted before the Board as a basis for finding that the debt was not valid, in part.

The court remanded the cases to the State Department and the Board of Contract Appeals for further consideration taking into account the effects of the Department's August 2005 waiver of the premium pay cap as it would apply to plaintiffs' earnings in pay period 25 of 2004. No decision on the remand has been reported to the FSGB as of this date.

Significant or Noteworthy Board Decisions in 2010

EERs and OPFs

As has been the case in recent years, a high percentage of the cases considered by the Board this year involved challenges to decisions by the promotion and retention boards that were based on the inclusion in EERs and official personnel folders (OPFs) of information alleged to be of a falsely prejudicial character. These assertions were rejected slightly more often than they were sustained in the particular cases decided in 2010.

In FSGB Case No. 2003-034C, a case on remand from the United States Court of Appeals for the District of Columbia Circuit, United States Department of State v. Coombs, 482 F.3d 577 (D.C. Cir. 2007), the Board had occasion to discuss the meaning of Section 1101(a)(1)(E) of the Foreign Service Act which provides that the "alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member" is grievable. Section 1101(a)(1)(A) of the Act contains similar language with respect to separation actions predicated upon

information alleged to be an inaccuracy, omission, error, or of a falsely prejudicial character. The Board reaffirmed its earlier holding that grievant's EERs contained material and prejudicial omissions and violated Section 1101(a)(1) of the Foreign Service Act. The rationale for the Board's finding, however, changed following the Court of Appeals' decision.

The initial appeal challenged EERs that resulted in the employee being low-ranked and, ultimately, being selected out of the Service. He complained that his 2000 and 2001 EERs were of a falsely prejudicial character since they failed to note that he was suffering from a mental illness, which was later diagnosed and treated by his own psychiatrist, and that the undiagnosed illness could explain to a large degree certain aspects of his performance that were criticized in the EERs. The Department denied his grievance, relying upon examinations by its own medical personnel, and the fact that at the time that the EERs were prepared the Department lacked knowledge of the grievant's mental illness. An appeal was taken to the Board, which agreed that the EERs were of a falsely prejudicial character and ruled in his favor.

On appeal, the United States District Court for the District of Columbia affirmed the Board's decisions. On further appeal, the United States Court of Appeals for the District of Columbia Circuit reversed. The Court of Appeals held that material could not be found to be of a falsely prejudicial character if the material itself was not untrue. It questioned why the Board had not relied instead on the language in Section 1101(a)(1) regarding "omissions" from the personnel record. The Court remanded the case to the Board and ordered it to reconsider its interpretation of the relevant statutory provisions, and to review the part of its order that directed the Department to reinstate the employee

into the Foreign Service unless medically disqualified, stating that there were issues that the Board had not resolved with respect to the relationship between the Rehabilitation Act and the Foreign Service Act.

On remand, the Board reaffirmed its original decision that the 2000 and 2001 EERs violated Section 1101 of the Foreign Service Act and that the proposed separation was, therefore, improper. Following the Court of Appeals' analysis, the Board held that the omission of any reference to grievant's medical condition was of a prejudicial nature. The Board noted its concern, however, with the Court of Appeals' restrictive interpretation of the term "falsely prejudicial character of information" in the statutory definition of grievances. For many years its decisions, as well as court decisions and documents filed by the parties, have applied the provisions of Section 1101, including Sections 1101 (a)(1)(A) and (E), as a whole, rather than attempting to parse and separately apply each of the component parts. The Board further noted that the legislative history of the statutory provisions supports such a holistic reading.

With respect to the unresolved issues regarding medical qualification to serve, the Board found that the issue was moot since the Department had cleared the grievant medically to work at all times from 1998 to the present. The Board further found that the affirmative obligations imposed by the Rehabilitation Act neither eliminated nor took precedence over the rights and protections embodied in the Foreign Service Act, and that there was no conflict between the Board's findings in this case and the mandates of the Rehabilitation Act.

In FSGB Case No. 2009-022, the Board decided that criticism from a Selection Board placed in an employee's OPF regarding the manner in which the employee

prepared another employee's EER was subject to the same standards under Section 1101(a)(1) of the Foreign Service Act as critical statements in the OPF from a supervisor of the employee. The Criticism Statement was found to have omitted certain facts that were necessary to present a fair and balanced description and were of a falsely prejudicial character. The Board, therefore, ordered that the Criticism Statement be removed from the employee's OPF.

Financial Cases

The number of grievance appeals docketed in 2010 complaining about financial claims of various types increased over the similar number of appeals in 2009.

The cases decided in 2010 by the Board included appeals with respect to disputes over the establishment of initial salary; claims to recoup pay that was forfeited due to application of the annual salary cap; claims regarding moving and storage expenses charged to employees; and claims regarding whether particular allowances were improperly denied due to choices having been made on the basis of inaccurate or incomplete information.

Four cases involving the agencies' setting of initial salaries reached final conclusion during the past year that are worthy of mention.

The grievants in two cases with nearly identical fact patterns (FSGB Cases No. 2010-003 and 2010-004) claimed that USAID was equitably estopped from changing the salary offers they had been given. Both grievants applied to positions that were advertised at the FS-03 level, with a top salary of \$94,643. The grievants were offered salaries above the announced top salary based on their salary histories. Less than two weeks later, after each had begun work, each was advised that the salary offers were

incorrect, and that their actual salaries would be reduced to the maximum advertised.

The grievants claimed that equitable estoppel prevented the agency from lowering their salaries.

The Board found that the elements of equitable estoppel were not present in either case: the grievants' reliance on the erroneous offers was not reasonable given the salary stated in the position notice; the agency did not have discretion to set a higher salary; the Human Resources person who made the erroneous offers did not have actual authority to deviate from the top salary position posted; and there was no evidence that the grievants had actually relied detrimentally on the erroneous offer. The agency's actions were affirmed.

Two other initial salary cases (FSGB Case Nos. 2007-042 and 2008-032) also presented fact patterns and claims similar to one another. Both grievants had been Marine Security Guards prior to applying for positions as Special Agents with the Department of State. In reviewing their prior experience for the purpose of setting their initial salaries, the Department's Office of Recruitment, Examination and Employment (HR/REE) had granted grievants 20% credit for their MSG experience. The Department grants either 100% credit for specialized experience that is considered to be directly related to the responsibilities of a Special Agent, or 20% credit for other service, which though deemed "highly desirable," is considered not to be directly related. The Department had a set internal policy of awarding 20% credit for MSG experience, regardless of the applicant's actual experience in that position, not considering it to be directly related to a Special Agent's duties.

In its initial decision, which was discussed in the Board's 2009 Annual Report, the Board reviewed the published procedures, SOP-98, and attendant authorities and held that the Department's assignment of 20% credit for the grievants' MSG experience without individual review of the particular experience was arbitrary and capricious. The Department was directed to carry out an individual review of each grievant's prior experience to determine whether the initial salary was correctly determined or was in error.

On remand, the agency conducted an individual evaluation of grievants' applications and prepared a detailed written analysis in which it concluded that the entry level salary for each had been correctly established. The Board concluded following an appeal of the decision on remand that the evaluation conformed to the Department's regulations and that it had exercised informed discretion in setting the grievants' starting salaries. The Department's actions were affirmed.

Non-Promotion Grievances

In FSGB Case No. 2006-004R, the grievant, who was to be separated for failing to be promoted within the time-in-class (TIC) limits, challenged the operation and results of six reconstituted selection boards that had been convened pursuant to her earlier grievances.

In 2005 grievant filed three grievance appeals with the Board challenging the failure of six Senior Threshold Selection boards (STBs) to promote her into the Senior Foreign Service, alleging various procedural errors. The Department of State agreed to convene six reconstituted selection boards to review grievant's corrected file before any decisions were reached by the Board in those appeals.

As reported by the Department, five of the reconstituted boards ranked grievant eighth out of the eight files reviewed and one panel ranked her sixth, resulting in no promotion. In a new grievance appeal filed with the Board in 2008, grievant challenged those results, alleging that the Department had suppressed or deliberately manipulated the actual results of the panels for the purpose of representing that grievant had not been promoted. As the case progressed, grievant clarified that she was also questioning the bona fides or accuracy of the reported results and argued that those results could not be credited, even absent proof of any intentional manipulation.

The Board concluded that the record established the existence of serious deficiencies and irregularities in the operation of each of the six reconstituted boards which, taken together, rebutted the presumption that the boards were conducted with regularity, and prevented the Board from crediting their results. These deficiencies and irregularities included: 1) the destruction of many of the underlying records, not only with respect to the internal deliberations of the reconstituted boards, but with respect to the preparation and approval of the reported ranking results; 2) the failure of any of the board members from any of the six reconstituted boards to be able to confirm that the results reported in the final reports accurately reflected the judgments of the boards as a whole; 3) evidence that the boards were not conducted in a fashion that incorporated the safeguards followed by regular selection boards designed to ensure the accuracy of results reported; and 4) a lack of evidence that the preparation of the final ranking reports by Human Resources was accomplished with sufficient attention to detail and based upon reported individual rankings such that they could be accepted as accurately reflecting the consensus rankings of any of the reconstituted boards.

The FSGB ordered that six new reconstituted boards be conducted. It denied, however, grievant's request for a directed promotion.

Discovery – Law Enforcement Privilege

In FSGB Case No. 2010-001, the Board addressed a significant issue involving discovery in a case that has not yet been concluded. In objecting to a discovery request to produce what otherwise would have been highly relevant documents, the Department asserted that the documents were protected against disclosure by virtue of the law enforcement privilege. Specifically, it declined to provide several of the documents because they were asserted to reveal the identity of confidential and sole source informants and because of a claim that disclosure would reveal an investigative technique used by its investigators.

The Board rejected the claim of privilege, holding that there was a question whether the information gathered on grievant during the course of its investigation was for law enforcement purposes and thus even subject to the claim of privilege. A number of cases hold that when an agency is investigating its own employees, the law enforcement privilege applies “only if it focuses ‘directly on specifically alleged illegal acts ... which could, if proved, result in civil or criminal sanctions.’” Cotton v. Adams, 798 F. Supp. 22, 25 (D.D.C. 1992), citing Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984). The Department had not shown that it was investigating the grievant in Case No. 2010-001 for possible violations of law that could result in civil or criminal sanctions.

The Board further found that, even assuming arguendo that the law enforcement privilege was available, the Department had not met the threshold requirements that have

been required by courts as a condition to application of that privilege. See, e.g., In re Sealed Case, 272 U.S. App. D.C. 314, 856 F.2d 268, 271 (D.C. Cir. 1988). Nor was it shown that the Department considered and weighed the numerous factors included in the balancing test outlined in Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) that were necessary to establish that invocation of the privilege was appropriate.

The Board denied the claim of privilege and directed the production of the requested documents.

Mootness Based on Full Relief

In FSGB Case No. 2008-043, the grievant challenged a 30-day suspension imposed by the U.S. & Foreign Commercial Service on charges that he had failed to exercise supervisory responsibility; exercised poor judgment; and engaged in conduct unbecoming a Foreign Service Officer. Shortly before the start of a scheduled hearing on the merits of his appeal, US&FCS issued a letter to grievant rescinding the 30-day suspension and moved that the grievance appeal be dismissed as moot. The US&FCS initially reserved the right to reimpose disciplinary action for the same underlying conduct and proposed to suspend grievant for three days instead for essentially the same alleged misconduct. The Board declined to grant the agency's request to dismiss the appeal as moot under those circumstances.

The agency subsequently rescinded the disciplinary action that underlay grievant's appeal, with prejudice, and stated that it would not reassert disciplinary action in the future based on the same events. The Board granted the motion to dismiss the appeal under the new stipulations. A request by the grievant for attorney fees was denied on the basis that he was not a "prevailing party" since the case was moot after the

agency rescinded the disciplinary action. Sacco v. Department of Justice, 90 M.S.P.R. 225 (2001) affirmed, 317 F.3d 1384 (Fed. Cir. 2003).

Disability Discrimination

In FSGB Case No. 2008-004, a disabled Foreign Service Officer with the Department of State filed a grievance asserting that the Department failed to promulgate and maintain a valid affirmative action plan (AAP), in accordance with the requirements imposed by the Rehabilitation Act, and that this failure contributed to his non-selection for promotion and his separation due to having exhausted his time-in-class (15 years as an FS-02 without promotion to the FS-01 level). For virtually that entire period, the grievant experienced symptoms to varying degrees of a progressive neurological disorder that ultimately severely limited his ability to walk and speak. During a number of these years, he experienced difficulty securing assignments in the open bidding process and for certain periods was unable to work in posts that may have been most helpful in satisfying the Precepts for promotion. From 2002 until the present, grievant has been mid-ranked each time he came up for promotion except on two occasions (2003 and 2004) when he was low-ranked. He received compassionate waivers of the low-rankings by the Department due to his medical condition.

In his appeal to the Board, he argued that he had been denied the benefit of a properly drafted and executed AAP for promotion of disabled employees in the Foreign Service, as mandated by the Rehabilitation Act of 1973. He also claimed that the Department's Foreign Service promotion system gave special consideration to service in overseas and hardship assignments, among other criteria, that disadvantaged disabled

officers, but precluded specific consideration of how a disabled employee's disabilities impacted the member's ability to meet the promotion criteria.

Because grievant's time-in-class had expired without a promotion, the Department curtailed his last assignment and proposed to separate him from service immediately. Prior to its final ruling denying the grievance, grievant remained employed with the Service as a result of interim relief orders of the Board.

The Board concluded that grievant had standing to bring this claim because he presented a cognizable grievance under the Foreign Service Act, but that grievant had not demonstrated that he has a private right of action to challenge the substance of the AAP before the Board. The Board further concluded that there was no showing of the required content of an appropriate AAP or the impact that such a plan would have had on his promotion opportunities. Nor did the grievant seek enforcement of any provision of the AAP.

With respect to the Department's promotion system, the Board concluded that grievant did not seek, nor argue that the Rehabilitation Act requires, a different set of promotion criteria for disabled employees. Grievant also did not argue that the promotion Precepts as written violated the Rehabilitation Act. The Board found that neither the promotion Precepts nor the promotion process, as applied to the grievant, discriminated against him or violated the Rehabilitation Act of 1973.

One member of the panel dissented, concluding that the Foreign Service promotion Precepts did, in fact, screen out or tend to screen out the grievant from promotion solely because of his disability, in violation of the Rehabilitation Act of 1973.

The Board's decision, as well as the underlying Department actions, were appealed to the District Court for the District of Columbia. That appeal is pending.

Disciplinary Cases

The Board issued decisions in five cases in 2010 in which grievants challenged disciplinary action by the agency. The issues presented, the factual situations, and the decisional standards are the same as those reflected in the Board's jurisprudence for many years. As is typical in challenges to disciplinary action, many of the appeals included questions as to whether the penalty meted out to the grievant was consistent with penalties issued to employees in prior similar cases.

Respectfully submitted this 28th day of February 2011.



Ira F. Jaffe
Chairperson, Foreign Service Grievance Board

Annual Report 2010 – Statistics

A. Total cases filed 56

B. Types filed

EER/OPF	18
Financial	14
Disability	0
Discipline	10
Separation	8
Assignment	2
Implementation Dispute	0
Other	4

C. The following dispositions were cited for the 58 cases closed in 2010:

Agency Decision Affirmed	27
Agency Decision Reversed	8
Partially Affirmed/Partially Reversed	3
Settled/Withdrawn	15
Dismissed	5

Note: Agency Decision Affirmed means that the grievance filed with the Board was denied and the grievant did not prevail. Agency Decision Reversed means that the grievance was sustained in whole or in substantial part. Dismissals refer to cases in which the Board found no proper basis to proceed (e.g., dismissal due to mootness, denial of motion for reconsideration, lack of jurisdiction, timeliness, etc.).

D. Oral hearings 2
(1 for a period of 5 days)
(1 for a period of 1 day)

E. Mediations 1

F. Grants of Interim Relief 15

G. Average time for consideration of a grievance, from the time of filing to a Board decision, was 47 weeks.

H. There were 41 cases pending before the Board as of December 31, 2010.

I. The new cases docketed in 2010 were filed by Foreign Service employees in the following agencies:

Department of State	43
U.S. Agency for International Development	9
Department of Commerce	3
Peace Corps	1

No cases were filed in 2010 by Foreign Service employees of the Foreign Agricultural Service or the Animal and Plant Health Inspection Service (both part of the Department of Agriculture) or by Foreign Service employees of the Broadcasting Board of Governors (which includes Voice of America, Radio Free Europe, Radio Free Asia, TV Martí, and the Middle East Broadcasting Networks).