
Foreign Service Grievance Board

Annual Report *for the Year* **2005**



Annual Report for the Year 2005

Recipients

Committee on Foreign Relations
United States Senate

Committee on International Relations
United States House of Representatives

Director General of the Foreign Service
United States Department of State

Annual Report for the Year 2005

**Message
from the
Chairman**

*Here is the Annual Report of the Foreign Service Grievance Board for the year 2005. It is transmitted with pleasure under the obligation imposed by Section 1105(f) of the Foreign Service Act (22 U.S.C. 4135(f)). Although the basic requirements of that statute ask for statistical data only, I am including a brief summary of the more significant decisions of the Grievance Board as well as of the decisions of the Federal Courts in our cases. Together, they provide a sample of the matters that typically come before the Grievance Board. At that, experience shows new issues continually crop up and that can be expected into the future because the Foreign Service grievance system is, as has been recognized by the United States Supreme Court, “comprehensive”. To be sure, it is even more comprehensive than the appeals system for civil servants. *Bush v. Lucas*, 462 U.S. 367 (1983)*

One notable feature for 2005, and a factor that puts that year apart from recent years, was the nature of the decisions. The scope and breadth of the issues recently presented made it necessary to issue decisions of greater length and more detail than had been previously required.

The majority of our case processing derives from written submissions of facts and arguments. Oral hearings are provided for but, in practice, have been infrequent. Even so, I am convinced that the Board’s statutory obligations are being fairly met. Interestingly, regulations allow the Board to conduct hearings abroad. To date, that has never been necessary.

FOREIGN SERVICE GRIEVANCE BOARD

The Board continues to convene general meetings – where all attend – on a quarterly basis. These have proven popular among the members as well as useful as educational tools. In that all members work only part-time -- some at home and some out-of-town -- these general meetings gain added relevance as they contribute to the collegiality of the Board. The importance of that should not be overlooked, because the Board most often functions in three-person panels and compromise in deciding an issue is not unusual.

Members of the Board are appointed by the Secretary of State for a term of two years. Terms are renewable. Appointees are selected from recommendations of the foreign affairs agencies and the American Foreign Service Association. Membership draws upon professionals from the labor relations' field and from highly regarded former members of the Foreign Service. The only statutory limitation on the size of the Board is that it shall consist of "no fewer than five." As of December 31, the cadre was twenty-one.

In as much as there is a turnover of Board membership from year-to-year, there is a learning process for the newly appointed. On-the-job training with a mentor has shown to be the most responsive teaching method. That, coupled with our general meetings, provides a fertile training ground.

As might be expected, the number of cases dealing with security issues continues apace. The obvious reason is that there has been greater emphasis on these matters throughout the Department of State and, of course, elsewhere. The majority of the grievances adjudicated by the Board involve employees of the Department of State. This is understandable because State is by far our largest "client" in size. Even

so, the number of grievances filed by members of the Foreign Service is but a tiny fraction of the total employment.

The Board continues to meet periodically with the foreign affairs agencies we serve. Such gatherings allow us to engage in active discussion of current grievance procedures and to explore possible improvements of the process. These meetings focus on broader issues and pending grievances are not discussed. They are well attended.

An excellent administrative staff of six, headed by an Executive Secretary, provides not only vital support to the Board as a whole, but desirable continuity as well. Consistency in handling grievances is essential for the reputation of the Board. And the parties are entitled to that. However, when the year drew to a close a number of questions as to staffing of the Grievance Board came into focus. Our Executive Secretary was selected for the prestigious job as Consul General in Islamabad. The likelihood was that she would have to curtail by several months her normal tour at the Grievance Board. A successor has been selected, but her availability date is uncertain. There looms the possibility of a void of several months as the United States Agency for International Development has not provided a Special Assistant.

Our policy is to render just, fair, and prompt decisions. That policy must mesh with the Congressional mandate that we maintain an effective system for the resolution of grievances that will ensure the fullest measure of due process for the members of the Foreign Service. Logistical support from the Department of State continues to be excellent. Though supported administratively by the Department of State, the Grievance Board is not a division of the Department. Its members may not be removed except for cause. And, with continued support, I foresee

FOREIGN SERVICE GRIEVANCE BOARD

that the Board will meet its statutory obligations as an important player in the Foreign Service personnel management system.

Sincerely,

*Edward J. Reidy
Chair
Foreign Service Grievance Board
March 23, 2006*

FOREIGN SERVICE GRIEVANCE BOARD

**Board
Members,
Executive
Secretary
and Staff**

Under Section 1105 of the Foreign Service Act of 1980, as amended (the Act), Congress established the Foreign Service Grievance Board, which consists of no fewer than five members who are independent, distinguished citizens of the United States. Well known for their integrity, they are not employees of the foreign affairs agencies or members of the Service. Each member -- as well as the Chairman -- is appointed by the Secretary of State for a term of two years, subject to renewal. Appointments are made from nominees approved in writing by the agencies served by the Board and the exclusive representative for each such agency. The Chairman may select one member as a deputy who, in the absence of the Chairman, may assume the duties and responsibilities of that position. The Chairman also selects an Executive Secretary, who is responsible to the Board through the Chairman.

As of December 31, 2005

Edward J. Reidy was the *Chairman of the Board*

and he selected

Edward A. Dragon as *Deputy*.

Kay Anske was *Executive Secretary*.

**Members
of the
Board
for 2005**

Edward J. Reidy
(Chairman)

Edward A. Dragon
(Deputy Chairman)

Robert J. Bigart

Theodore Horoschak

James E. Blanford

Thomas Jefferson

Suzanne R. Butler

Marvin E. Johnson

Garber A. Davidson

Warren R. King

Harriet E. Davidson

Gail M. Lecce

Margery F. Gootnick

Garvin L. Oliver

Walter Greenfield

Sean J. Rogers

Lois E. Hartman

Harlan F. Rosacker

Lois C. Hochhauser

Jeanne L. Schulz

Barry E. Shapiro

FOREIGN SERVICE GRIEVANCE BOARD

As of the date of this report, the Board had two Special Assistants, Janet McGhee and Joseph Pastic. The Support Staff consisted of Conchita Spriggs, F. Elena Cahoon, and Margaret Marin. Unless the workload increases, that staffing seems adequate to meet the needs of the Board for the near term.

Judicial Review

Final actions of the Grievance Board are reviewable in the District Courts of the United States. 22 U.S.C. § 4140. Whenever a court reviews a Board decision, the standards of the Administrative Procedure Act, as set forth in Chapter 7 of Title 5, United States Code, apply. Under the Foreign Service Act, 22 U.S.C. § 4140(a):

Any aggrieved party may obtain judicial review of a final action of the Board on any grievance in the district courts of the United States . . . if the request for judicial review is filed not later than 180 days after the final action.

Summary of Significant Court Decisions During 2005

Summarized below are judicial decisions rendered during calendar year 2005 on appeals from, or related to, Grievance Board decisions.

Oliver v. United States, et al.
Civil Action No. 03-2417 (CKK) (D.D.C. April 18, 2005)

The agency involuntarily separated from employment Charles Oliver – a career candidate – based upon an assessment by a Performance Standards Board. On appeal, the Grievance Board found his separation was improper and ordered his reinstatement. The Grievance Board did not uphold the agency action in separating grievant because it had failed to provide Oliver with notice of performance deficiencies and an opportunity to correct those deficiencies, a serious violation of its own regulations. The agency did not comply with the directive to reinstate. Oliver sought an order directing the agency to comply. In response, the agency refused to comply on the grounds that the Grievance Board’s order itself was improper.

In Court, the decision of the Grievance Board was found supported by statute and regulation, so the Court ruled that the agency is “obligated to comply . . . or reach some alternative, mutually acceptable resolution . . .”

Much of the argument made by the parties in this action dealt with a dispute over what statute or regulation applied to career candidates in contrast to tenured members. The Court left this issue hanging, finding that the failure to give grievant notice and an opportunity to improve was a serious defect that invalidated the evaluation on which the separation rested.

United States Department of State v. Coombs

Civil Action No. 04-0025 (RMU) (D.D.C. March 24, 2005)

Gene Craig Coombs was designated by a Performance Standards Board of his agency for separation from the Foreign Service based upon negative reviews contained in his Employee Evaluation Report for 2000. His appeal to the Grievance Board culminated in a ruling requiring that the records on which separation was based be expunged. His employing agency sought judicial review but the decision of the Grievance Board was upheld.

The Grievance Board found that Coombs' poor performance was traceable to a psychiatric disorder that was erroneously regarded by the agency as poor performance. The agency, on the other hand, maintained that his poor performance stemmed solely from his inability to handle his duties at the required class level. Both parties presented expert witnesses to support their positions. As the Court observed, the evidence presented was "diametrically opposed."

The significance of this decision resides in the Court's agreement with the finding by the Grievance Board that an evaluation "is invalid if it reflects poor performance caused by an underlying serious illness."

The Court also concluded that the Grievance Board "had the authority to weigh the evidence presented and conclude that the grievant's witnesses were more credible and persuasive than the agency's witnesses." That, in itself, was a significant finding because of the conflicting evidence presented by the parties' witnesses.

Thompson v. Department of State

Civil Action No. 03-2277 (ESA) (September 26, 2005)

and

Thompson v. Barbara Pope, et al.

397 F. Supp 2d 28, (D.D.C. November 3, 2005)

These decisions are related and thus will be discussed together.

Rather than appealing the decision of the Grievance Board, Jill Thompson chose to go to Federal Court raising other issues. In the earlier case, she claimed that the Department violated the Privacy Act, 5 U.S.C. 552(a) *et seq.*, in many particulars, while investigating allegations that her supervisor had exalted Thompson's career prospects to the detriment of others as a result of her alleged "romantic" involvement with her supervisor. Thompson also saw Privacy Act violations in a variety of actions spawned by the investigation. She sought monetary damages.

This decision is lengthy but deals with some important aspects of the Privacy Act, and for that reason warrants comment.

Upon completion of the investigation, the report concluded that "there was a strong likelihood" Thompson and her supervisor "had a relationship which negatively impacted on the office and other employees." Pointing to that comment, the Department initially proposed to suspend her for three workdays for allegedly making false or misleading statements during the investigation. On further analysis the Department mitigated the sanction to a Letter of Admonishment for an "inappropriate . . . volume of e-mails . . . that at best could be suggestive in tone." That letter was to be included, not in her Official Performance Folder but rather in the Bureau of Human Resources, and properly safeguarded from unauthorized disclosure. It was to remain for one year. Nonetheless, the suspension letter and related documents had been left on her chair while she was out of the office on vacation. While the Department says that Thompson consented to the delivery of these documents to her empty cubicle, Thompson disputes this.

During the investigation Thompson was suffering from health problems. Medical officials suggested that she avoid all stressful situations because that might aggravate her physical condition. This circumstance caused the Department to be concerned what impact her medical issues might have on her eligibility for a security clearance. A series of letters, including some from medical authorities, triggered the onset of anxiety attacks, asserts Thompson, because she had come to the conclusion that the Department was "seeking a pretext to end her Foreign Service career."

Thompson presented medical evidence from a psychiatrist who attributed the psychological impact and her severe pain and suffering to “what she perceived to be the deliberate infliction of stressful, coercive and inhuman treatment by . . . Department officials.”

In its analysis the Court noted that to obtain monetary damages here, Thompson would have to prove that: (a) the conduct of the Department was “intentional or willful” and (b) she suffered “actual damages.”

Thompson insists that by interviewing more than a dozen witnesses without first attempting to obtain that same information from her, the Department ran afoul of applicable Privacy Act guidelines. In analyzing this contention, the Court ruled that it “must weigh the interest of both accuracy and privacy in determining whether a . . . violation has occurred.”

The Court did not accept that argument by Thompson, concluding the Department sought information directly from her “to the extent practicable” but that additional interviews were necessary to the investigation. The Court emphasized that in the final analysis the Department “gave her an opportunity to respond” to any of the charges made against her. In addition she was offered a second interview to supplement the first. She declined the offer.

The Court added that Thompson “cannot show that [the Department’s] alleged violation was intentional or willful or that it proximately caused an adverse effect.” Case law construing this requirement sets a “high bar” that Thompson has been unable to hurdle, and goes so far as to explain that an intentional violation of the Privacy Act resides only in a “flagrant disregard” for the rights the Act protects.

Two adverse effects resulting from the request by the Department for medical records directly from her doctor are identified by Thompson. The first was the possibility that the medical information could have resulted in the revocation of her security clearance. As to this argument the Court gave it short shrift. It saw no evidence that she actually lost her security clearance and held that the mere possibility of such a loss is not cognizable.

As to Thompson's argument that the alleged violation caused her anxiety disorders the Court stated it "also lacks support." In so concluding the Court commented that the Privacy Act "does not protect . . . from all work-related emotional trauma." To support such a contention she is obliged to establish a connection between the asserted violation and her emotional distress.

In finding against Thompson on this allegation the Court commented that to prevail she "must show that it was the Department's manner of collecting information that specifically led to her alleged injuries." Because the evidence established that her "anxiety resulted from her concern over the fact that the agency was seeking her medical information," this claim relating to solicitation of medical information was not sustained.

Thompson also argued that she was not sufficiently warned about the subject matter of the interview, another violation of the Act. In fact, she insists she would never have consented to the interview had she been fully alerted to what was coming. She even went as far as to suggest that by subjecting herself to the interview she was "putting her life and recovery of her health at risk."

This argument was also rejected by the Court. First, she had been advised by her attorney about the scope of the investigation, and yet consented. Second, the Act does not expressly require an agency to tell an individual that she is the subject of an investigation.

The Court went on to hold that Thompson failed to demonstrate that the Department violated that section of the Act which required it to "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive Order of the President." This section is not violated, wrote the Court "so long as the maintenance of the information at issue is relevant and necessary to accomplish a legal purpose of the agency."

The Court had no difficulty in finding that:

Maintenance of information concerning whether [Thompson's] supervisor provided unfair employment advantages to her is clearly "relevant and necessary . . ."

It emphasized that Thompson's relationship with her supervisor was inextricably linked with allegations of favoritism.

Another argument raised by Thompson was that whereas the Department is obligated to maintain all records which are used by that agency in making any determination about an individual with such accuracy as is reasonably necessary to assure fairness, the agency relied here on false or inaccurate information. More particularly, Thompson seeks damages because inaccuracies in the documents provided by her co-workers led to the agency's "adverse determination" to assign her to a new position.

No errors in the agency records have been shown to have caused this personnel action, found the Court. In this respect Thompson would need to show not only that inaccurate records were considered in making the determination, but also that an error in the records caused this determination. No evidence was found by the Court to support this argument. Indeed her temporary reassignment was no more than an incidental effect of the decision to initiate an investigation. What is more, the allegations were seen as "serious enough" for the Department to reasonably conclude that an investigation and temporary detail were necessary.

Thompson also contends that dissemination of this record to the Office of Civil Rights was a violation of that portion of the Privacy Act proscribing the disclosure of records only to those "who have a need for the record in the performance of their duties."

In holding against Thompson on this claim the Court found the disclosure entirely proper because that office had a legitimate need for the records in the performance of its duties. The rationale was that the Office of Civil Rights has an obligation for promoting and maintaining a workplace free from discrimination and harassment.

As an alternate basis for not sustaining this argument the Court found it did not constitute an intentional or willful violation of the Privacy Act.

Thompson also argued that disseminating the record of the investigation to the Foreign Service Grievance Board was a violation of the Privacy Act. The Court ruled against her because that provision concerns dissemination "outside" the agency. And the Board was clearly an agency.

Finally, Thompson claims the Privacy Act has been violated because a copy of the Report of Investigation and suspension letter were inappropriately left on her chair in an open cubicle. The Court remarked that while there was conflicting evidence on the question of whether Thompson had authorized that action, it found no need to resolve this uncertainty. There was no showing that in so doing the Department has acted in a “patently egregious” manner, a condition precedent.

Having lost her lawsuit against the Department, *supra*, Thompson filed another complaint alleging a violation of her rights under the Fourth and Fifth Amendments to the U.S. Constitution. This time the action was against seven current or former employees of the Department of State. The facts that ignited her earlier suit also spark this. She based her lawsuit on *Bivens v. Six Unknown Named Federal Narcotics Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). She sought monetary damages by asserting that her constitutional rights were violated.

The Court ruled, however, that because Thompson had available to her a comprehensive statutory scheme governing grievance procedures under the Foreign Service Act, it would not extend the reach of *Bivens* to cover the complaint. Under *Bivens* a plaintiff may bring a civil action for monetary damages against a federal official in his or her individual capacity, acting under color of then authority, for a violation of the plaintiff’s constitutional rights. The Federal Courts are free to create *Bivens* remedies absent two distinct circumstances. No *Bivens* remedies are appropriate where Congress has expressly precluded judicially created remedies either by itself creating a remedy or, second, by expressly precluding the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress.

In dismissing this complaint the Court relied principally upon *Bush v. Lucas*, 462 U.S. 367 (1983) and *Spagnola v. Mathis*, 859 F. 2d 223 (D.C.Civ. 1988).

Applying *Spagnola* the Court ruled that federal employees are not entitled to *Bivens* remedies for constitutional challenges to minor personnel actions governed by the Civil Service Reform Act (CSRA). And it had no difficulty in finding this precedent also applicable to employees covered by the Foreign Service Act of 1980, convinced as it was that the Act was intended to be a companion measure to the CSRA. It stated, also, that because Congress has established a comprehensive statutory scheme governing grievance proceedings under the Foreign Service Act, the Court would not extend the range of a damages remedy under *Bivens*.

Prior to bringing this suit, Thompson invoked the grievance procedures of the Foreign Service which culminated in a denial of her grievance by the Grievance Board. What the Court held was:

The plaintiff's own decision not to seek judicial review of the Foreign Service Grievance Board's decision, where Congress has provided a judicial review process, does not constitute a sufficient justification for this Court to create a *Bivens* remedy.

In its decision this Court, in what constitutes an important reminder, noted that any decision by the Grievance Board "shall be based exclusively on the record of proceedings."

**Foreign
Service
Grievance
Board
Decisions**

During calendar year 2005, the Grievance Board decided a number of cases having particular significance. Those having the most significance are summarized here in random order.

FSGB Case No. 2004-033 (January 14, 2005)

In this appeal grievant challenged his performance evaluation as containing language that was "impermissible, inappropriate, and prejudicial." The agency denied his grievance in all aspects. But a recent evaluation contained comments that faulted his English language competency which, he insisted, constituted an inappropriate reference to his national origin and foreign birth in violation of the Civil Rights Act of 1964. The evaluation was discriminatory because it was the sole reason for the negative criticism.

Accepting that grievant is a member of a protected class based on his national origin, the Board nonetheless determined that he had not provided any evidence that the comments he objected to were the product of any unlawful discrimination. The agency had correctly determined that the need for good writing skills is widespread in the Foreign Service, irrespective of national origin, but the Board found that this specific objective was not effectively communicated to the grievant in a timely manner, as required in the instructions for the EER preparation and thus disadvantaged him since he was unable to comply with the requirement.

This Board ordered that the objective in the Work Requirements Statement that referred to the requirement to complete English skills training be expunged from the rating, and that the section of the evaluation that discussed grievant's failure to pursue English training opportunities must be expunged, as well as grievant's comments about English training in the rated officer's comments. In all other respects, the grievance was denied.

FSGB Case No. 2004-016 (January 31, 2005)

In this disciplinary action matter the Grievance Board sustained two of four charges against the employee. Grievant had been found guilty of making false statements and filing a false voucher. Proposed initially was a suspension of nine days. The Board remanded the matter to the agency for consideration of the appropriateness of that penalty given the fact not all charges were sustained. On remand, the agency determined that the same penalty was nevertheless appropriate. The Board agreed that the original penalty imposed was within an acceptable zone of reasonableness, highlighting the fact that foremost among the factors to be considered in determining the appropriateness of a penalty is the "serious nature of the offenses upheld." The Board reiterated its policy that it will not normally displace the determination of an agency in matters of discipline because punishment is essentially a discretionary function of management.

FSGB Case No. 2003-038 (March 10, 2005)

Grievant claimed that statements contained in the Inspector's Evaluation Report (IER) concerning him and a Report of Inspection (IR) of the embassy prepared by the Office of the Inspector General were inaccurate and falsely prejudicial.

Both contained remarks critical about an Independence Day celebration as being too grandiose and funded by questionable solicitations. He alleged the comments were unfairly traceable to his sexual orientation.

The Grievance Board denied the appeal. Among the important findings: an Inspection Report prepared by the Inspector General is not a grieveable action over which we have jurisdiction because it is a report made only to the Secretary of State and not made part of the record of the officer inspected. It also found no discrimination and no adequate proof of error in the IER.

FSGB Case No. 2004-044 (April 15, 2005)

Grievant, an FS-02 officer with the Department of State, grieved an Inspector's Evaluation Report (IER), prepared during an inspection of an embassy where he served. The IER, critical of grievant's interpersonal and management skills, was cited in the Selection Board's Low Ranking Statement prepared on grievant. Among other relief, he sought to have the IER expunged on the ground that his low ranking resulted principally from the IER which was inaccurate and falsely prejudicial, violated the Office of Inspector General's Handbook, and was inconsistent with the Inspection Report and the observations of many witnesses.

The Board found that the current Inspector's Handbook contains a section nearly identical to that cited by grievant, but with a significant difference in that it omits the phrase relied on by grievant, i.e., "or to any information that the inspector learned in confidence." Because the wording of the Handbook has changed, and since he cannot point to any language matching that which he cites, grievant failed to show that the agency violated its regulations.

Moreover, the Board found that the IER played little part in the Selection Board's decision to low rank grievant. It found that the grievant failed to show that his low ranking resulted "principally from the IER or that removal of the IER from his performance folder would have substantially altered the Selection Board's decision to low rank him."

FSGB Case No. 2005-024 (August 3, 2005)

Grievant alleged prejudice in her promotion opportunities because of what she described as "delicate ongoing eldercare issues" relating to her mother precluded her from serving abroad. Recognizing that service abroad was an important ingredient toward earning promotion, she wanted to explain in her evaluation reports why she could not go. The agency found that such comments were not admissible in an evaluation report. So she grieved.

The Grievance Board found that the agency properly excluded these comments from her evaluations based upon 3 FAM 2815.1.b.(16). Her grievance was denied because the medical matters were not personal to her.

FSGB Case No. 2002-045 (August 22, 2005)

In this grievance appeal, the parties agreed to mediate the dispute which concerned financial benefits. During the mediation, the parties voluntarily entered into a Settlement Agreement, one term of which provided that the mediator assigned by the Grievance Board would preside over an arbitration to resolve the somewhat convoluted issues. The arbitrator's decision would be final in all respects.

Based upon the agreement of the parties to enter into binding arbitration, the Board ruled it no longer had jurisdiction over the dispute. The Grievance Board adjudicates grievance; it is not an arbitral body.

FSGB Case No. 2005-029 (September 6, 2005)

Injured during a terrorist attack on the United States Embassy where he was posted, grievant continued working for several years thereafter. After a while his health deteriorated and he eventually retired on disability. Prior to his retirement, he submitted a grievance claiming the agency's promotion policies and procedures unfairly discriminated against the class of employees who, like himself, were injured in the line of duty. As relief, he requested changes in the agency's promotion policies, special promotion reviews for this class of employees and, as appropriate, retroactive promotions and/or adjustments to annuities for members of the class, including himself.

The Board found that grievant had not established that he was a "qualified individual with a disability" for the purposes of the Americans with Disabilities Act of 1990. While he may have been disabled under the law, he could not show how the changes to promotion policies he sought would have enabled him to continue working. Those changes could not, therefore, constitute a "reasonable accommodation" to his disability.

The Board sustained the agency's observation that the grievance was really an argument about the adequacy of agency policies in recognizing the sacrifices made by those Foreign Service Officers who are injured in the line of duty. While giving grievant "great credit" for continuing to perform as a Foreign Service Officer even while suffering significant injuries, the Board explained that policy questions such as he raised are beyond our "purview."

FSGB Case No. 2004-063 (October 11, 2005)

Grievant appealed the agency's denial of his grievance where he challenged the policy of the Department to provide security incident reports to selection boards. This policy was implemented in 2003. Grievant had committed certain security violations in 1999-2000 so he alleged it was contrary to concepts of due process to retroactively adopt a policy that adversely impacted on his promotion prospects.

As part of its decision, the Board concluded that it was entirely proper for the Department to retroactively implement a policy where the policy was reasonable and the grievant was on notice that his security history could be made known by the selection board considering him for promotion into the Senior Foreign Service once he opened his window to compete for promotion. The decision cited authoritative federal case law in support.

FSGB Case No. 2004-050 (October 28, 2005)

Grievant was low-ranked because of performance deficiencies which she alleged were falsely prejudicial. The negative comments criticized her supervisory abilities. She insisted such remarks could not be included in a performance evaluation because the agency failed to provide appropriate supervisory training or adequate counseling during the assignment process. These failures were said to be in violation of the Foreign Service Act, its implementing regulations, published policy, and case precedent.

After combing the record, the Grievance Board disagreed with grievant's assertion that she was deprived of adequate counseling. Because her shortcomings were not related to her technical competence – which had consistently been praised – the requirement of advanced training did not apply. What the Board emphasized was that she was being blamed for behavioral flaws, not actual performance deficiencies. And that:

No one can insist that lack of formal training excuses the need: to avoid developing conflicts with colleagues; to maintain a reasonable relationship with subordinates; to avoid public humiliation of her staff; and to be “respectful” in dealing with her co-workers.

Her grievance appeal was denied. Regulations had been applied correctly, the Grievance Board concluded.

FSGB Case No. 98-087 Remand (November 7, 2005)

This case was not only protracted, but prolix. In a decision on remand from the United States District Court for the District of Columbia, the Grievance Board upheld its earlier decision that had denied grievant's appeal. His performance evaluation contained false negative comments, grievant alleged, claiming they were the product of bias against him by his supervisors because he was homosexual. In its original decision the Grievance Board had found "weighty evidence" of a homophobic attitude at post but did not further deal with that matter finding that there was adequate evidence otherwise to support the negative comments made. On remand the Court directed us to deal with the issues of the impact on his evaluation of the attitude at post against the gay lifestyle.

The Grievance Board examined in depth the issue identified for consideration on remand. Evidence was presented on both sides of this question, noted the Board, but the evidence presented by grievant did not constitute the preponderance. This was a hotly contested proceeding. Depicted by this record is an officer highly skilled and adept in his technical performance, but not so in his interpersonal relations. He was found to be a "disruptive force" in the workplace. Succinctly, it was held that:

The challenged comments in the EERs are not the consequence of any bias, but rather are attributable to [grievant's] conduct.

Grievant had also attacked the evaluations as the ranting of a dysfunctional supervisor. That argument sagged badly in the total picture, the Board concluded.

FSGB Case No. 2004-067 (November 23, 2005)

Appellant, a retired Foreign Service Officer, appealed a decision by the Department denying his request for a waiver of recovery of an annuity overpayment. At the time of his retirement in 1976, he elected to receive a reduced annuity to provide for a survivor benefit for his wife. After a divorce from her in 1982, appellant remarried and elected to receive a reduced annuity to provide a survivor benefit for this wife. This marriage ended in divorce in 1994.

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In November 2000, appellant notified the Office of Retirement that he was thinking of getting married again. He asked for complete information about the survivor benefit. In February 2001 the office informed appellant that in order to provide for the survivor benefit for a new spouse, his annuity would be reduced from \$2,430 per month to about \$2,253 per month.

In March 2001, appellant submitted the required paperwork to the agency, in which he elected to provide his spouse with a survivor annuity, acknowledging that his annuity would again be reduced. In May 2004, the office notified appellant that his election of the survivor benefit that he had submitted and the change in his annuity payment were never initiated; further, that the survivor benefit would be implemented effective May 2004 and that his gross monthly annuity would be reduced. Appellant was advised that he would be contacted about any overpayment that may have occurred because of the delay in implementing his election of the survivor benefit.

In June 2004, the Department informed appellant that an audit showed that he had been overpaid because the annuity reduction to provide for the survivor benefit had not taken place. Appellant was advised that he had the option of repaying the full amount within 30 days or with an installment plan over a reasonable period of time. Appellant's request for a waiver of recovery of the overpayment was denied.

Appellant claimed that the overpayment should be waived because there was no overpayment, he was not at fault, and recovery of the monies would be against the principle "of equity and good conscience" because of financial hardship. He asserted that he was not at fault in failing to detect the overpayment because he had never before received an inaccurate payment and had no reason to monitor his annuity and because he had been on a three-year camping tour in Europe and did not have the opportunity to check his bank account.

The Department concluded that there had been an overpayment and his appeal should be denied since appellant could not establish that he was without fault and that recovery would be against equity and good conscience. The Department determined that appellant was at fault since he had received annuity payments that he "should have known to be erroneous after March 2002." The agency based its determination on 22 CFR § 17.5(b) and concluded that appellant could have determined that the payments were erroneous.

The Board held that the agency had demonstrated by a preponderance of the evidence that an overpayment occurred.

A waiver of overpayment may not be made unless appellant established by “clear and convincing” evidence that he “performed no act of commission or omission that resulted in the overpayment” (22 CFR § 17.5(b)(2)). When he agreed to reduce his annuity to provide survivor benefits for his current spouse, he was by no means without knowledge and experience with regard to annuity reduction. Appellant was experienced with annuity reductions, knew the amount and timing of the reduction, and could easily have determined whether the reduction was actually being made with a minimum of effort. Appellant’s decision not to read annuity and other notices and an unquestioning confidence in the accuracy of the agency’s accounting systems were not reasonable excuses. The Board found that he was provided sufficient information about the reduction and could have determined that the payment was erroneous.

The Board held that the appellant was not without fault and thus found it unnecessary to address the question of whether recovery of the overpayment would be against equity and good conscience. The Board further found that, although appellant had not established any entitlement to a waiver, the Board could adjust the recovery schedule so that he could pay the debt in installments as proposed by the agency.

The appeal was denied. The Board authorized the agency to begin its collection process 30 days after receipt of the decision and to recover the debt in 36 equal monthly installments.

FSGB Case No. 2004-056 (December 7, 2005)

A senior official of the Department received an Inspector’s Evaluation Report (IER) which was generally praiseworthy but contained some unfavorable comments as well. His challenge to the unflattering remarks in that IER was unsuccessful at the agency level, so he filed an appeal with the Grievance Board.

An inspection team of the Office of the Inspector General had issued a report based upon a concentrated inspection of senior officials at post. The group of inspectors focused largely on management issues and a purpose of the detailed inspection was to identify officials who held promise for more senior positions. Grievant presented a number of arguments to support his claim that the IER was falsely prejudicial and inaccurate. He also assailed the head of the inspection team as “predisposed” to find fault and insisted that the entire inspection and process was bungled.

The Board was not convinced. Analysis of grievant's arguments revealed disagreement with the comments in the IER but offered no persuasive evidence to support the claims made. In denying the appeal the Board reviewed the totality of the record in a lengthy decision. Where grievant felt he had been unfairly tarred by evidence and witnesses that should not have been relied upon, the Board found that the record in its entirety supported the conclusions about his performance which the team as a whole had reached.

The challenge that the inspection team lacked the competence to conduct such an important evaluation was rejected. The Board examined their backgrounds and concluded they were qualified to perform.

Also rejected was the serious contention the leader was predisposed to find fault. The Board found ample evidence to support the conclusions in the evaluation.

FOREIGN SERVICE GRIEVANCE BOARD

**Case
Statistics
2005**

A.	Number of Cases Filed	76
B.	Types of Cases Filed¹	
	EER	31
	Financial	10
	Disability	0
	Discipline	16
	Separation	9
	Jurisdiction	0
	Assignment	0
	Implementation	0
	Attorney Fees	1
	Other	10
C.	Disposition of 2005 Cases	
	Affirmed	19
	Reversed	2
	Partially Reversed	1
	Settled	2
	Withdrawn	4
	Dismissed	0
	Remanded	1
	Pending (as of 12/31/2005)	47
D.	Oral Hearings	2
E.	Interim Relief	7

¹ The total of types of cases filed might not match the number of cases filed as a case might involve more than one type.

FOREIGN SERVICE GRIEVANCE BOARD

**Case
Statistics
2005**

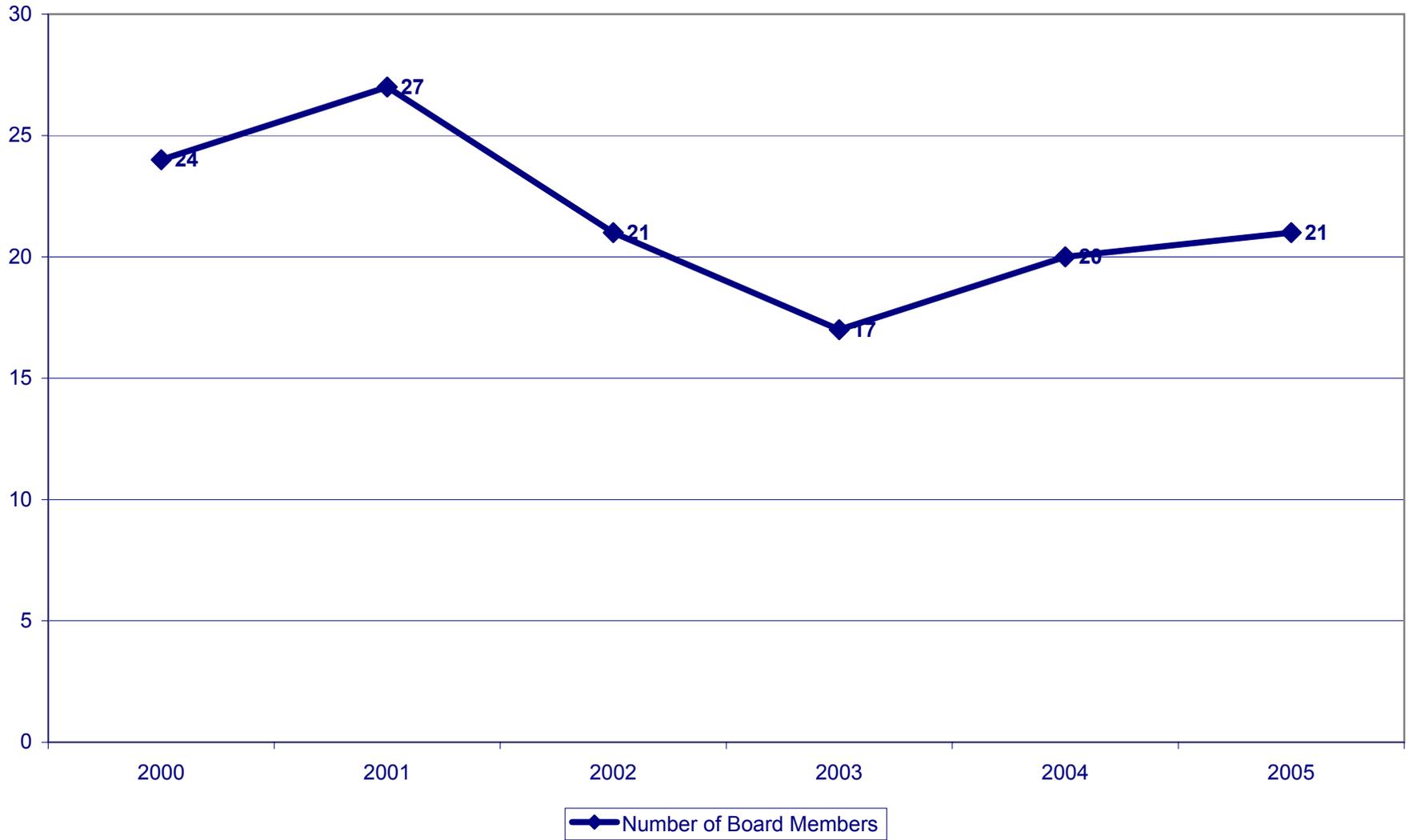
F. All Cases Closed in 2005
(Including Prior Year Cases)

Total	82
Affirmed	51
Reversed	5
Partially Reversed	4
Settled	7
Withdrawn	13
Dismissed	0
Remanded	2

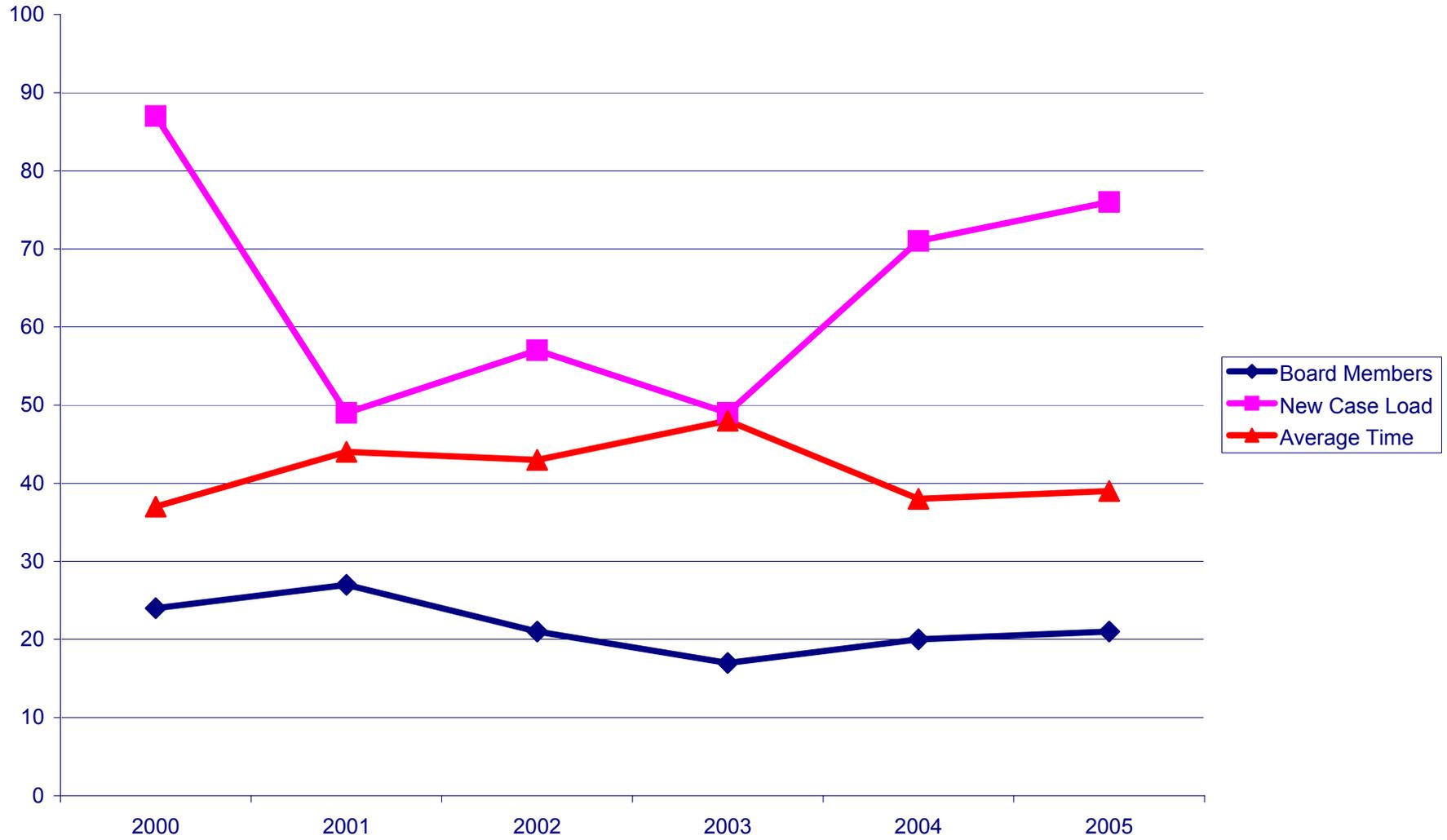
The average time for all cases closed in 2005 from filing to resolution was a total of 39 weeks, a slight increase from the 38 week average in 2004. The longest time between filing and resolution was 150 weeks, significantly less than the 338 weeks in 2003 but more than the 110 weeks in 2004. The shortest was 5 weeks. The average time for 2005 cases from filing to resolution was a total of 22 weeks.

As of December 31, 2005, there were 60 cases pending before the Board. The oldest undecided case was pending 139 weeks as of December 31, 2005.

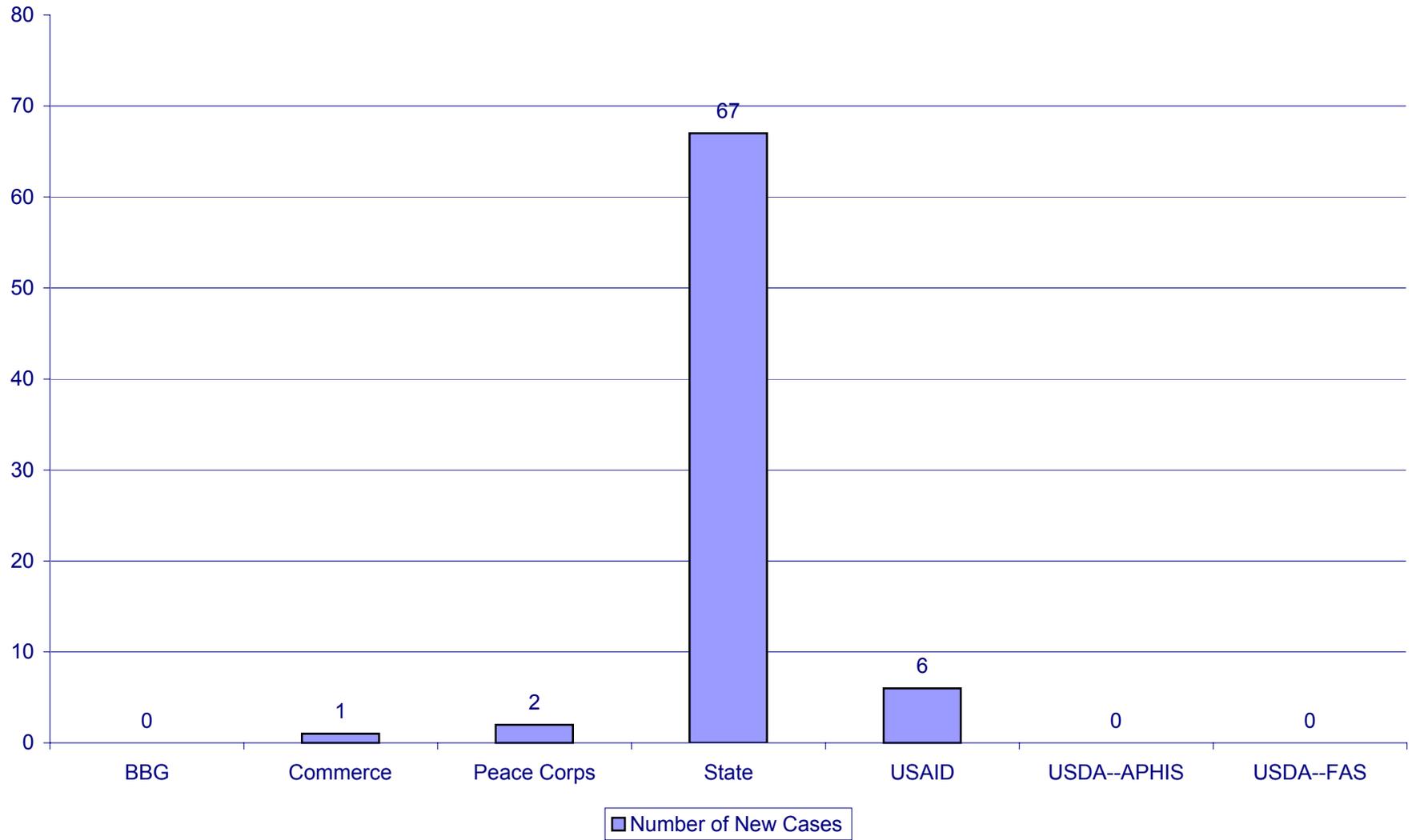
Number of Board Members



Workload



Number of New Cases By Agency



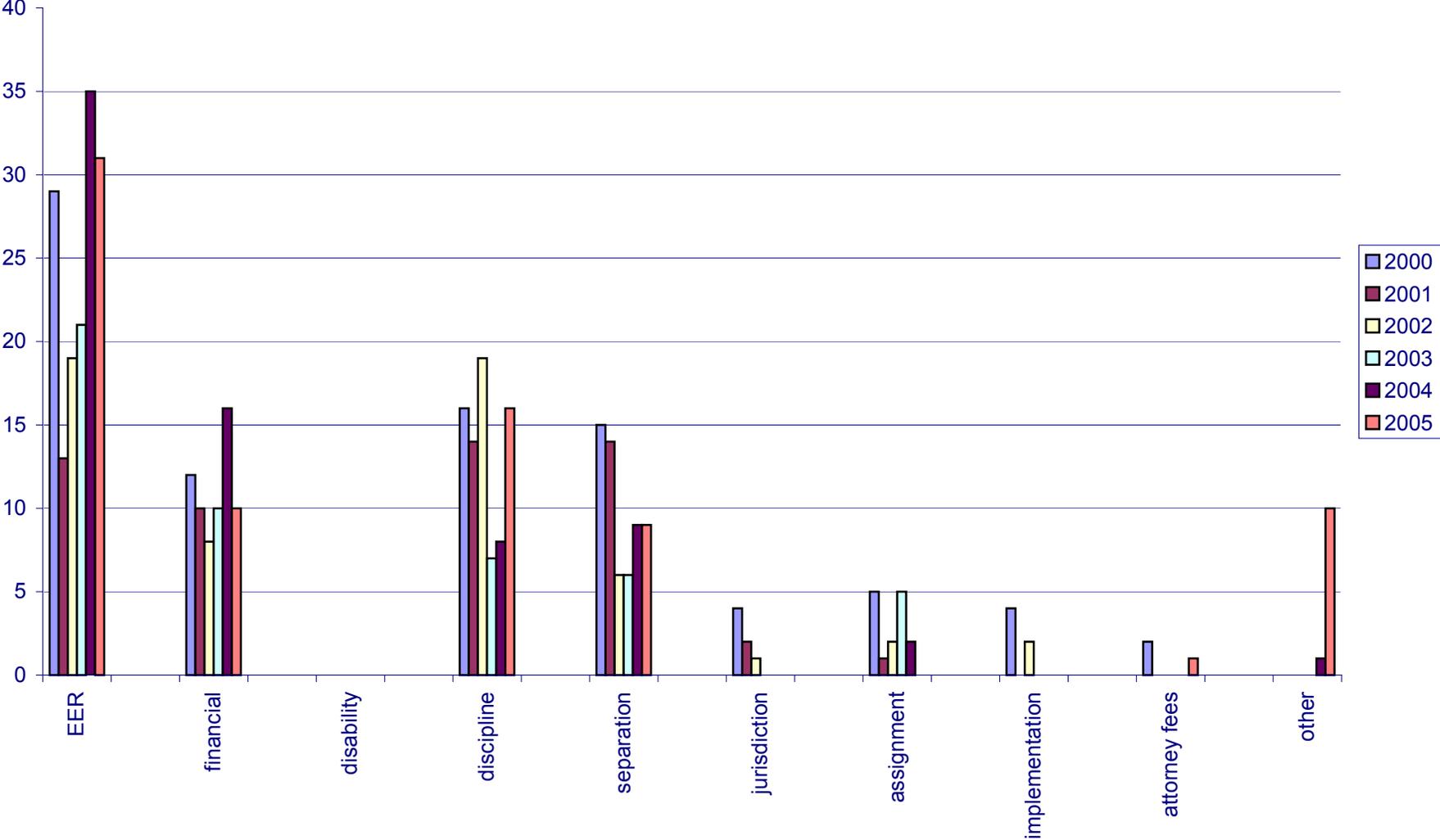
Number of New Cases Filed



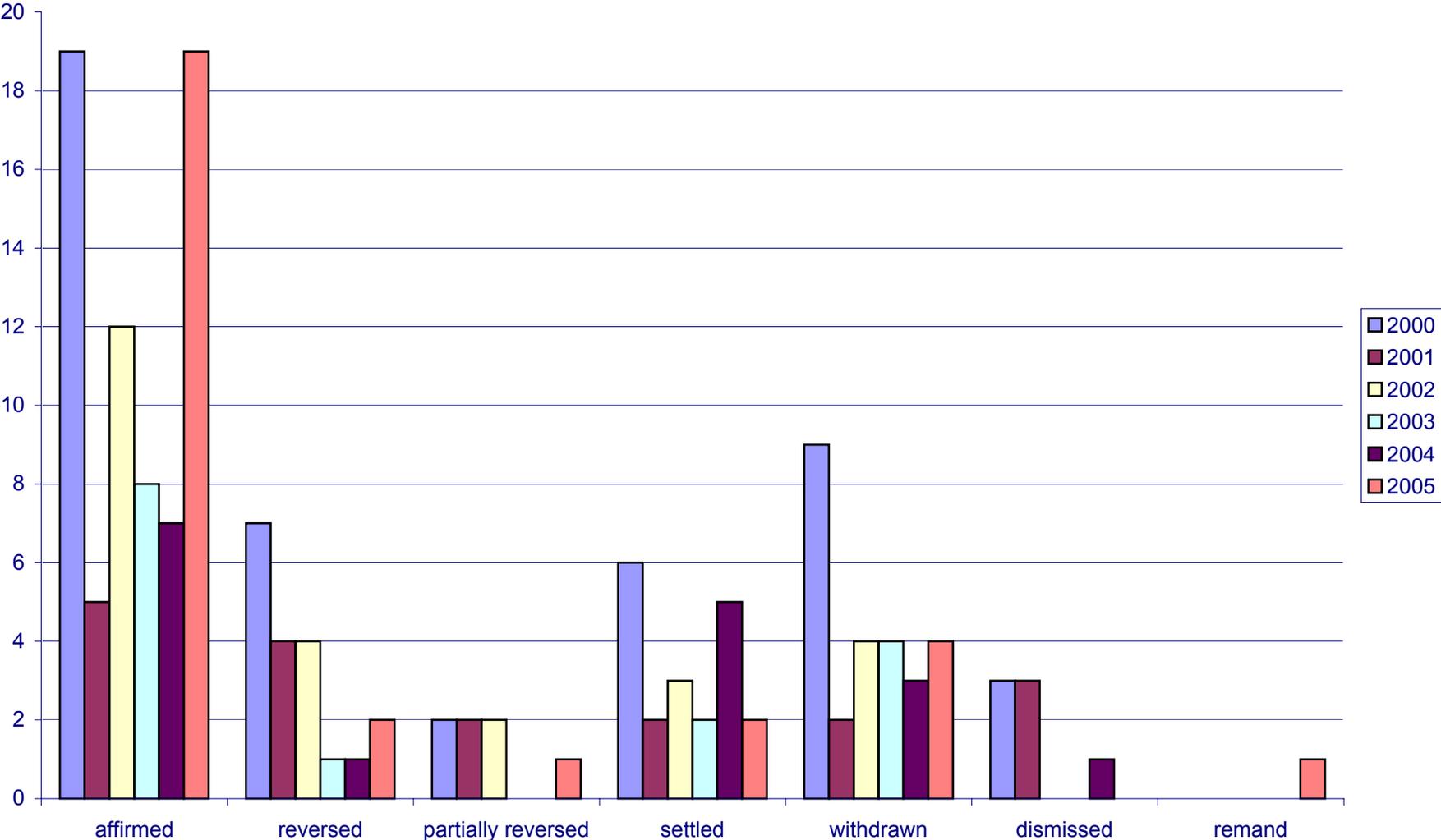
TYPES OF CASES FILED

	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
EER	29	13	19	21	35	31
financial	12	10	8	10	16	10
disability	0	0	0	0	0	0
discipline	16	14	19	7	8	16
separation	15	14	6	6	9	9
jurisdiction	4	2	1	0	0	0
assignment	5	1	2	5	2	0
implementation	4	0	2	0	0	0
attorney fees	2	0	0	0	0	1
other	0	0	0	0	1	10

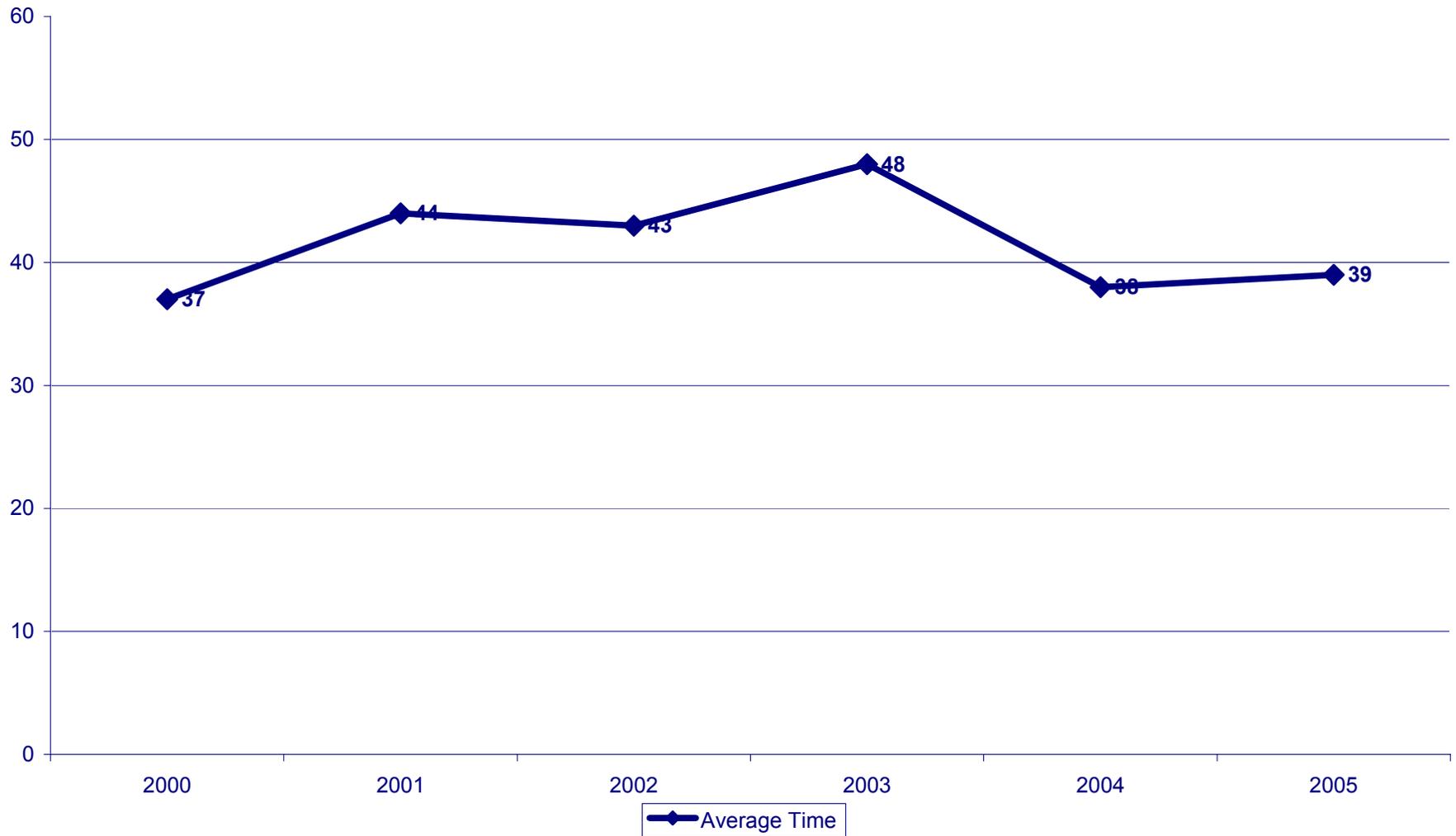
Types of Cases Filed



Disposition of Cases



Average Time to Close Cases (in weeks)



This is an average time for all cases closed in a particular year, which includes cases filed in previous years.