

**FOREIGN SERVICE GRIEVANCE BOARD**

*Annual Report*  
*for the Year*  
**2006**



Annual Report for the year 2006

*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

## Annual Report for the year 2006

Message  
From  
The Chairman

*I am pleased to transmit the Annual Report of the Foreign Service Grievance Board for the year 2006. The report provides information and historical perspective on the operations and responsibilities of the Grievance Board and meets the obligations imposed by Section 1105(f) of the Foreign Service Act (22 U.S.C. 4135(f)). The part of this Report which shows in tabular form statistics depicting the number of cases decided meets the basic requirement of law. I am, however, providing additional narrative so that the report becomes more meaningful.*

*As my prior Annual Reports suggest, case intake fluctuates from year to year. For 2006, our caseload fell below that of the prior year. The clear trend in recent years is that fewer complaints are received at the Grievance Board than was the case less than a decade ago.*

*All Board members work under contract on a part-time basis. Not all are located locally. In order to foster greater collegiality the Board convenes general membership meetings several times each year. For the most part these meetings focus on current problems and issues. That the membership has keen interest in the Grievance Board work is clear from the substantial and willing attendance of the members at these meetings, which have proven to be a useful method for the free exchange of ideas and discussion of issues pending before the Grievance Board. The meetings will be convened at least quarterly during 2007.*

*The accompanying Report provides a realistic portrait of the work of the Board during the past year. Our mandate, as set forth at Section 101(b)(4) of the Foreign Service Act (22 U.S.C. 3901(b)(4)), is*

*to process cases promptly, all the while maintaining a fair and effective system for the resolution of grievances that will ensure the fullest measure of due process for the members of the Foreign Service. That mandate continues to be our beacon. Unquestionably there are times when the issuance of a decision lingers. These are becoming less often for overall our decisions are timely, that is, they are issued within 90 days of closing the record. Cases that consume more time typically have novel or complex issues or are hotly contested.*

*The Grievance Board has jurisdiction over filings from the varied foreign service agencies, and our largest intake comes from the Department of State. No surprise there because it has, by a wide margin, the most foreign service members eligible to seek relief here.*

*We continue to encourage the parties to settle disputes short of a full-scale proceeding. To assist, we offer experienced mediators. We have some, albeit limited, success in obtaining the approval of both parties to agree to mediation. Even so, our policy is to resolve matters fairly and promptly.*

*Although the jurisdiction of the Grievance Board is extensive, there are statutory subject matter and time limitations. Stated differently, the Grievance Board has only that authority granted to it by the Congress. We do have authority under Section 610 of the Foreign Service Act (FSA) to award attorney fees to prevailing parties in separation for cause actions. We decided a handful of these cases during 2006 and all were disposed of based upon the precedents we established through the years.*

*Logistical support from the Department of State continues to be excellent. With that continued support I foresee that the Grievance Board will meet its statutory obligations.*

*My term as Chair of the Grievance Board expires September 30, 2007. So, too, does the term of the Deputy Chair.*

*Add to that the fact that one of the two special assistants will retire then and the result is that there will be an extensive turnover in the leadership of the Grievance Board. Continuity will be provided by the Executive Secretary, whose assignment started in June 2006 (two months after her predecessor's departure), the remaining special assistant, and the support staff.*

*It has been my pleasure to serve in this role. I like to believe that I leave the Grievance Board in an improved position. Among other things, we have made dramatic advances in placing our decisions on our website. Research of precedent has been dramatically improved.*

*Sincerely,*

*Edward J. Reidy  
Chairman  
March 27, 2007*

*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 5 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 Foreign Service. Each Board 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, 2006

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

and he selected

**Edward A. Dragon** as *Deputy*.

**Jacqueline Ratner** was *Executive Secretary*.

*Members  
of the  
Board  
for 2006*

<b>Edward J. Reidy</b> (Chairman)	<b>Alfred O. Haynes</b>
<b>Edward A. Dragon</b> (Deputy Chairman)	<b>Lois C. Hochhauser</b>
<b>Robert J. Bigart</b>	<b>Theodore Horoschak</b>
<b>James E. Blanford</b>	<b>Arthur A. Horowitz</b>
<b>Suzanne R. Butler</b>	<b>Thomas Jefferson, Jr.</b>
<b>Garber A. Davidson</b>	<b>Marvin Johnson</b>
<b>Harriet E. Davidson</b>	<b>Warren R. King</b>
<b>Margery F. Gootnick</b>	<b>Gail M. Lecce</b>
<b>Walter Greenfield</b>	<b>Garvin L. Oliver</b>
<b>Lois E. Hartman</b>	<b>Harlan F. Rosacker</b>
	<b>Jeanne L. Schulz</b>
	<b>Johnny Young</b>

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. That staffing seems adequate to meet the needs of the Board for the near term.

Structure of  
The Board

The only statutory limitation on the size of the Board is that it shall consist of “no fewer than five.” The cadre now is twenty-two.

Inasmuch 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 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 and, of course, elsewhere.

The Board continues to meet periodically with representatives of 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 personnel system within the Foreign Service just as the Civil Service Reform Act (Pub. L. No. 95-454, 92 Stat. 1111 (1978) aimed to accomplish improvements for the Civil Service personnel system. Congress established this Board to assume an appellate adjudicatory function except in separation for cause proceedings, where it has original jurisdiction. Consonant with the objectives of the Foreign Service Act to ensure procedural protections for the Foreign Service members, the Grievance Board must resolve the tensions which sometimes develop between the need to protect member rights and the desire to enhance Foreign Service efficiency.

The Board operates from a single location, State Annex 15, in Rosslyn, Virginia. Although it may conduct hearings abroad, it was not necessary to do so in 2006. The Board may operate as a whole, through panels, or individual members designated by the Chairman. Currently, the Board functions almost exclusively through panels of three members. Each panel is chaired by an experienced arbitrator and also includes two retired members of foreign affairs agencies. This procedure has never been challenged.

The Secretary of State may remove a Grievance Board member for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform, established at a hearing. No such action has been required in the history of the Grievance Board. None seems likely owing to the high caliber of the Board membership.

The Chairman has delegated to the Executive Secretary the authority to assign cases to the members for decision. Cases are assigned to panels according to complexity and consistent with the experience, availability, and workload of each member. This system has proven responsive to the needs of all and will continue to be followed. No member is ever assigned a grievance where the assignment may even appear to create a conflict of interest.

The Board obtains facilities, services, and supplies through the staff of the Executive Director in the Office of the Secretary of State. Expenses of the Grievance Board are paid out of funds appropriated to the Department of State. No serious budgetary problems arose in 2006. None are anticipated for 2007.

Records of the Grievance Board are maintained in-house by the Board and kept separate from all other records of the Department under appropriate safeguards to preserve confidentiality. The Board is charged with making every effort, to the extent practicable, to preserve the confidentiality of the grievant or the charged employee in matters brought before it. This requirement is closely adhered to.

Jurisdiction

The Board's jurisdiction extends to any grievance, as defined in Section 1101 of the FSA, and to any separation for cause proceeding initiated pursuant to FSA Section 610(a)(2). In determining what is grievable, the legislative history makes clear that this Board is to avoid a narrow interpretation of its jurisdiction. That policy prevails when close questions of jurisdiction are encountered.

While the Act grants broad jurisdiction for grievances of current members, former members have limited grievance rights. A former member, or surviving member of the family of a former member of the Service, may file a grievance only with respect to an alleged denial of an allowance, premium pay, or other financial benefit. Grievances from former members are infrequent, but this year we considered a few Survivor Benefit claims.

Most often questions as to jurisdiction are handled at the very

outset, for if the Board lacks jurisdiction, it has no power to act. Jurisdictional issues crop up regularly. Although the workforce of the Foreign Service agencies consists of a blend of Civil Service and Foreign Service employees, the jurisdiction of the Foreign Service Grievance Board is limited to current and former members of the Foreign Service. Civil Service employees may have recourse to the Merit Systems Protection Board. The Board has jurisdiction with respect to Labor-Management implementation disputes under FSA § 1014. These disputes have been uncommon. None were submitted to the Board under this provision in 2006. In addition, the Board hears appeals of claims of waivers of overpayment of Foreign Service retirement annuities under 22 CFR Part 17 and certain appeals under the Foreign Service Pension System as specified in FSA § 859(b) (22 U.S.C. 4071h(b)). Grievances under these latter two provisions have been rare.

Board  
Decision-  
Making

The principal function of the Board is to provide a forum for the fair review and adjudication of grievance appeals. Its primary responsibility in satisfying that function is to interpret and apply the Act. Many decisions involve the application of our regulations and the interpretation of agency regulations, policies, and procedures known as the Foreign Affairs Manual. In processing grievances, the Board recognizes the need to accommodate the many members appearing without legal counsel or other representation. Oftentimes they obtain assistance from the American Foreign Service Association (AFSA). Able assistance from AFSA is welcome because that often accelerates case processing while providing the grievant with professional help. Regulations and precedent establish the procedural bases for practice before the Board. Federal Court decisions do, of course, have a dramatic impact on Board law. Our decisions are made available to the public, but in excised form, thereby preserving employee confidentiality.

Remedies

The remedial power of the Grievance Board is broad. It may, in general, direct the agency to take any corrective action deemed appropriate provided it is not contrary to law or a collective bargaining agreement. See 22 CFR § 908.1(e).

In this connection if the Board finds a grievance meritorious, it has the authority to direct the agency to retain a member in the Service; reinstate a member with back pay; reverse an agency decision denying compensation or other financial benefits authorized bylaw; reverse or

mitigate the penalty in a disciplinary action; and correct personnel records. Where it may not direct, the Grievance Board may recommend agency action. Section 908.3 of our regulations (22 CFR Chapter IX) provides that it may recommend remedial action that relates directly to promotion, tenure, or assignment of “other remedial action not otherwise provided for in this section . . . .” unless it is rejected as contrary to law or would adversely affect the Foreign Service or national security of the United States. The Board may also award reasonable attorney fees if the grievant is the prevailing party and if warranted in the interest of justice.

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.

During 2006 there was only a single court decision rendered upon judicial review of an appeal from a Grievance Board decision: *Ehrman v. United States* Civ. Action No. 04-01970 (RCL) (D.C.D.C., April 11, 2006). Grievant, a former Foreign Service Officer, filed an agency-level grievance after having been selected out of the Foreign Service. The agency denied his grievance on its merits and, on appeal, the Grievance Board dismissed the grievance holding it lacked jurisdiction to entertain the appeal.

The Court found the decision of the Grievance Board to be “in part, arbitrary and capricious” and remanded the matter for reconsideration consistent with its Memorandum Opinion. *See* 5 U.S.C. § 706 (2)(A) (a Court must set aside agency action if it is arbitrary and capricious). The Court also noted that if the agency’s conclusion is not supported by a reasonable explanation based upon the full administrative record, it must be set aside.

The decision by the Grievance Board to dismiss for lack of jurisdiction was based on its conclusion that Ehrman’s appeal was a challenge to the judgment of a Performance Selection Board, not grievable under 22 U.S.C. § 4131 (b)(2). We, of course, only have that authority given us by rule, law, or regulation.

The Court saw the complaint otherwise. Ehrman had been low-ranked by Selection Boards in 1999, 2000, and 2001. As a consequence the Performance Standards Board designated him for selection out of the Foreign Service – applying regulations applicable to low-rankings.

The PSB relied in part upon certain aspects of his labor-specific performance. Ehrman ultimately appealed the action of the PSB to the Grievance Board which accepted jurisdiction of his appeal on October 18, 2002. As part of his appeal Ehrman claimed that as a Labor Officer he should have been reviewed in the Labor skill code and that he should have been protected from low ranking after the Labor skill code was abolished. When Ehrman sought through discovery information relating to his performance, the Department selectively responded by limiting any evidence provided to that related to his performance in the Political skill code, considering only that evidence discoverable. In response to a Motion to Compel, the Grievance Board ruled against his desire for information about others' performance. In effect, it agreed with the Department.

But, prior to making a decision on the merits of the appeal by Ehrman, the Grievance Board issued a decision dismissing the appeal, finding it had no jurisdiction because Ehrman had challenged the judgment of the PSB; this is not grievable under 22 U.S. C. § 4131 (b)(2). Later requests for reconsideration of the dismissal for lack of jurisdiction were not successful. For relief, he then turned to the District Court.

The heart of the decision by the Court is:

While the FSGB's ultimate decision may be valid, this Court cannot affirm it because the FSGB did not consider all the relevant record and failed to provide a reasonable explanation for some of its holdings.

What bothered the court was that, in dismissing the appeal, the Grievance Board "failed to consider some of the issues raised by Ehrman during discovery."

As seen by the Court, the Grievance Board overlooked the fact -- made implicit in Ehrman's discovery requests -- that he had also alleged "the misapplication by the personnel system of Department policy", a matter unquestionably grievable.

On remand, the Department promoted Ehrman to the rank of Minister-Counselor.

Significant  
Grievance  
Board  
Decisions  
of 2006

**FSGB Case No. 2004-068 (May 5, 2006)**

Because most decisions by the Grievance Board are decided on a written record, credibility determinations can be difficult. In this proceeding we drew on court precedent to reiterate the established principle that, as the finder of fact, we have the authority to find one witness more credible than another even where there is no hearing.

**FSGB Case No. 2005-043 (March 14, 2006)**

Here, we emphasized that settlement agreements entered into by the parties will be enforced and interpreted in accordance with contract law. But the Grievance Board will only retain jurisdiction over a voluntary settlement agreement if it is made part of the record of proceeding.

**FSGB Case No. 2004-059 (December 7, 2006)**

The grievant alleged that his low-ranking by the Department was based upon impermissible age discrimination as well as retaliation. The premise of the latter claim was an assertion that the Selection Board (SB) engaged in reprisal because he had previously filed five other grievances with his agency. The Grievance Board found there was no evidence that the SB had actual or even constructive knowledge of his prior grievances and concluded that this assertion was baseless.

As to an age discrimination claim, the Grievance Board applied the precedent of and procedure set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 348 (1981) and determined that grievant had failed to show that he was treated any differently from that of others similarly situated. Useful precedent for the Grievance Board was thereby established.

**FSGB Case No. 2005-045 (May 12, 2006)**

Within the performance evaluation process in the Foreign Service, an area that is somewhat clouded is that under Areas for Improvement (AFI), the section that “must be completed” and has as its purpose an explanation of what the employee might do to improve in the future.

In this proceeding, the Grievance Board ordered rescinded a low-ranking statement because the Selection Board misconstrued statements in the AFI as criticism of past performance whereas they were nothing more than the required guidance for the future. This case illustrates the inherent problems of the AFI.

**FSGB Case No. 2006-022 (October 20, 2006)**

The Grievance Board dismissed the appeal as not within its jurisdiction finding that it was not included in the definition of “grievance”. Grievant alleged, among other matters, that his grievance should be accepted for disposition as an action covered by 3 FAM 4412 (c)(4), “Dissatisfaction with respect to the working environment of the member.”

What concerned grievant was an amended rule by the Department made in 1999. The essence of his argument was that the new rules regarding Time-in-Service and Time-in-Class gave those specialists who entered the Service between 1993 and 2000 an “incalculable advantage” for promotion over him and other specialists who entered the Foreign Service in the late 1970s and 1980s.

Not often has the Grievance Board been presented with the “dissatisfaction with the working environment” argument, so this decision has significance for the future. The Grievance Board ruled that his claims that he was subject to stress and psychologically harmed by the inherent unfairness of the amendment, were not in the contemplation of the concept of dissatisfaction with the working environment. The appeal was dismissed.

**FSGB Case No. 2005-035 (June 26, 2006)**

This was a case involving a Foreign Service officer who engaged in inappropriate relationships with two Chinese nationals while stationed in China and failed to report those relationships in a timely manner, as required.

While his on-the-job performance was graded as outstanding, these actions created serious concerns over his ability to abide by the standards of conduct expected of a professional Foreign Service Officer.

Exacerbating the actions by grievant was the fact that the inappropriate contacts took place in a critical threat post and ran afoul of the Department policy on contact reporting as set forth in 12 FAM 262.1.

Grievant was separated from the Foreign Service on May 1, 2006.

*Case  
Statistics  
2006*

<b>A.</b>	<b>Number of Cases Filed</b>	57
<b>B.</b>	<b>Types of Cases Filed<sup>1</sup></b>	
	EER	14
	Financial	14
	Disability	0
	Discipline	8
	Separation	7
	Jurisdiction	4
	Assignment	0
	Implementation	0
	Attorney Fees	15
	Other	16
<b>C.</b>	<b>Disposition of 2006 Cases</b>	
	Affirmed	2
	Reversed	1
	Partially Reversed	1
	Settled	2
	Withdrawn	1
	Dismissed	2 in whole, 1 in part
	Remanded	0
	Pending (as of 12/31/2006)	43
<b>D.</b>	<b>Oral Hearings</b>	1
<b>E.</b>	<b>Interim Relief</b>	7

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

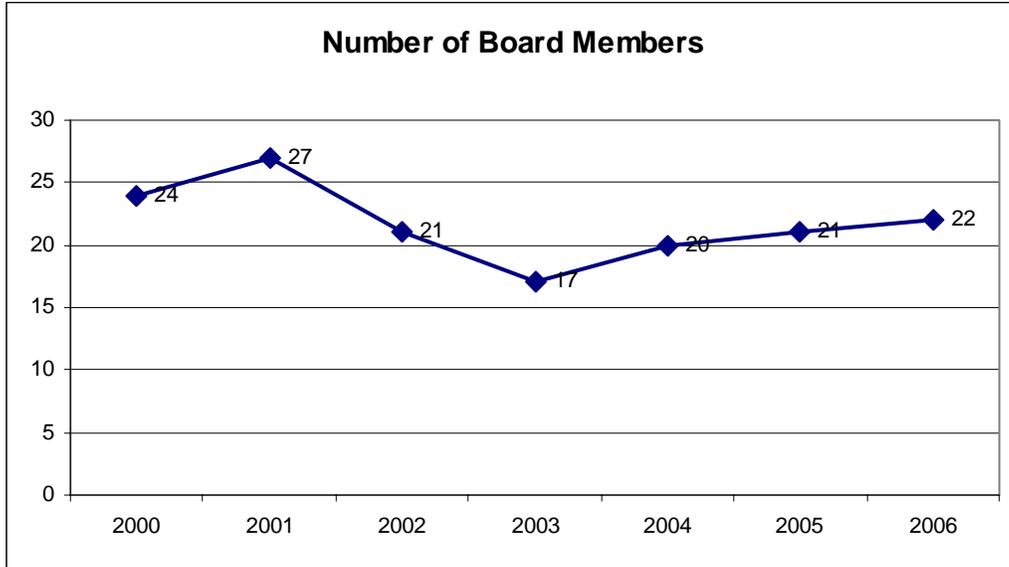
*Case  
Statistics  
2006  
Continued*

	<b>F.</b>	<b>All Cases Closed in 2006 (Including Prior Year Cases)</b>	
		Total .....	61
		Affirmed .....	34
		Reversed .....	1
		Partially Reversed .....	9
		Settled .....	6
		Withdrawn .....	4
		Dismissed .....	6
		Remanded .....	1

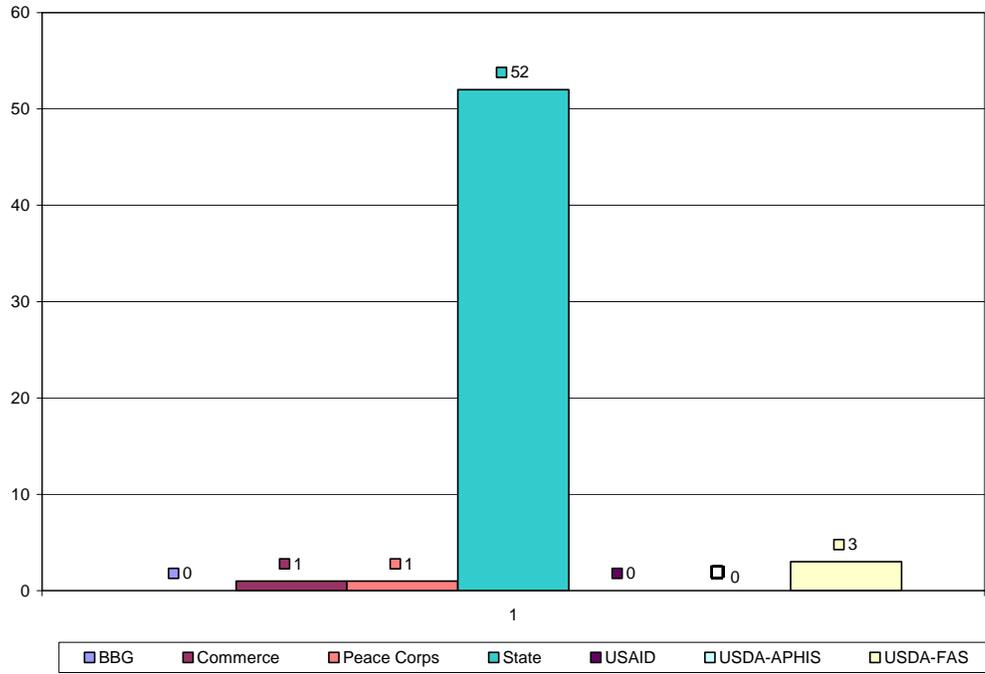
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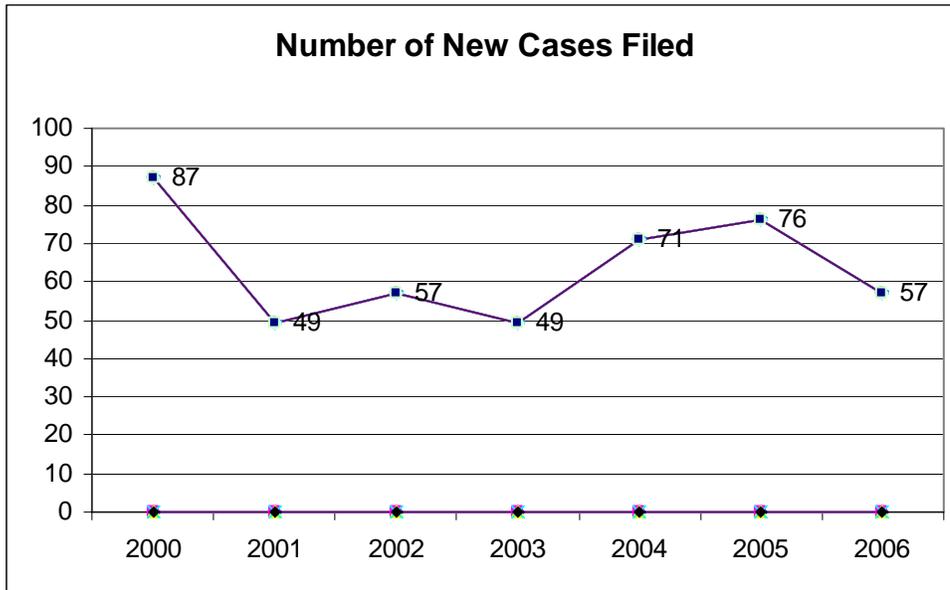
The average time for all cases closed in 2006 from filing to resolution was a total of 39 weeks, which was consistent with the average in 2005. The longest time between filing and resolution was 154 weeks, which was slightly more than the 150 weeks in 2005. The shortest was 2 weeks. The average time for 2006 cases from filing to resolution was a total of 17 weeks.

As of December 31, 2006, there were 50 cases before the Board; two decided cases were pending judicial review; one decided case was awaiting Department implementation of a promotion order; and two cases were being mediated. Of the 50 cases then before the Board, the oldest undecided case was pending 106 weeks as of December 31, 2006.



Number of New Cases in 2006 by Agency





**FOREIGN SERVICE GRIEVANCE BOARD 2006**

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TYPES OF CASES FILED

	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>
EER	29	13	19	21	35	31	14
financial	12	10	8	10	16	10	14
disability	0	0	0	0	0	0	1
discipline	16	14	19	7	8	16	8
separation	15	14	6	6	9	9	7
jurisdiction	4	2	1	0	0	0	4
assignment	5	1	2	5	2	0	0
implementation	4	0	2	0	0	0	0
attorney fees	2	0	0	0	0	1	5
other	0	0	0	0	1	10	16

