

FOREIGN SERVICE GRIEVANCE BOARD

*Annual Report*  
*for the Year*

2007

# **FOREIGN SERVICE GRIEVANCE BOARD**

## **ANNUAL REPORT FOR THE YEAR 2007**

### **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 2007**

### **Composition and Operation of the Board**

It is my pleasure to transmit the Annual Report of the Foreign Service Grievance Board for 2007. The report provides information on the operations and responsibilities of the Board during calendar year 2007 and is intended to comply with the reporting obligations imposed by Section 1105(f) of the Foreign Service Act (22 U.S.C. 4135(f)). The Report includes tables which summarize the number and types of cases decided and their disposition and narrative regarding the current and historical operation of the Board.

I became Chairman of the Board effective October 1, 2007. In that capacity, I succeeded Edward J. Reidy, who served as Chairman of the Board for over nine years. I wish to acknowledge his contributions to the Board over that period. He served for many years prior to coming to the Grievance Board as Chief Administrative Law Judge at the Merit Systems Protection Board. His experience in that role undoubtedly affected his views of the Foreign Service Grievance Board.

I come to the Board from a related, but different professional background. I have served as an Impartial Arbitrator and Mediator in labor and employment and related disputes since 1981 on a full-time basis, having presided over more than 3,500 cases in a wide variety of industries and situations in the private and public sector. During this same period, I have also served as a Member of three Presidential Emergency Boards, as

an Administrative Judge for the EEOC, as a Mediator for the Office of Compliance, as a Hearing Officer for the Office of Senate Fair Employment Practices, and as a Member and Chair of the GAO Personnel Appeals Board. I have continued my professional practice as an Impartial Arbitrator and Mediator since becoming Chairman.

In the brief period since becoming Chairman of the Board, I have enjoyed learning about this unique system of grievance resolution and about some of the ways and customs of the Foreign Service. No significant changes in the way that the Board functions are contemplated at this time. It is my hope, however, to institute measured changes in the operation of the Board with the goal of making the dispute resolution process even more efficient and enhancing further due process for all parties appearing before the Board (e.g., increased use of status conferences to focus and resolve discovery and other case management issues, as well as to offer additional opportunities for settlement).

I have been privileged to have the continued presence on the Board of Edward A. Dragon, a retired Foreign Service Member, who served as Deputy Chairman under the immediate past Chairman, and continues to serve in that capacity. I have also been fortunate in having inherited a dedicated and competent staff to ensure that the day-to-day functioning of the Board continues without problem. Jacqueline Ratner, an experienced member of the Foreign Service, serves as Executive Secretary. The Board has two Special Assistants, Linda B. Lee and Joseph Pastic. The Support Staff consists of Conchita M. Spriggs, F. Elena Cahoon, and Margaret Marin. Staffing seems adequate to meet the needs of the Board for the foreseeable future. Jeremiah A. Collins, with the law firm of Bredhoff & Kaiser, continues to serve as outside Counsel to the Board.

The Board Members work as contractors on an “as needed” part-time basis. Our Members consist of a pool of individuals who previously served and are retired from one or more foreign service agencies, and a second pool of individuals whose background consists of professional experience presiding over and deciding disputes, including particularly labor relations and employment disputes. Customarily, cases are heard and decided by three Member panels consisting of two members from the foreign service retiree pool and a third member, who serves as the Presiding Member, from the professional dispute resolver pool. 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 take into account both applicable legal and personnel principles and an appreciation of the unique nature of the Foreign Service. Historically, the Chairman has delegated to the Executive Secretary the authority to assign cases to the Members for decision. Cases have been assigned taking into account the experience, availability, and workload of each Member. This system has worked well and has been continued since my becoming Chairman last October 1<sup>st</sup>.

At the beginning of 2007, the number of Board Members was 20. The number of Board Members for the final quarter in 2007 was 17 (one of whom indicated that due to personal reasons he would no longer be able to accept cases). Members are appointed to two-year terms by the Secretary of State. Appointees are selected from recommendations of the various foreign affairs agencies and the American Foreign Service Association. Turnover among the members has historically occurred. Greater than usual turnover, however, took place coincident with the appointments effective October 1, 2007. The number of Members who previously served in the Foreign Service dropped from 13 to

11. All of those Members had prior experience serving on the Board. Shortly after October 1, 2007, one of those individuals resigned and the Board member who previously indicated that due to personal reasons he would no longer be able to accept new case assignments remained unavailable. The effective pool of such Members, therefore, is nine. The number of Members drawn from the pool of professional dispute resolvers experienced significant change. Four individuals in that pool were appointed. Only one of those persons had served previously on the Board. Thus, while highly experienced adjudicators, three of the seven Member complement of labor relations professionals were new to the Board and to the Foreign Service. There will be a familiarization period as the new appointees become familiar with both the Foreign Service and with the Board's processes and customs and as the staff and returning Members become acclimated to the new appointees.

As of December 31, 2007, the members of the Board were:

Ira F. Jaffe (Chairman)

Edward A. Dragon (Deputy Chairman)

James E. Blanford

Garber A. Davidson

Harriet E. Davidson

Margery F. Gootnick

Roger C. Hartley

Lois E. Hartman

Alfred O. Haynes

Theodore Horoschak

Arthur A. Horowitz

Gail M. Lecce

Garvin L. Oliver

Harlan F. Rosacker

John H. Rouse

Jeanne L. Schulz

Susan R. Winfield

A majority of our Members reside in the Washington, D.C. area. Those residing elsewhere come to the Board's Headquarters in Rosslyn, Virginia, for quarterly Board meetings or as needed to participate in hearings. Most day-to-day interaction among Board Members, however, takes place electronically, by phone, video conference, facsimile, and/or e-mail.

Additionally, as has been the case historically, a relatively small number of cases involve in-person hearings. Of the 31 cases in which decisions were issued in 2007 by the Board, hearings were held in only two cases. Partly, this is a function of the nature of the Foreign Service and the fact that individuals are often located in remote locations. To some extent, this is also a function of custom and the desires of the parties. The statute, which renders hearings a matter of Board discretion in most cases, also contributes to the situation. Finally, the mix of cases affects the number of hearings; hearings are to be held, unless waived by the charged employee, in separation for cause cases. As a result of historical custom, the procedures for development of the Record of Proceedings reflect the fact that, in most cases, hearings will not be held. The process is one that is highly paper-driven, but which has the flexibility needed to ensure that hearings are held in

cases where there are disputed material facts that cannot be fairly resolved on the basis of the documentary submissions.

### **2007 Case Load**

The number of new cases docketed at the Board in 2007 was 54, a number roughly comparable to the number of new cases docketed in 2006 and in the 2001-03 time period, but down sharply from the number of new cases docketed in 2000 and in the 2004-05 time period. The vast majority of cases are from individuals who are employed by the Department of State, which is consistent with historical filings and reflective of the relative size of the Foreign Service in the Department of State as contrasted with the other covered foreign service agencies. The proportion of cases settled or withdrawn remains high, which is desirable. Decisions should be issued only when other means of voluntary resolution have proven ineffective. The Board is careful, however, to ensure that it does not apply inappropriate pressure upon a party to settle a case.

The mix of cases by type and the disposition of cases that resulted in Board rulings appear consistent with the comparable statistics in recent prior years.

### **Judicial Decisions Involving Board Rulings**

Two judicial decisions were issued by the federal Courts in 2007 that related to decisions of the Board.

In *Department of State v. G. Craig Coombs*, 375 U.S. App. D.C. 485, 482 F.3d 577 (D.C. Cir. 2007) (“*Coombs*”), a panel of the United States Court of Appeals for the District of Columbia Circuit reversed a decision by the United States District Court for the District of Columbia and ordered the decision of the Foreign Service Grievance Board vacated. The matter is presently pending on remand before a panel of the Board.

Coombs joined the Department of State in 1990, and, in 1998, was assigned to be an administrative and consular officer at the United States Consulate General in Surabaya, Indonesia. Based on a critical year 2000 Employee Evaluation Report (“EER”), Coombs was “low-ranked” by the annual Selection Board (“SB”) and referred to the Performance Standards Board (“PSB”) for consideration for separation from the Foreign Service. The PSB recommended Coombs for selection out of the Service. The Department notified Coombs of his impending separation in February 2001.

Soon thereafter, the Department’s regional medical officer, Dr. Riesland, learned from Coombs’ colleagues at the Surabaya consulate that Coombs was exhibiting troubling behavioral problems. Dr. Riesland arranged for Coombs to meet with the Department’s regional psychiatrist, Dr. Lauer, for a clinical interview. After a two and a half hour examination, Dr. Lauer found that Coombs had “no discernible pathology other than probable characterological issues.” Dr. Lauer also determined that “no psychiatric medication seems indicated at present.”

Coombs submitted an amended agency-level grievance in May 2001 contesting his separation. His grievance contained an affidavit from Dr. Bristol, a board-certified psychiatrist unaffiliated with the Department, who, having reviewed prior EERs for Coombs, diagnosed him with Obsessive-Compulsive Personality Disorder and Acute Adjustment Disorder during the time covered by the 2000 EER. Coombs appealed the Department’s negative grievance decision to the FSGB. In the Board’s proceeding, the Department disputed Coombs’s claim of mental disability and pointed to the psychiatric examination performed by Dr. Lauer, wherein Lauer attributed Coombs’s behavior to “character problems.”

The Board issued its decision on January 27, 2003, stating, *inter alia*, that Coombs's poor performance was in fact behavior attributable to psychiatric illness, that the EER based on his poor performance was of a falsely prejudicial character (one of the stated grounds for review of EERs pursuant to 22 U.S.C. §4131(a)(1)) and that the Department's ignorance of the underlying medical condition furnished even greater cause to set aside the 2000 EER. In arriving at its decision, the Board credited Dr. Bristol's opinions over those of Dr. Lauer. In addition to collateral relief under 22 U.S.C. §4131(a)(1) directing the rescission of certain portions of the EERs, the Board directed the Department to rescind Coombs' proposed separation based upon the finding that the Department had improperly characterized behavior that was attributable to Coombs' undiagnosed mental illness and to provide him with an appropriate regular assignment unless he was "medically disqualified."

The Department claimed that Coombs was really making a claim for disability discrimination under 22 U.S.C. §4131(a)(1)(H) and that he had no claim because the Department had no reason to know of the officer's alleged impairment under the Rehabilitation Act of 1973, 29 U.S.C. §791, 42 U.S.C. §12112.

The Department sought review of the Board's decisions with respect to the 2000 and 2001 EERs in federal district court. Coombs moved for judgment on the pleadings, and the Department cross-moved for summary judgment. The District Court, treating Coombs' motion as one for summary judgment, granted it, upholding the Board's decision. The Department's motion was denied. An appeal to the Court of Appeals for the District of Columbia Circuit followed.

On appeal, the Court of Appeals reversed the judgment of the District Court and vacated the Board's decision, stating in part:

The Board does not appear to have even considered whether it is reasonable to require reinstatement of such an employee, in light of the demands of the Foreign Service. We think such an omission makes the Board's decision arbitrary and capricious. We therefore vacate and remand for the Board to reconsider its interpretation of 22 U.S.C. 4131(a)(1)(A) and (E) and whether its ordering Coombs's reinstatement is appropriate in light of both the Rehabilitation Act and the demands of the Foreign Service. The other relief granted by the Board (i.e., expungement of the 2000 and 2001 EERs, insertion of gap memoranda, extension of time to compete for promotion, and attorneys' fees) is collateral to the Board's decision to rescind Coombs' separation, and the Board should reevaluate it accordingly.

The Court of Appeals also found that the Board erred in its interpretation of 22 U.S.C. §4131(a)(1), which specifically includes in the definition of a grievance a claim that involves: "(A) separation of a member allegedly contrary to laws or regulations or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member;" or "(E) alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member which is or could be prejudicial to the member." In discussing whether the Board's finding that the Department's characterization of Coombs' performance was of a falsely prejudicial character given the failure to reference his mental illness, the Court of Appeals stated:

State argues that the term "false" necessarily refers to an intentional misstatement. We disagree. The word is ambiguous; it could mean intentionally false--that may well be its more typical usage--but it is not an inevitable meaning. "False" can also mean simply "not true." The Board's adoption of the second meaning is certainly authorized under Chevron. 467 U.S. at 843-45. However, that is not enough to bring the Board home because, whether intentional or not, "false" does, at a minimum, mean untrue, and nothing in either EER is contrary to fact in that sense. Coombs essentially argues that the EERs are incomplete because they do not include a valid psychiatric explanation for his behavior. But to be incomplete is not the same as being "false"--particularly when the person completing the EER is entirely unaware of the omitted information. Thus, the Board's interpretation of "falsely prejudicial" strikes us as an impermissible interpretation of ambiguous language (Chevron Step II).

We are puzzled, however, because the Foreign Service Act also authorizes the Board to correct a grievant's personnel record if it finds the record is prejudicial because of an "omission." See 22 U.S.C. § 4131(a)(1)(E). That would seem to be a possible statutory

basis for the Board to rely on in granting relief to Coombs. We, of course, do not so conclude because it would be up to the Board to make that decision in the first instance.

This construction of the Act appears to separate the phrase “falsely prejudicial character of information” from the remainder of the subsection in which it appears and departs from an interpretation of 22 U.S.C. §§4131(a)(1)(A) and (E) that has been adhered to consistently by the Board and accepted by the Parties for many years.

In the only other reported judicial decision of 2007 involving an appeal from a Board decision, *Wright v. Foreign Service Grievance Board, et al.*, 503 F. Supp. 2d 163 (D.D.C. 2007), the United States District Court for the District of Columbia upheld a Board decision that dismissed a grievance on the basis of a settlement agreement between the employee and the Department of State that expressly barred that grievance from proceeding. Phillip E. Wright is a former member of the Foreign Service who resigned from his position as a Public Affairs Officer at Kinshasa, Congo, on July 14, 2005, pursuant to the terms of a settlement agreement that provided, in pertinent part, that Wright would relinquish all future administrative and judicial claims against the State Department. Wright had filed a grievance appeal with the Board on March 6, 2002, requesting that the Department expunge or otherwise amend allegedly inaccurate and falsely prejudicial material in his official personnel record. On July 8, 2003, the Board denied his grievance. After he entered into and received the benefits from the settlement agreement, Wright, proceeding *pro se*, brought this action against the FSGB, the State Department, and Condoleezza Rice in her official capacity as the United States Secretary of State in part as an appeal of the FSGB’s July 8, 2003 denial of Wright’s grievance. Wright sought a declaratory judgment that the July 14, 2005 settlement agreement was

void (1) for being signed under duress, (2) for lack of consideration, (3) as against public policy, or (4) as a violation of due process.

The defendants moved for summary judgment on Wright's challenge to the FSGB's July 8, 2003 decision, asserting that it is barred by the settlement agreement. The defendants also contended that even if the settlement agreement did not bar Wright's action, the FSGB's decision was neither arbitrary, capricious, an abuse of discretion, nor otherwise contrary to law.

The Court held that: (1) there was consideration for the settlement agreement which was enforceable; (2) the settlement agreement was ratified by the employee's acceptance of the benefits provided thereunder – i.e., a guarantee of full retirement benefits and continued employment after the date on which he would have been separated, along with a rescission of the separation itself, thereby rendering inapplicable his claim of duress; (3) the settlement agreement, as a contract, was governed by principles of contract law and, because one of the parties to the contract was the federal government, was governed by federal common law; (4) there was no showing in any event that the grievant had no realistic alternative other than to resign and the claim of involuntariness regarding his resignation was rejected; his ability to reject the offered settlement agreement and to pursue his appeals before the Board constituted a realistic alternative other than resignation; the mere fact that a choice is a difficult one does not render it coercive; (5) the claim that enforcement of the settlement agreement would violate public policy was also unpersuasive; and (6) the claim that the Board's refusal to permit the employee to propound over 900 interrogatories was not shown to violate the

grievant's due process or to provide grounds for refusing to enforce the settlement agreement.

Finally, the Court applied the provisions of the Administrative Procedure Act and reviewed the Board's decision under a deferential standard of review.

### **Significant or Noteworthy Board Decisions in 2007**

There were no major rulings in 2007 in which the Board reversed established precedent and announced a new substantive approach. The cases involved largely the application of established principles to the particular facts with a few matters of first impression. The following sampling of decisions was selected principally to provide some insight into the day-to-day adjudicatory case load of the Board. To ensure confidentiality, cases are published by the Board in redacted format and are referenced in this Report by case number only.

#### ESGB Case No. 2004-065 (February 9, 2007)

An employee was found guilty of cheating in a Federal Law Enforcement Training Center course and, as a result, was found not to have satisfactorily completed one of the conditions of his limited term appointment. The employee was removed from employment. The Board upheld that action. Two members of the panel treated the issue as one of separation for cause and held that the termination was improperly treated as one covered by Section 612 of the Foreign Service Act, but found that the charges of cheating were proven and that the grievant's removal was for such cause as would promote the efficiency of the service. The third panel member concurred, but would have treated the case as involving a termination covered by Section 612 of the FSA and thus a matter over

which the Board would have lacked jurisdiction pursuant to 22 U.S.C. Section 4131(b)(3).

ESGB Case No. 2006-012 (June 6, 2007)

The Board found in this case that the grievant was separated properly for misconduct. The charged misconduct involved a variety of acts of a dishonest nature in connection with claims for travel expense reimbursement.

The Board in that case ruled that the employee's claims of discrimination based on race, gender, and national origin could not be maintained before the Board due to his having previously filed an EEO complaint raising those same claims. The Board limited the issue at hearing, therefore, to the question of cause.

ESGB Case No. 2006-001 (June 20, 2007)

The grievant and his ex-spouse both were long-time employees of the Foreign Service. When they divorced, their decree provided that each would enjoy the right to receive one-half of the retirement allowance payable to the other. The Department initially advised the grievant that he would be entitled to receive one-half of the retirement benefits payable to his ex-spouse, but later reversed that position based upon the fact that the grievant remarried prior to attaining age 55. The Department's rejection of the grievant's claim was upheld by the Board. In affirming the Department's position, the Board relied upon the provisions of 22 U.S.C. §4071j, the wording of the court decree, and the language of the agreement between the grievant and his ex-spouse.

ESGB Case No. 2005-069 (April 27, 2007)

An employee received erroneous advice as to whether he could use family and medical leave ("FML") for a particular absence to care for a sick parent. The employee

retired, but prior to doing so, the Department determined that sick leave used by the employee in excess of the FML limits would be converted to annual leave (or leave without pay at the employee's option). That act resulted in decreased lump sum benefits received by the employee upon retirement. Prior to using the FML, the employee checked with a Career Development Officer who confirmed the propriety of the FML. The employee explained that, if he had known of the hours limitations on FML usage, then he would have made alternative arrangements for the care of his parent.

The Board found that all of the criteria for equitable estoppel were present and sustained the grievance. The decision of the United States Supreme Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) was distinguished on the basis that there was no expenditure of appropriated funds involved in the case at bar, but only a change in leave designation. Several MSPB and judicial decisions were also cited and relied upon in support of the Board's ruling.

FSGB Case No. 2006-028 (December 20, 2007)

The Board upheld a one day suspension issued to a Diplomatic Security Agent for a conviction of driving while under the influence while stationed in the United States for training. The Board found sufficient nexus to permit the imposition of the discipline, agreeing with the Department that: "a DUI conviction raises issues of judgment by a law enforcement officer generally and, more specifically, raises issues involving the appropriate use of alcohol, the appropriateness of driving under the influence of alcohol, and whether defense counsel may try to discredit the officer's investigation or testimony given his history of alcohol abuse." The penalty also was found reasonable and

consistent with the punishment meted out to employees who had committed similar offenses.

ESGB Case No. 2006-52 (December 19, 2007)

The Board found that a number of statements included in various EERs were of a falsely prejudicial character and ordered the offending statements excised. The Board ordered low ranking statements that relied upon those statements rescinded and overturned the pending separation and directed that the Department place a corrected official personnel folder before reconstituted selection boards.

It should be noted that the Board's docket of cases decided in 2007 included a significant number of cases challenging EERs and/or low rankings of grievants based upon claims that the EERs contained information of a falsely prejudicial character, claims of procedural impropriety of various types and claims that the selection boards made decisions on bases other than those set forth in the applicable precepts. Similarly, a significant number of cases decided in 2007 involved claims that the employer improperly set initial salaries based upon the prior experience of the employee.

Respectfully Submitted,

Ira F. Jaffe

Chairman, Foreign Service Grievance Board

March 27, 2008

Annual Report 2007 – statistics

A. Total cases filed 54

B. Types filed<sup>1</sup>

EER	21
Financial	14
Disability	0
Discipline	4
Separation	3
Jurisdiction	0
Assignment	3
Implementation	0
Attorney fees	7
Other	12

C. Disposition of 2007 cases

Affirmed	7
Reversed	0
Partially reversed	0
Settled	8
Withdrawn	7
Dismissed	0
Remanded	0

---

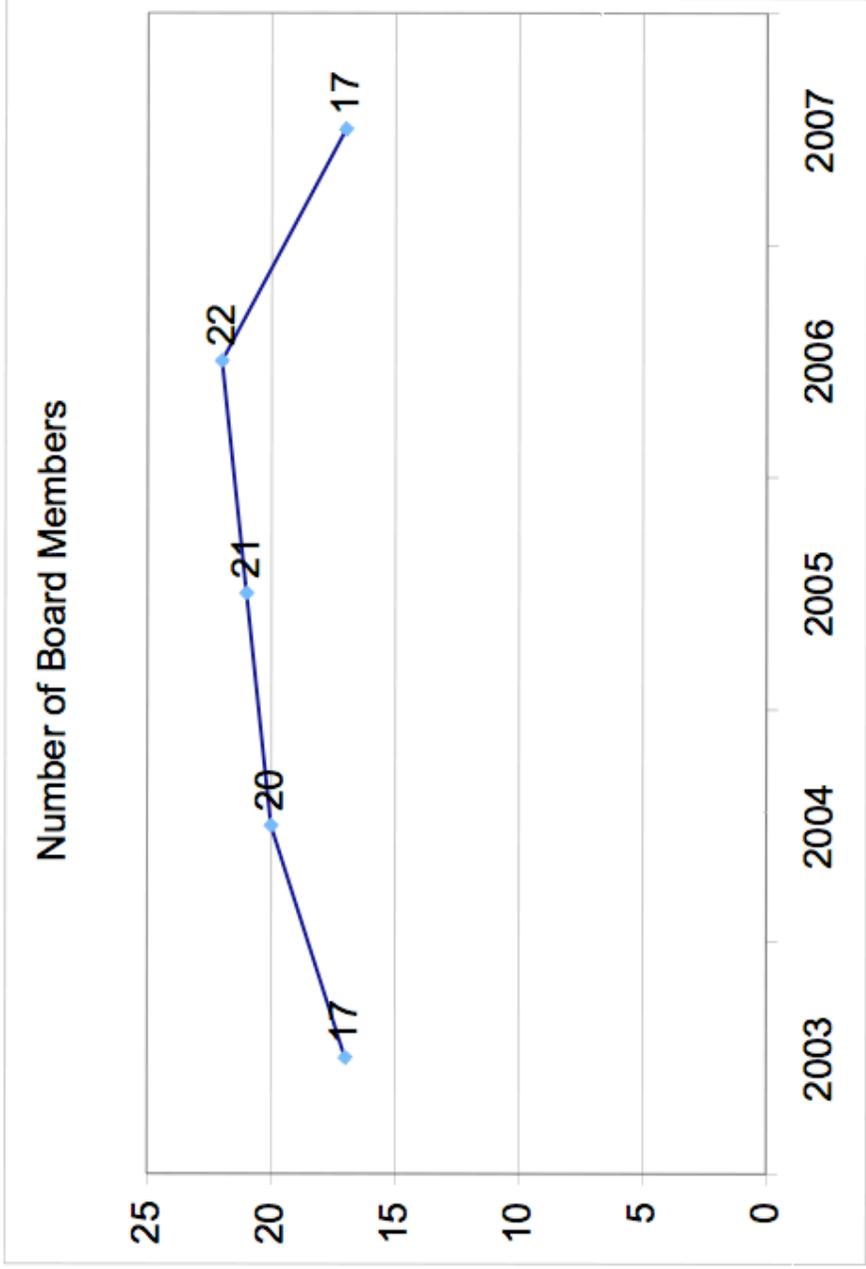
<sup>1</sup> The total of types filed might not match the total cases filed as a case might involve more than one type.

Lacked jurisdiction	1
Pending as of 12/31/06	31
D. Oral hearings	1
E. Interim relief	3
F. Disposition of cases closed in 2007	
Total:	60
Affirmed:	32
Reversed	2
Partially reversed	1
Settled	16
Withdrawn	9
Dismissed	0
Remanded	0

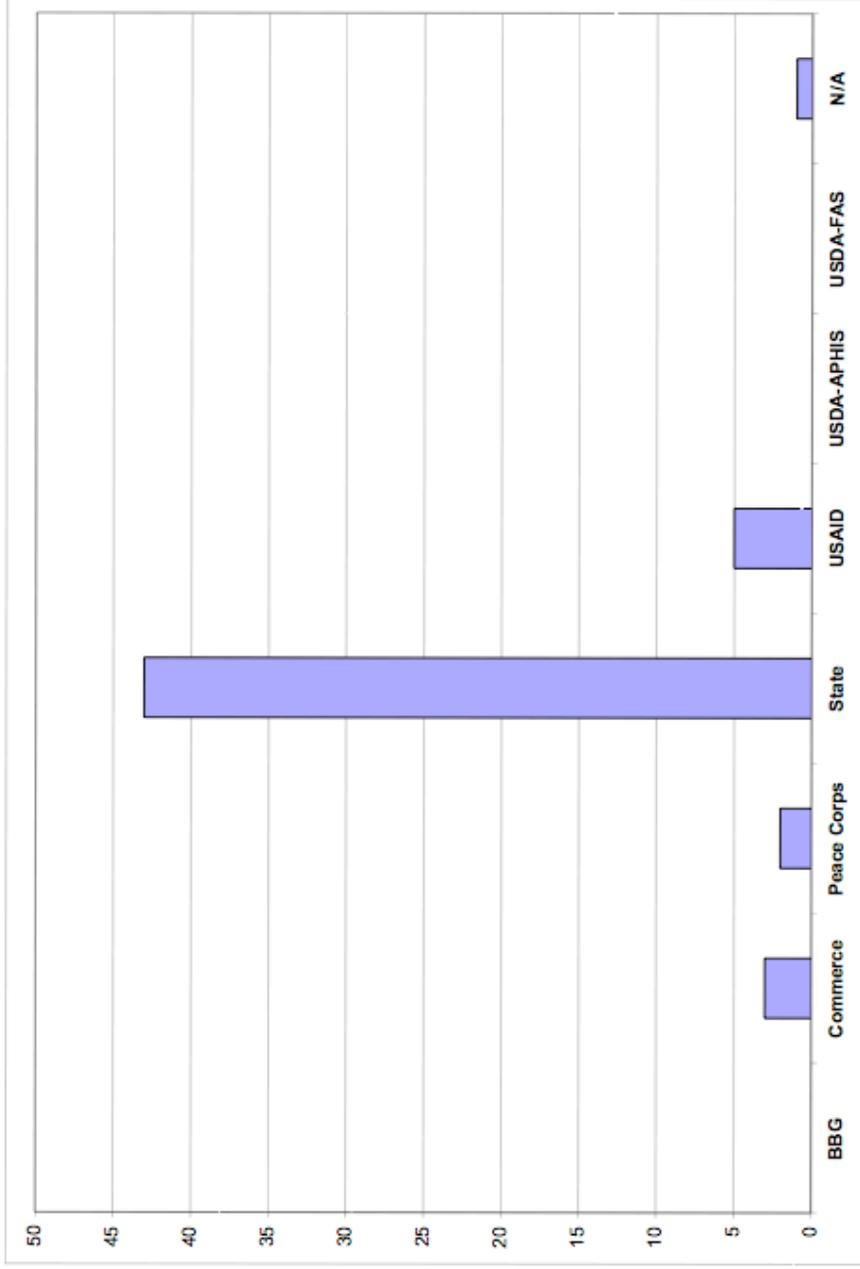
---

The average time for all cases closed in 2007 from filing to resolution was a total of 43 weeks, which was a slight increase over the average in 2006. The average time for 2007 cases from filing to resolution was a total of 17 weeks, identical with what it was in 2006.

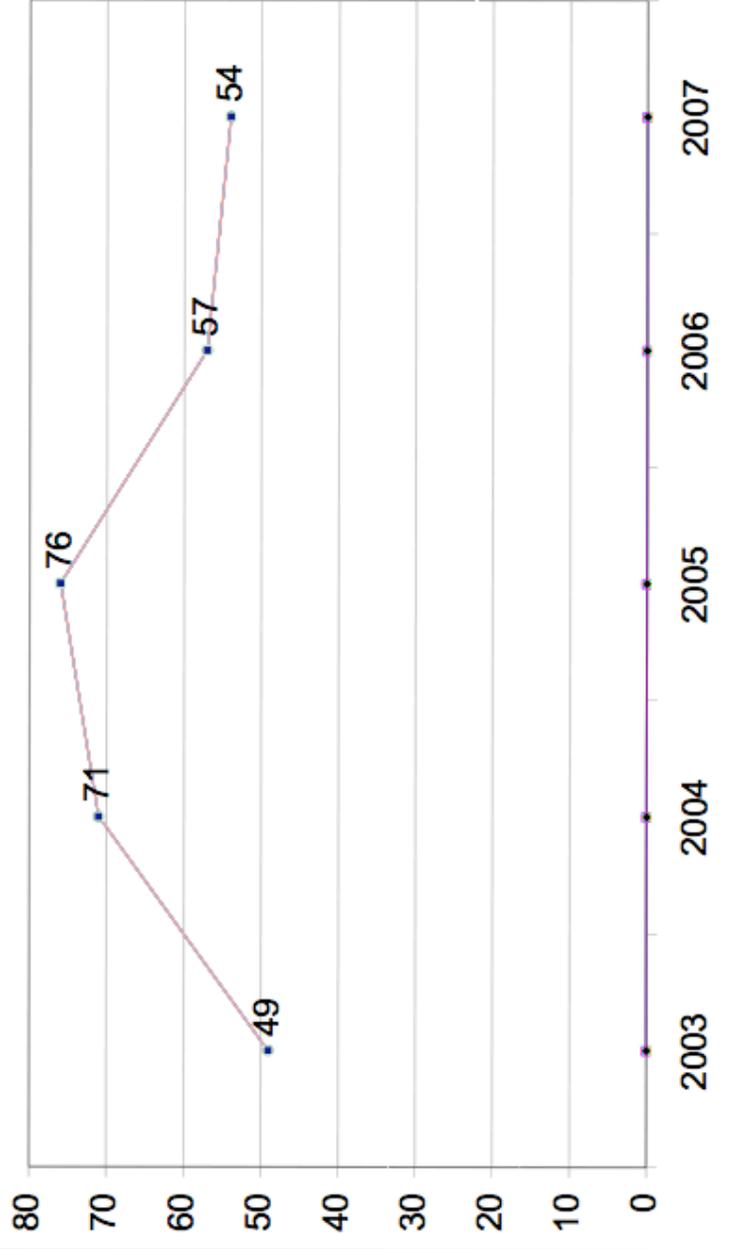
As of December 31, 2007, there were 46 cases pending before the Board, including one that was being mediated.



**Number of New Cases in 2007 by Agency**



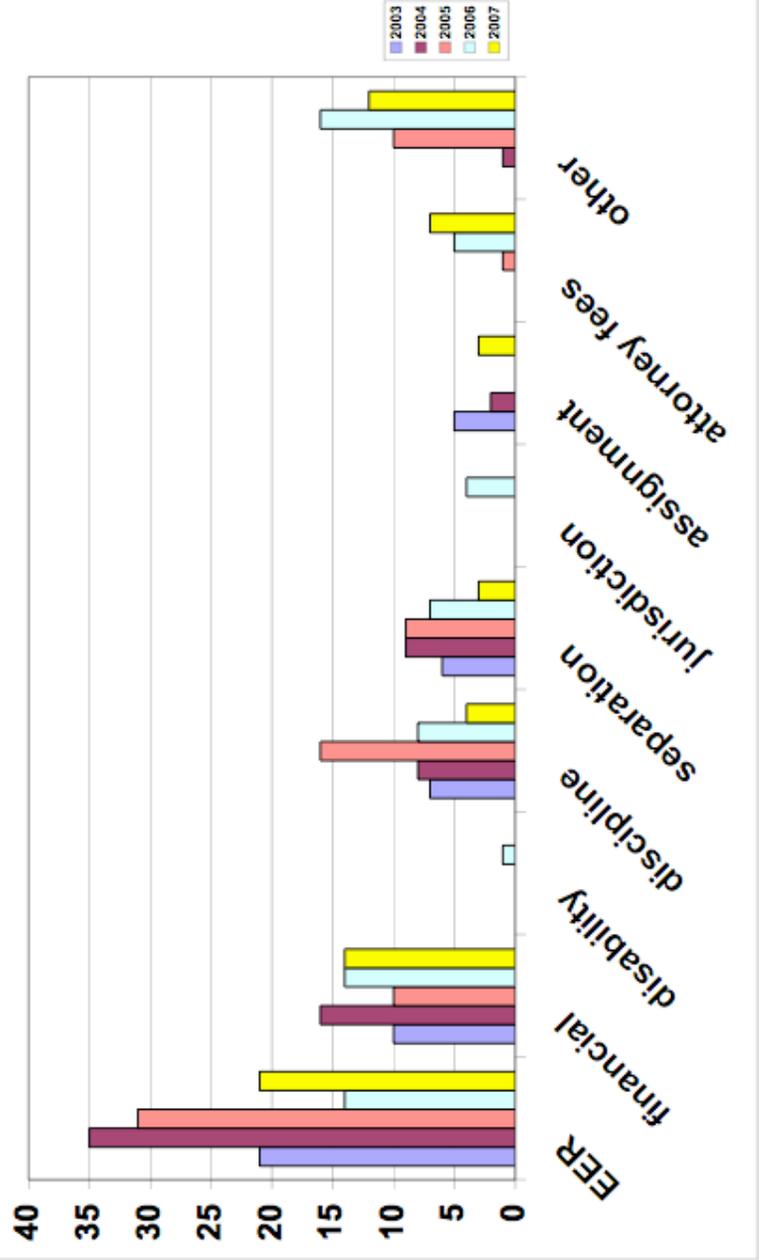
**Number of New Cases Filed**



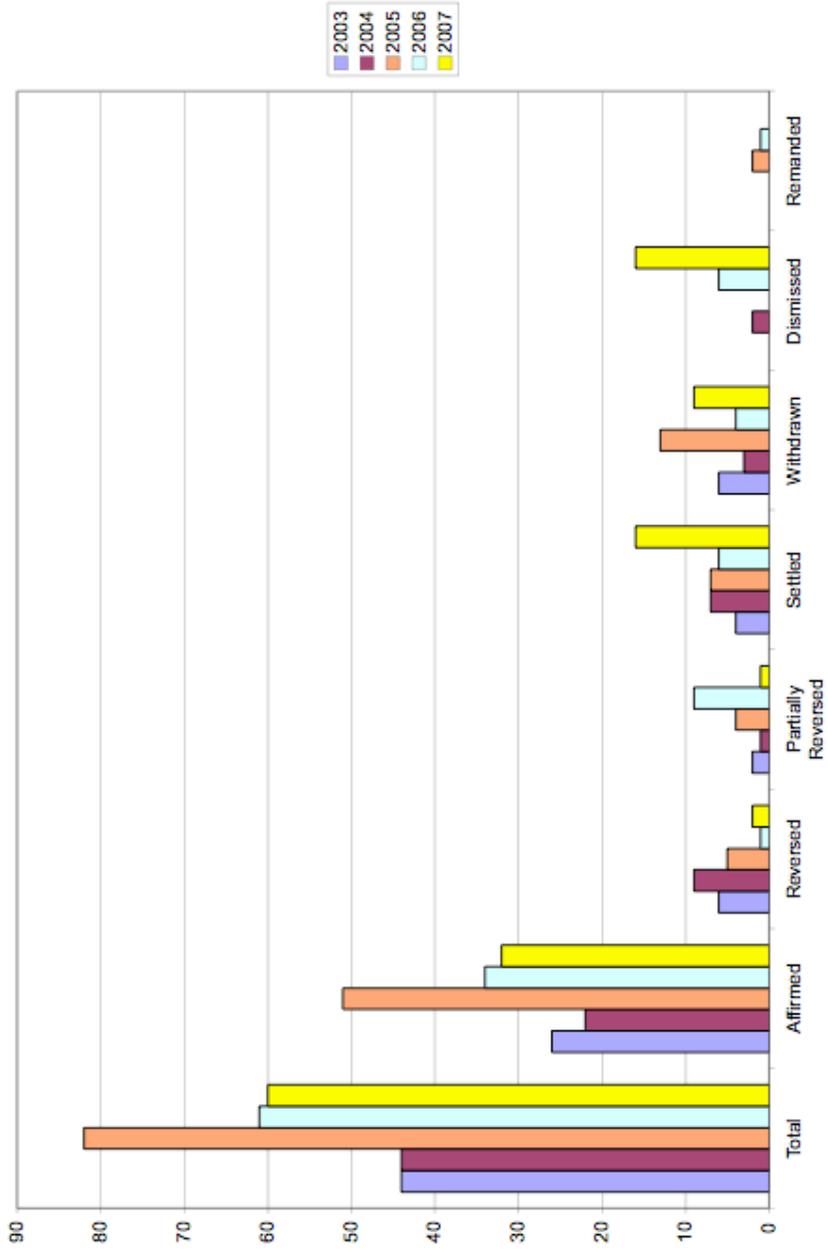
**TYPES OF CASES FILED**

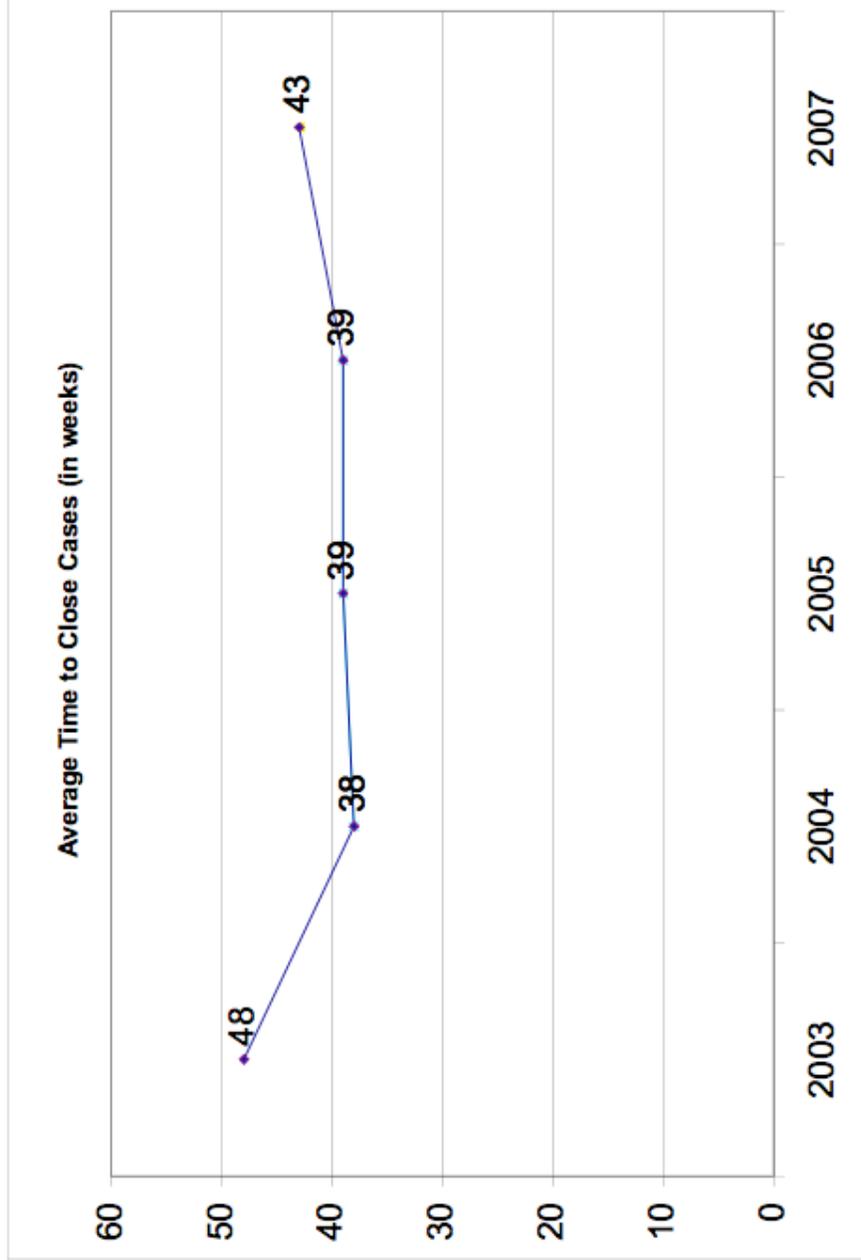
	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>EER</b>	<b>21</b>	<b>35</b>	<b>31</b>	<b>14</b>
<b>financial</b>	<b>10</b>	<b>16</b>	<b>10</b>	<b>14</b>
<b>disability</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>1</b>
<b>discipline</b>	<b>7</b>	<b>8</b>	<b>16</b>	<b>8</b>
<b>separation</b>	<b>6</b>	<b>9</b>	<b>9</b>	<b>7</b>
<b>jurisdiction</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>4</b>
<b>assignment</b>	<b>5</b>	<b>2</b>	<b>0</b>	<b>0</b>
<b>attorney fees</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>5</b>
<b>other</b>	<b>0</b>	<b>1</b>	<b>10</b>	<b>16</b>

# Types of Cases Filed



## Disposition of all Cases Closed





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