

ANNUAL REPORT

OF THE

**FOREIGN SERVICE
GRIEVANCE BOARD**

FOR THE YEAR

2008

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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

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Composition and Operation of the Board

It is my pleasure to transmit the Annual Report of the Foreign Service Grievance Board for 2008. The report provides information on the operations and responsibilities of the Board during calendar year 2008 and complies 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 October 1, 2007. During my second year as Chair, the Board has focused on increasing the efficiency of its operations and enhancing due process for all parties appearing before the Board, while maintaining our fundamental operating procedures. We have increased our use of status and pre-hearing conferences, to focus discovery and expedite the flow of case proceedings. We have enhanced our capacity for video teleconferencing to accommodate parties who are physically located throughout the world. We have formalized appropriate mediation procedures and, in suitable cases, offer the parties the assistance of the professional mediators on the Board to facilitate the settlement of cases, while conscientiously avoiding undue pressure on the parties to settle rather than proceed to a final Board decision. We have instituted more regular “brown bag” lunches to allow the Board to discuss common issues, with members participating both in person and through

teleconferencing. We are also in the process of reorganizing our library and reference materials to increase the efficiency of our research.

On October 1, 2008, I designated Ms. Gail Lecce, a retired USAID Foreign Service Officer and Member of the Board since 2005, to serve as Deputy Chairman. She succeeded as Deputy Chairman Edward Dragon, who served on the Board for 12 years and had been active in the labor relations of the Foreign Service in various capacities since the early 1960s.

Mr. Thomas Burke, a career Foreign Service Officer with the Department of State, became Executive Secretary effective October 1, 2008. Two special assistants, Linda B. Lee (also a career FSO from the Department of State) and Joseph Pastic (a retired USAID Foreign Service Officer) provide case management and research support to the panels. The support staff consists of Conchita M. Spriggs (USAID), F. Elena Cahoon (State), and Kelly Hopkins-Morell (State). Mr. Jeremiah A. Collins, with the law firm of Bredhoff & Kaiser, continues to serve as outside Counsel to the Board.

The Board itself consists of a pool of highly dedicated and experienced individuals who are retired from one of the Foreign Service agencies, and a second pool of individuals whose background consists of professional expertise presiding over and deciding disputes, including labor relations and employment disputes. Members are appointed to two-year terms by the Secretary of State from recommendations made by the various foreign affairs agencies and the American Foreign Service Association, the exclusive representative of Foreign Service members. Members work as contractors on an as needed, part-time basis.

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 pool of members who are professional dispute resolvers and who come from diverse backgrounds outside of the Foreign Service. 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 blend applicable legal and personnel principles and an appreciation of the unique practices, culture, and environment present in the Foreign Service. Historically, the Chairman has delegated to the Executive Secretary the authority to assign cases to the members for decision. Case assignments take into account the experience, availability, and workload of each member.

At the beginning of 2008, there were 17 Board members. As of December 31, 2008, the Board had a complement of the following 16 members:

Ira F. Jaffe (Chairman)

Gail M. Lecce (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

Arline Pacht

John H. Rouse

Jeanne L. Schulz

Nancy M. Serpa

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 Arlington, 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 telephone, video conference, facsimile, and/or e-mail.

Most cases are decided on the documents submitted for the record, in keeping with the general preferences of the parties and reflecting the fact that potential witnesses are often located at a number of locations across the globe. The Board occasionally holds hearings. In separation for cause cases, a hearing is required, unless waived by the charged employee. One full hearing was held in 2008. A second hearing was begun, but was suspended when the parties settled at the outset of the hearing.

We hope to continue to improve the process by increased use of conferences to better focus issues at earlier stages of the process and decrease unnecessary paper filings, by improvements to our website (which presently is hampered by budgetary considerations), and by reductions in the length of some of our rulings (to enhance the readability of the decisions and better highlight the analysis that is central to our holdings in a given case).

2008 Case Load

The number of new cases docketed at the Board in 2008 was 57, a number roughly comparable to the number of new cases in 2007. The vast majority of cases are filed by Foreign Service Officers with the Department of State, as could be expected given the size of State compared to the other foreign affairs agencies. The proportion of cases settled and/or withdrawn remains high, which is desirable. 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

Three judicial decisions were issued by the federal courts in 2008 that related to decisions of the Board. In *Wright v. Foreign Service Grievance Board*, 2008 U.S. App. LEXIS 6642 (D.C. Cir. 2008), the Court of Appeals affirmed *per curiam* the District Court's ruling that rejected arguments that a settlement agreement he had entered into with the Department of State should be set aside. In the plaintiff's original grievance, the Board had also determined that no grounds existed to set aside the agreement. The Court of Appeals noted that the plaintiff had not challenged certain findings of the District Court and also noted that the plaintiff had accepted the benefits from the settlement agreement and thereby ratified its terms.

In *Shea v. Rice*, 587 F. Supp. 2d 166 (D.D.C. 2008), a *pro se* litigant asserted that he had been underpaid for sixteen years due to his race (white) and ethnicity (Irish). The matter had been dismissed by the District Court as time-barred in a decision issued in 2004. The Court of Appeals reversed in a 2005 decision, finding that each new pay check constituted a new occurrence. The District Court, on remand, in a decision issued

on November 21, 2008, again dismissed the claim as untimely, relying upon the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Company*, 550 U.S. 618 (2007). Whether the matter will continue to be litigated based upon the Ledbetter Fair Pay Act, enacted in January 2009, is currently not known.

The plaintiff in the third case, *Hampton v. Schafer*, 561 F. Supp. 2d 99 (D.D.C. 2008), was a former employee of the Department of Agriculture. He alleged that USDA had discriminated and retaliated against him both during his employment and in terminating him. USDA moved to dismiss certain counts on the grounds that the plaintiff had previously filed a grievance on these claims, and that the time for appealing the Board's decision had passed. The court denied a motion to dismiss the claim, noting that the Board had considered only the issue of whether USDA had established cause for the employee's separation. The Board had specifically declined to adjudicate his discrimination and retaliation claims based upon the employee's election of remedies by having previously filed charges with the USDA and with the EEOC covering his claims of discrimination.

Significant or Noteworthy Board Decisions in 2008

None of the cases decided in 2008 reversed long-standing Board precedent; however, one case established new ground on the legal issue of estoppel. Additionally, a number of themes emerged that are noteworthy.

EERs and OPFs

Employee evaluation reports (EERs) and official performance files (OPFs) are at the heart of the Foreign Service promotion and retention system. Of the cases decided by

the Board in 2008, almost one-third involved those issues. This is consistent with the Board's case load in recent years.

One of the more significant EER cases was FSGB Case No. 2008-006 (December 31, 2008), in which the grievant alleged that he had never been counseled on supposed deficiencies that ultimately led to his being denied tenure. Counseling, confirmed by a written counseling statement, is an explicit regulatory requirement for untenured employees. Although the agency invalidated a key counseling certificate that had been provided after the rating period, it nevertheless found that the rater had provided sufficient oral counseling, and that written counseling during the prior rating period had given the grievant adequate notice that he needed to improve certain skills. The agency also found that the tenure board had drawn its own conclusions with respect to one area for improvement not noted by the rater, and that it could do so without providing counseling.

The Board reversed the agency decision. It found that written counseling outside the rating period did not fulfill the Department's obligations under the regulations, and that the claimed oral counseling was not proven to have, in fact, taken place. The Board also confirmed its earlier decision that the requirement for counseling applies to agencies as a whole, not just the rater and reviewer, and that the tenure board could not make decisions based solely on its own conclusions regarding deficiencies if the employee had not been counseled on those deficiencies.

A recurring theme in the EER cases was a claim that the EER contained alleged inaccuracies, omissions, errors, or information of a falsely prejudicial character which was or could have been prejudicial to the member. Those claims were often coupled with

claims that the EERs had not been processed according to the regulations. In a number of these cases, the challenged material had already led to the employee being low ranked.

Several of the cases involved claims that an employee had not been promoted because documents were missing from the employee's OPF. The Board looks at the circumstances of each case to determine the potential effect of the missing documents. In FSGB Case No. 2008-036 (November 20, 2008), the Board found that the omission of a Superior Honor Award from an employee's OPF had not disadvantaged him in consideration for promotion. However, in FSGB Case No. 2008-027 (November 17, 2008), the Board found that a missing Meritorious Honor Award and narrative may have been a substantial factor in grievant's failure to be promoted or receive a meritorious step increase. That case was remanded to the agency to show that grievant would not have been promoted or received a step increase had the error not occurred. Similarly, in FSGB Case No. 2006-036 (March 17, 2008), the Board found that a missing evaluation may have affected the grievant's chances of being promoted.

Financial Cases

The category of cases termed "financial" included a wide array of issues. FSGB Case No. 2007-050 (November 18, 2008) typifies a significant sub-category in which Diplomatic Security Agents complained that their initial salaries were established improperly. In that case, the grievant had relied on the job description and criteria provided in the vacancy announcement and the application form when he provided information about his prior military experience that was used to set his initial salary. The Department of State later clarified to the grievant that neither of these documents provided reasonably complete or accurate information regarding the experience credited

in setting initial salaries. The Department then refused to allow him to supplement his experience with a description of service that was more responsive to the actual criteria that the Department claimed to have used in setting his initial salary. The Board found in favor of the grievant. It remanded the case to the Department to allow the grievant to provide amplified information based on a more accurate position description, and directed the Department to provide a second salary review based on that new information.

FSGB Case No. 2007-034 (July 30, 2008) was an unusual case that established legal precedent when the Board found that the agency was estopped from denying the grievant incentive pay under the unique circumstances present. The grievant was an Information Technology Specialist who made the decision to accept an employment offer that involved a significant pay cut from his previous salary, only after having been assured by the agency personnel specialist that he would be receiving a 15% incentive payment in addition to his base salary. After the grievant had left his former job, moved his family overseas, and been employed for a month, he was advised that he was not eligible for the incentive pay, since he had earned the certificates needed to qualify *before* he was employed, rather than *after*. The Board found that all the elements for equitable estoppel were present: misrepresentation by someone who had actual authority to make the salary offer; good faith reliance by the employee; and financial detriment resulting from that reliance. It also found that the case was distinguishable from *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), in that the payment did not violate law or regulation. The Board sustained the grievance and the agency was directed to pay the allowance retroactively.

In a second case involving an information technology skills incentive program, FSGB Case No. 2007-028 (April 3, 2008), the Board also found that the payment had been improperly discontinued. In that case, the Board found that the agency failed to follow its own regulations when it retroactively applied a policy change to the grievant's detriment.

The Board's decision in FSGB Case No. 2008-001 (May 20, 2008) contrasts with the equitable estoppel case cited above. In that case, when grievant had been offered employment, the post had stated that additional within-grade steps would later be available. That information turned out to be incorrect. The Board found that the grievant was not entitled to additional pay because: 1) the payment would have been contrary to law; and 2) it appeared unlikely that the grievant had relied on the incorrect statement when deciding to accept the position. The Board also found that a downgrading and later upgrading of the position were both appropriate, and that the grievant was not entitled to retroactive pay at the higher level as a result.

Five cases, FSGB Case Nos. 2006-029 through 2006-033 (July 28, 2008), involved similar financial claims stemming from the first year of United States diplomatic presence in Iraq following military engagement. At the time, allowances unique to posting in Iraq were in flux. As a result of changes and the agency's failure to track payments, the grievants received premium payments that exceeded applicable caps. When the agency sought to collect the overpayments, the grievants requested a waiver of debt repayment. The agency determined that it was legally prohibited from waiving the debts because the grievants were "at fault" in not tracking their own payments and taking steps to limit the incurrence of overtime once the cap was reached. The Board found that

under the particular circumstances of these cases, the grievants were not “at fault,” and directed the agency to make a determination on the merits of the waiver requests.

Five cases decided in 2008 involved payment of travel and shipping allowances. Based upon the particular facts of these cases, grievants prevailed in two cases, and the agency’s decision was sustained in the other three cases.

Disciplinary Cases

The Board decided four cases in 2008 in which the grievants challenged disciplinary action by the agency. In FSGB Case No. 2008-031 (October 20, 2008), the Board found that the agency had imposed a more severe penalty on grievant than it had on others similarly charged with failing to pay their government credit card debts in a timely manner, and directed that the penalty be mitigated. In FSGB Case No. 2006-027 (April 24, 2008), the Board upheld the penalty imposed for misuse of a government credit card. Similarly, in FSGB Case No. 2007-022 (March 31, 2008), the Board upheld a 30-day suspension for an officer charged with misusing her position to wrongfully purchase government property and for making false statements to investigators. The fourth case was settled.

General Observations

A review of the Board’s rulings entered in 2008 showed that grievants prevailed in far greater proportion than in any recent period. Details are shown on Attachment 3. No conclusions may be drawn, however, given the relatively small number of cases in the aggregate and the diversity of issues and factual situations presented. All that can presently be noted is that each case is being addressed to the best of our ability based upon careful review of the submitted record and application of appropriate procedural

and substantive legal principles. We are also striving to close cases and issue decisions with greater dispatch, but it should be recognized that certain cases simply do not lend themselves to expeditious resolution, due to various factors including the complexity and number of issues presented, the time frames applicable to the filing of submissions, the fact that most cases are decided by panels (rather than by individual members) and the needs of the parties and their representatives regarding various scheduling issues.

Respectfully submitted this 27th day of February 2009.

A handwritten signature in black ink that reads "Ira F. Jaffe". The signature is written in a cursive style and is positioned above a solid horizontal line.

Ira F. Jaffe
Chairman, Foreign Service Grievance Board

Annual Report 2008 – Statistics

A. Total cases filed 57

B. Types filed

EER	16
Financial	11
Disability	1
Discipline	14
Separation	4
Assignment	2
Implementation Dispute	2
Other	7

C. The following dispositions were cited for the 53 cases closed in 2008:

Agency Decision Affirmed	16
Agency Decision Reversed	16
Settled/Withdrawn	15
Dismissed	6

Note: Agency Decision Affirmed means that the grievance filed with the Board was denied and the grievant did not prevail. Agency Decision Reversed means that the grievance was sustained in whole or in substantial part. Dismissals were cases in which the Board found it lacked continuing jurisdiction to proceed. These cases included dismissals due to untimeliness, mootness, and lack of subject matter jurisdiction.

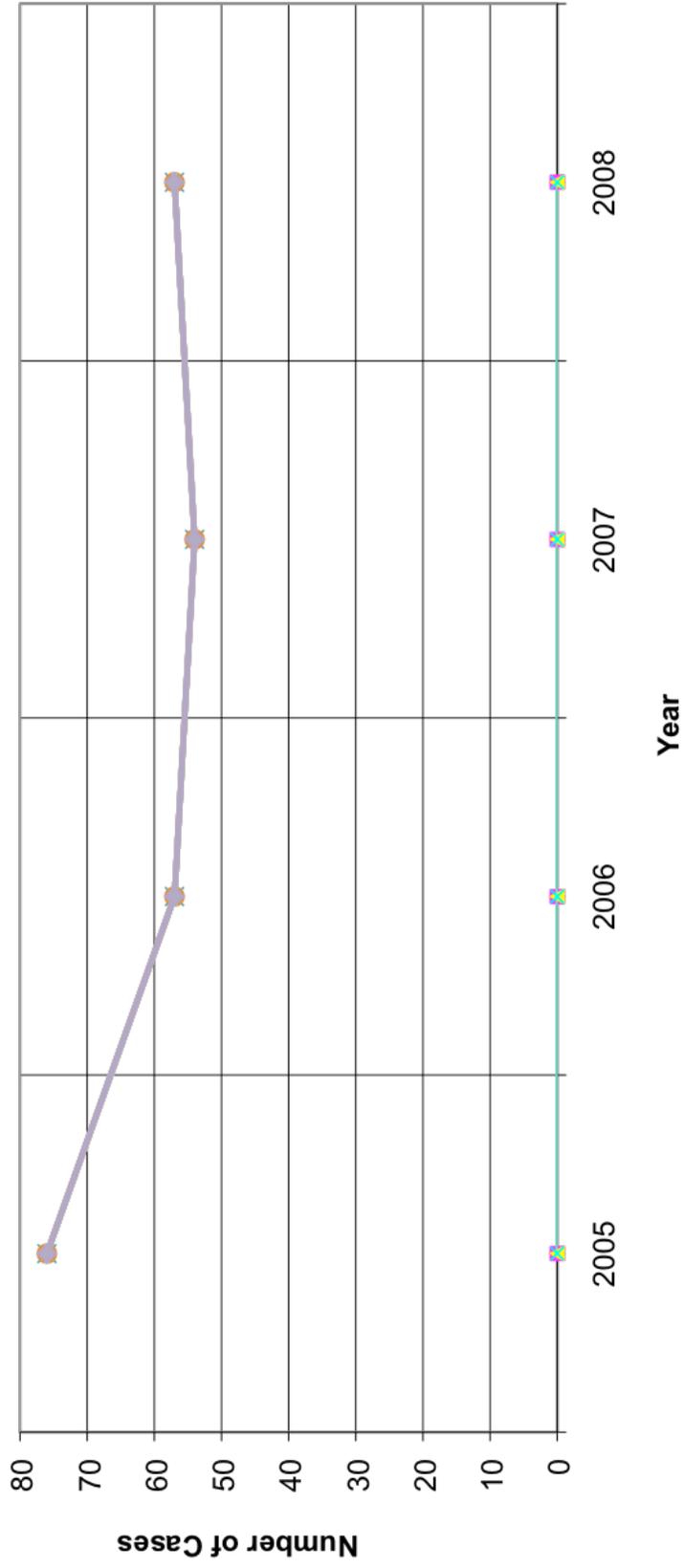
D. Oral hearings 1 (for a period of 3 days)

E. Interim relief 13

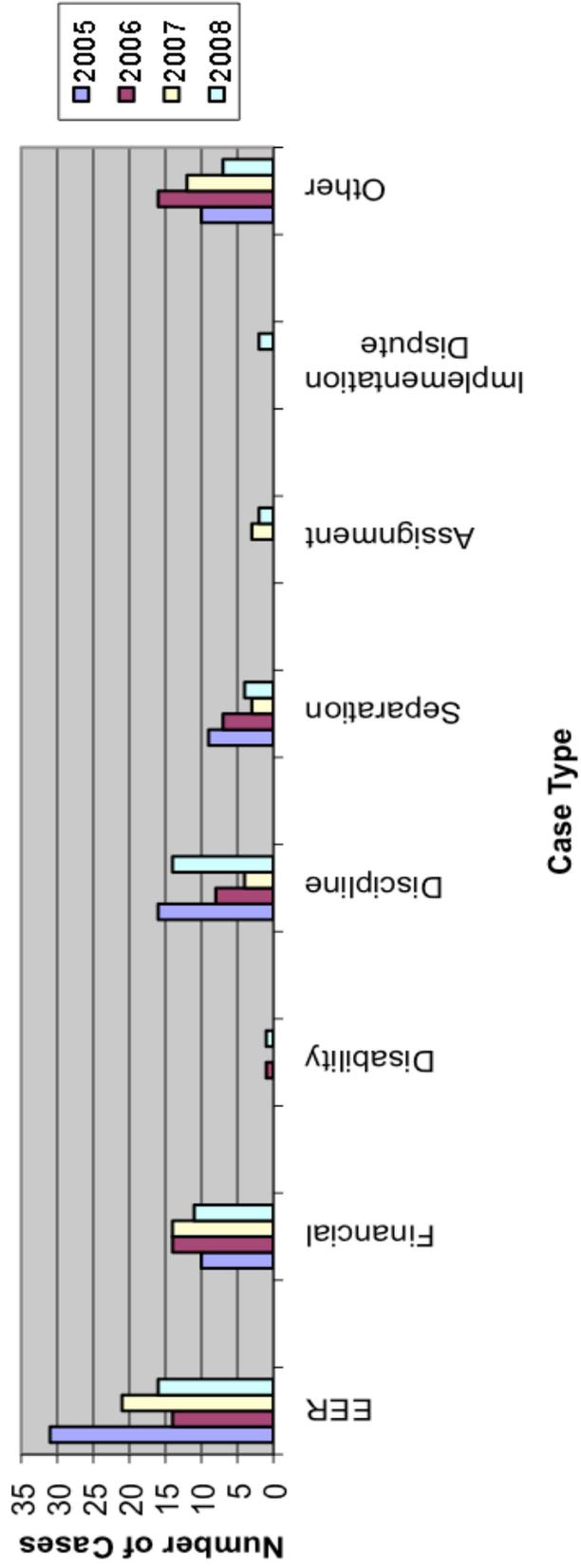
F. Average time for consideration of a grievance, from the time of filing to a Board decision, was a total of 37 weeks. This figure includes five related cases that took unusually long to close. The delay in processing resulted, in part, from the need for grievants' counsel to coordinate with five clients at different posts. If those five outlier cases are excluded from the calculation, the average time for consideration for the remaining cases was 27 weeks, a significant reduction from the closure times in 2005, 2006, and 2007.

There were 53 cases pending before the Board as we entered into 2009.

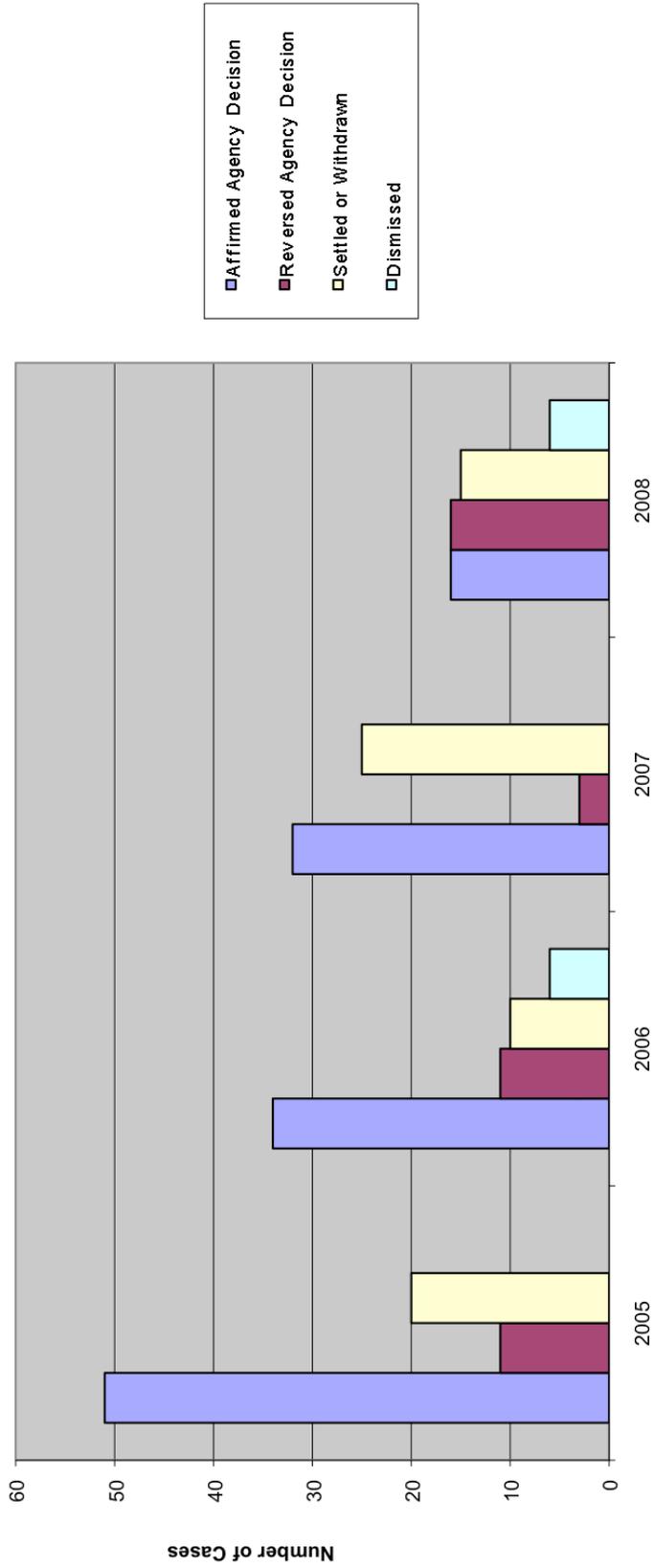
ATTACHMENT 1
Number of New Cases



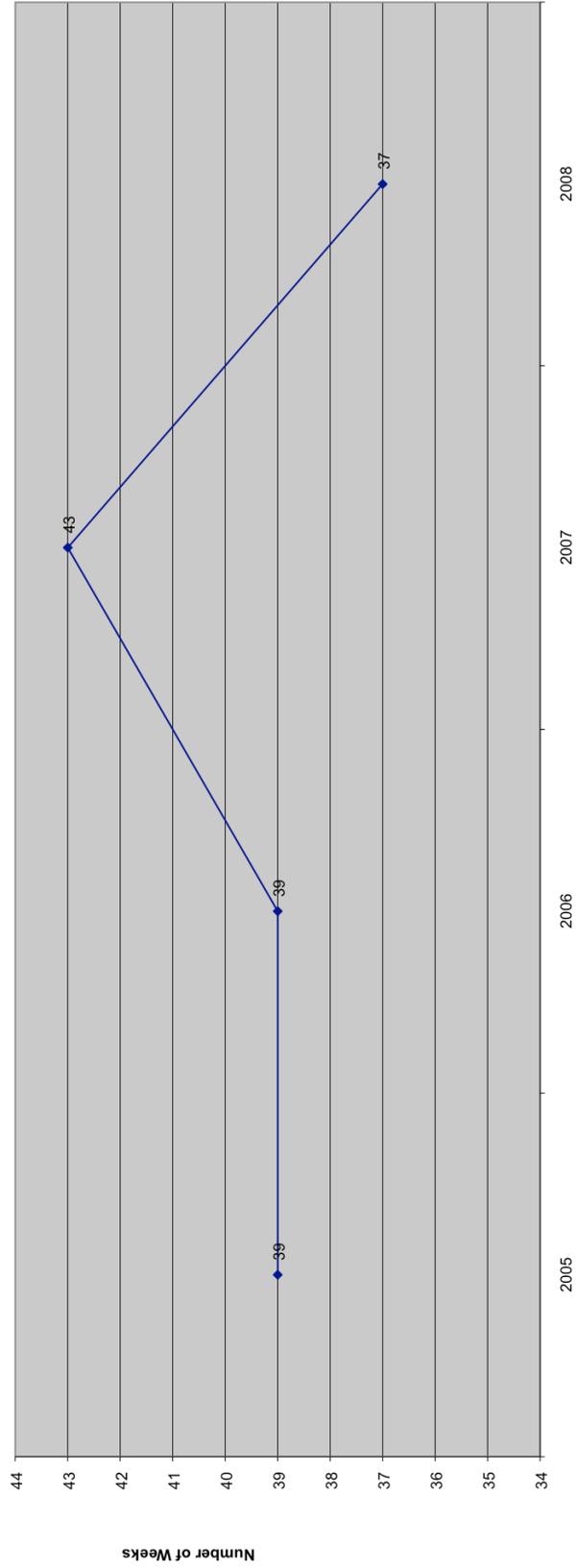
**ATTACHMENT 2
Types of Cases Filed**



ATTACHMENT 3
Dispositions of Cases Closed



ATTACHMENT 4
Average Time to Close Cases¹



ATTACHMENT 5
Number of New Cases in 2008 by Agency

