

ANNUAL REPORT

OF THE

**FOREIGN SERVICE
GRIEVANCE BOARD**

FOR THE YEAR

2011

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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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Makeup and Operation of the Board

It is my privilege to transmit the Annual Report of the Foreign Service Grievance Board for 2011. The Report summarizes the operations and responsibilities of the Board during calendar year 2011 and is presented pursuant to the reporting requirements of Section 2205(f) of the Foreign Service Act (22 U.S.C. §4135(f)). The Report includes a brief description of the grievances decided during 2011, including the number and types of cases decided and their disposition. The Report also includes a narrative regarding the current and past operations of the Board.

The Board continues to function as the primary dispute resolution entity for the Foreign Service and operates through a combination of in-person and virtual interactions with the parties. In addition to the grievants, we deal with the Foreign Affairs Agencies within our jurisdiction,¹ the American Foreign Service Association (AFSA) (the exclusive bargaining unit), and with the public. The members of the Board work according to a schedule based upon individual case time-lines, and typically interact with other members of the Board and the parties from a distance. We continue to rely on a variety of means to facilitate our review of the Records of Proceedings (ROP) and to come to decisions on the grievance appeals that are based on the ROPs. The Board possesses a video-conferencing system to facilitate live interactions between the Board panels and the grievants, AFSA, the agencies, and their representatives.

¹ Agencies within FSGB jurisdiction are the Departments of State, Commerce and Agriculture, the U.S. Agency for International Development, the U.S. Peace Corps, and the Broadcasting Board of Governors.

Garber A. Davidson has served as Chairman of the Board since October 1, 2011. He is an attorney and former Senior Foreign Service Officer with the U.S. Agency for International Development (USAID) and has worked as a private attorney and a consultant in addition to his career with USAID. Elliot Shaller, an attorney and professional arbitrator and mediator of labor and employment disputes, who joined the Board in October 2009, has served as Deputy Chair since October 1, 2011.

E. Charles Ash, a Foreign Service Officer with 29 years of State Department service, has served as the Board's Executive Secretary since June 20, 2010. Mr. Ash will leave the Board in August, 2012, and retire from the Foreign Service in September.

Gail Lecce was appointed to the Board in 2005 and served the Board as Deputy Chair for the last four years. In October, Ms. Lecce assumed a newly established position as the Board's Appeals Counsel, assisting the Chair, Deputy Chair and panels with legal research and analysis.

Two Special Assistants, Jill Perry, a Foreign Service Specialist with the Department of State, and Joseph Pastic, a retired USAID Foreign Service Officer, provide case management and research support to the Board's panels. The Board also employs two permanent support staff members, Elena Cahoon (a Civil Service employee with the Department of State) and Kathy L. Cox (a career Foreign Service Specialist with the Department of State). Jeremiah A. Collins, a partner with the law firm of Bredhoff & Kaiser, continues to serve as outside counsel to the Board.

The Board is composed of two types of members. One is a group of seasoned, dedicated, retired Foreign Service officers from the various Foreign Service agencies. The second group is made up of individuals who are currently all attorneys and who have

extensive experience in presiding over and deciding labor relations and employment disputes. The various Foreign Affairs agencies and AFSA recommend members for appointment to the Board, and the Secretary of State makes the appointments. Members serve for two-year terms, and adjudicate their assigned cases on a schedule determined by case requirements.

Most of the cases before the Board are appeals from agency decisions. The Board's decision is based on the Record of Proceedings (ROP) which includes all material received or obtained by the Board in connection with a case, with the exception of materials determined to be irrelevant, immaterial or unduly repetitive. Cases involving a hearing must be considered by a panel comprising at least three members of the Board, and it has been Board practice to utilize three-member panels for all other grievances as well. Panels are typically composed of a presiding member selected from the pool of labor law professionals and two members selected from the Foreign Service retiree pool. Although the Chairman of the Board has the statutory authority to select the panel members, he has traditionally delegated that authority to the Executive Secretary. The Executive Secretary, in consultation with the Deputy Chair, assigns grievances to panels taking into consideration such factors as the likely issues to be resolved, whether a hearing may be required, and the experience and workload of each member. While cases are decided solely upon the ROP developed for each grievance, the blend of experience between the Foreign Service members and labor law expert members provides a decision making process that draws upon both the applicable legal and regulatory framework of the Foreign Service personnel system as well as the unique practices and culture of the Foreign Service. The panel chairs, all of whom have had extensive experience in

arbitrating and litigating personnel issues and disputes, provide the panels with guidance and advice on the legal and regulatory framework that the Board needs to decide the grievances.

As of October 1, 2011 the Board consisted of 16 members. One member has since resigned for reasons of health, so the Board currently consists of the following 15 members:

Garber A. Davidson (Chairperson)

Elliot H. Shaller (Deputy Chairperson)

James E. Blanford

Frank J. Coulter

Barbara C. Cummings

Lois E. Hartman

Alfred O. Haynes

Kevin F. Herbert

Arthur A. Horowitz

William B. Nance

Harlan F. Rosacker

Jeanne L. Schultz

Nancy M. Serpa

John M. Vittone

Susan R. Winfield

The majority of the Board members live within the Washington D.C. area.

Typically the day-to-day interaction among the members takes place electronically -- by

telephone, facsimile, and/or e-mail. When there is an occasional status conference or hearing involving the parties and their representatives, video conferencing may be utilized. Members report to the Board's headquarters in Arlington, Virginia. Board meetings are held quarterly and members who live in the area often use the Board's offices for reviewing the grievance ROPs, for panel meetings and status conferences, as well as for full hearings.

The majority of cases are decided on the record without hearings in keeping with the preferences of the parties. As mandated by law, the Board holds hearings in separation for cause proceedings (unless waived by the charged employee) and at the grievant's request in disciplinary cases and in cases of separation for expiration of time-in-class or relative performance. A hearing may also be conducted when, in the judgment of the Board, the case can best be resolved by a hearing or presentation of oral argument. Three hearings lasting a total of four days were held in 2011.

In order to increase the efficiency of the grievance process as conducted by the Board, we have attempted to utilize various means to streamline procedures in appropriate cases and expedite the process. We have increased the use of status conferences with the parties to identify key issues earlier in the process, to minimize and expedite discovery disputes, to clarify ambiguities in the record and to decrease the number of paper filings. We have emphasized the need for panels to make rulings briefer in order to enhance the readability of the work product as well as sharpen the analysis that forms the basis of the Board's holdings. The Board also encourages the parties to attempt mediation in appropriate cases, and two grievances were successfully mediated in 2011.

The Board members' responsibilities for managing case documentation have grown increasingly challenging as paper documents have been supplanted by electronic documents transmitted as e-mail attachments. The time-consuming and frustrating task of organizing and working with a body of information dispersed into hundreds of inconsistently-named electronic files does not represent the best use of Board members' limited and valuable time. In the closing months of 2011, the Board's staff confronted this problem by devising a system for consolidating, organizing and naming electronic case documentation in a way that will significantly simplify this aspect of Board members' work – and which will also provide them with better tools for working with the ROP and related documents. Our implementation of this system commenced in January 2012, and next year's report will include a more detailed description and assessment of the Board's Electronic Record of Proceedings (eROP).

We have not been able to make planned improvements to the FSGB website (FSGB.gov) because of a lack of resources and logistical considerations, but we have managed to keep the site current with recently decided cases and other information for both public and internal use. We hope to implement some of the planned improvements during the current year.

We look forward to an active year of dispute resolution with the expectation of maintaining the Board's historic record for making decisions that are fair, equitable and in the broader interests of individual grievants and the Foreign Service.

2011 Case Load

Seventy new cases were filed with the Board in 2011, a 25% increase over the 56 cases filed in 2010, which was itself a 30% increase over the previous year. All but 11 cases were filed by Department of State officers. A handful of cases were filed by Foreign Service Officers with the Department of Commerce, USAID, and the Department of Agriculture. As usual, the bulk of the cases involved challenges to Employee Evaluation Reports (EERs), disciplinary actions, and financial claims, with increases in the first two categories accounting for the majority of the overall increase in cases filed.

Fifty-two cases were closed during the year. Sixteen of those were settled or withdrawn, a proportion similar to that of previous years. The average number of weeks taken to resolve a case was 41 weeks. That is significantly better than the previous year (47 weeks), but comparable to the disposition times in 2008 and 2009. Fifty-nine cases were pending at the end of the year.

Board Decisions in 2011

Financial Cases

The Board addressed eight cases in which the grievant claimed to have been wrongfully deprived of a financial benefit. The benefits covered a range of issues: home leave allowances, rest and recuperation travel, overseas comparability pay, charges for damages to an apartment, overpayment of annuity, and living quarters allowance. The Board affirmed the agency decision (denying the grievant's claim) in four of the

grievances, and dismissed two for lack of jurisdiction. Two of the grievances were found to be partially meritorious.

EERs/IERs/OPFs

In eleven cases, the grievant either contested material that was included in their Official Performance File (OPF) as being falsely prejudicial; claimed that material was improperly omitted from the file; or claimed that a procedural error had occurred, causing harm to their careers. The Board affirmed the agency decision in eight of the cases. In one case, the Board denied three claims, but found in favor of the grievant on a fourth claim. The Board found the last two cases to be moot and granted the agency's Motion to Dismiss.

Two cases are particularly noteworthy. In FSGB Case No. 2010-031, the grievant claimed that an Inspector's Evaluation Report (IER), based on anonymous sources, contained misleading statements. In two cases reported in its 2009 Annual Report, the Board found that care had to be exercised when corrective IERs that included critical comments from anonymous sources were placed in an employee's OPF. The critical statements had to be sufficiently corroborated by named sources to allow the employee a meaningful opportunity to challenge them. In the case decided this year, the Board found that the State Department had independently corroborated and verified the criticisms with named sources, thus satisfying due process concerns. The Department was therefore justified in maintaining the IER in the employee's OPF.

FSGB Case No. 2010-010 was previously discussed in the Board's 2010 Annual Report. In that case, the grievant challenged critical statements contained in his EER and an involuntary curtailment, both of which were based on a Report of Investigation (ROI)

that the employee claimed was itself procedurally and factually defective. The Board had issued an order directing the Department of State to comply with several requests for documents during discovery, over the Department's objections that such documents were protected by the law enforcement privilege.

Rather than provide the documents, the Department provided the grievant the relief he had requested and asked the Board to dismiss the appeal as moot. The grievant objected, claiming that full relief had not been granted, since there were still inaccuracies in the ROI, and it had been compiled in violation of Department regulations. The Board found that the grievant's claims involving the ROI were outside the scope of the current grievance and it dismissed the case as moot. The Board further found that the grievant was not entitled to attorney fees under current case law, since there had been no decision on the merits. Grievant has since filed a new grievance appeal on his claims regarding the invalidity of the ROI.

Disciplinary Cases

The Board decided ten disciplinary cases in 2011, covering a range of issues -- an Assistant Regional Security Officer's altercation with a bodyguard; security infractions; leaving an embassy leased apartment in poor condition; mishandling of classified information; issuance of a visa to an ineligible applicant; failure to report an embassy colleague for illegal drug use; failure to disclose pertinent information during a security clearance update; and inappropriate conduct with a Locally Employed Staff (LES) member. In several cases, only the penalty was contested. The Board affirmed the agency decision in six of the appeals; granted the grievant's appeal in part and denied it in part in two cases; and granted the appeal in two cases.

The two appeals granted by the Board, FSGB Case Nos. 2010-051 and 2011-025, involved the same employee. In the first case, the employee was charged with Improper Personal Conduct for having engaged in unwelcome and non-consensual inappropriate sexual banter and physical contact with a junior LES employee. The Board found that the State Department did not carry its burden of proof to show that the conduct was unwelcome or non-consensual. The Board further noted that the Department did not attempt to resolve discrepancies between the parties that either could have undermined or supported its conclusion that the junior female employee was more credible. The Board therefore overturned the disciplinary action.

In the second case, the same employee was again charged with Improper Personal Conduct for having sought information to defend himself in the first action. There were two allegations: 1) that he sought information from the LES employee's personnel file from a LES Human Resources (HR) specialist; and 2) that he sought information from her former employers. With respect to the first allegation, the Board found that the grievant had a right to seek information to defend himself, and that he had been truthful with the LES HR specialist about what information he was seeking and why. It was the HR specialist's responsibility to make the decision about whether such information could be revealed or not. With respect to the second allegation, the Department cited no authority that prohibited the grievant from seeking information from the prior employers. The Board therefore overturned the disciplinary action in this case, as well.

Separation for Cause

The Board held a hearing in one separation for cause case. The employee had allegedly accessed the Passport Information Electronic Record System (PIERS) on multiple occasions to view his former girlfriend's passport record, as well as those of her friends and family. He also sent her hundreds of unwanted emails over a period of several years, ultimately resulting in the police issuing a warrant for his arrest. The employee admitted the wrongdoing, but argued that separation was too severe a penalty. He also claimed as an affirmative defense that he had been experiencing mental health issues at the time that he had ultimately resolved. The Board found that there was sufficient basis to support the Department's decision to separate the employee.

Other

The Board considered four miscellaneous cases that did not fall into the above categories. One case involving a grievant's request for administrative leave and access to consulate resources pending his retirement. The case was dismissed on the grounds that it was moot and also did not fall within the Board's jurisdiction. The Board found it lacked jurisdiction in a case in which a grievance was filed on behalf of an FSN who was terminated. In a third case, the Board denied a claim that the grievant had been improperly denied training. In the fourth case, the Board denied a Motion to Reconsider a case originally opened in 2003.

Judicial Actions Involving Board Rulings

Three Board cases involved actions in the federal courts in 2011.

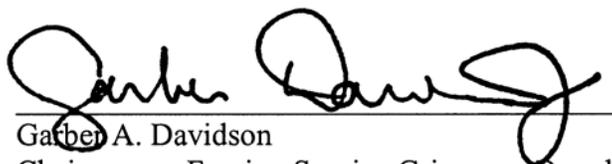
Karl Olson v. Hillary Rodham Clinton, 2011 U.S. App. LEXIS 3504 (D.C. Cir. 2011), is the continuation of a long-running case in which Olson, a Foreign Service Officer with the Department of State, challenged two EERs as containing material that was falsely prejudicial. The Board denied the grievance Olson filed in 1998. Olson appealed to the district court, which granted summary judgment in favor of the Department. On appeal this year, the court of appeals affirmed the district court's judgment.

In *Karl Hampton v. Tom Vilsack*, 760 F. Supp. 2d 38 (D. D.C. 2011), the defendant, the current Secretary of Agriculture, filed a motion for summary judgment asking that plaintiff's Title VII claims be dismissed. Hampton is a former Foreign Service Officer with the Department of Agriculture who was terminated for cause after a hearing before the Board in 2007. He is now suing his former employer, claiming discrimination on the basis of race, retaliation for engaging in protected activity, and a hostile work environment. The court granted the Department's motion for summary judgment on nine of the ten counts alleged, but denied it on one count. That count involved Hampton's contention that he was not selected for a foreign assignment because of a pending EEO complaint. The Department of Agriculture argued that, regardless of the EEO complaint, Hampton would not have been assigned overseas because his security clearance had been suspended. The court found that Agriculture had presented insufficient evidence to support its argument that suspension of a security clearance *per*

se precluded an overseas assignment. The motion for summary judgment was therefore denied on that count.

Appeal of Joan Wadelton. On January 7, 2011, Joan Wadelton, a Foreign Service Officer with the Department of State, filed a Complaint in the District Court for the District of Columbia, asking that it review the Board's decision resolving a 2008 grievance appeal. Ms. Wadelton had filed three grievances prior to the 2008 appeal contesting the results of six selection boards which had not promoted her. As a result of those grievances, all six boards were reconstituted and Ms. Wadelton's file was again reviewed for promotion. None of the six reconstituted boards promoted her. Ms. Wadelton then challenged the results of the reconstituted boards in the 2008 follow-on grievance. In its decision, the Board found deficiencies and irregularities in the operations of all six reconstituted boards, rebutting the presumption that they were conducted with regularity, and ordered that six new reconstituted selection boards be convened. Ms. Wadelton's complaint challenges the Board's decision to order a new round of reconstituted boards, rather than direct a promotion, as she had requested.

Respectfully submitted this 28th day of February, 2012.



Garber A. Davidson
Chairperson, Foreign Service Grievance Board

Annual Report 2011 – Statistics

A. Total cases filed 70

B. Types filed

EER/OPF	26
Financial	15
Disability	0
Discipline	15
Separation	2
Assignment	4
Implementation Dispute	0
Other	8

C. The following dispositions were cited for the 52 cases closed in 2011:

Agency Decision Affirmed	20
Agency Decision Reversed	2
Partially Affirmed/Partially Reversed	5
Settled/Withdrawn	16
Dismissed	7
Consolidated	2

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

D. Oral hearings 3
(2 for a period of 1 day)
(1 for a period of 2 days)

E. Mediations 2

F. Grants of Interim Relief 20

G. Average time for consideration of a grievance, from the time of filing to a Board decision, was 41 weeks.

H. There were 59 cases pending before the Board as of December 31, 2011.

I. The 70 new cases docketed in 2011 involved Foreign Service personnel from the following agencies:

Department of State	59
U.S. Agency for International Development	5
Department of Commerce	4
Department of Agriculture - FAS	2

No cases were filed in 2011 involving the Peace Corps or the Broadcasting Board of Governors (which includes Voice of America, Radio Free Europe, Radio Free Asia, TV Marti, and the Middle East Broadcasting Networks).