

**ANNUAL REPORT**

**OF THE**

**FOREIGN SERVICE  
GRIEVANCE BOARD**

**FOR THE YEAR**

**2009**

# **FOREIGN SERVICE GRIEVANCE BOARD**

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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**

## **ANNUAL REPORT FOR THE YEAR 2009**

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

It is my pleasure to transmit the Annual Report of the Foreign Service Grievance Board for 2009. The report provides information on the operations and responsibilities of the Board during calendar year 2009 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 information as to the number and types of cases decided and their disposition and narrative regarding the current and historical operation of the Board.

The Board has continued to focus on increasing the efficiency of its operations and enhancing due process and transparency for all parties appearing before the Board, while maintaining our fundamental operating procedures as an arbitration entity within the foreign affairs agencies. We have increased our use of status and pre-hearing conferences to focus discovery, to clarify the issues in dispute, to expedite the flow of case proceedings, to provide additional in-person interaction with the parties, and to encourage settlement in appropriate cases. We continue to take advantage of the benefits of technology having obtained video teleconferencing equipment to improve the ability to communicate during hearings and conferences with parties and witnesses who are located throughout the world and having obtained a high-speed document sender to facilitate the transmittal, receipt, and storage of case filings electronically. In suitable cases, we continue to 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 created internal safeguards to ensure that information learned during mediation does not come to the attention of others at the Board who may be involved in deciding the matter if the case does not settle. We have continued to conduct regular “brown bag” lunches to allow the Board to discuss common issues, with members participating both in person and through teleconferencing.

Ira F. Jaffe, who has served as Chairperson since October 1, 2007, is a full-time labor and employment arbitrator and mediator. He has served in that role for almost 30 years and presided over more than 4,000 disputes. Gail M. Lecce, a retired USAID Foreign Service Officer and Member of the Board since 2005, continues to serve as Deputy Chairperson. Thomas F. Burke, a career Foreign Service Officer with the Department of State, has been Executive Secretary since October 1, 2008. Two special assistants, Margaret Sula (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. We are currently operating with only one permanent support staff member, F. Elena Cahoon (State). A second position has been filled with a temporary hire pending identification of a permanent incumbent. Jeremiah A. Collins, a partner 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 (AFSA), 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. The Chairperson is vested by statute with the authority to appoint Members to panels. Typically, 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, are appointed to the panel. Historically, the Chairperson has delegated to the Executive Secretary the authority to assign individual Members to the panels. Case assignments take into account the experience, availability, and workload of each Member. 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 integrate applicable legal and personnel principles and an appreciation of the unique practices, culture, and environment present in the Foreign Service.

At the beginning of 2009, there were 16 Board Members. In July, long-time member of the Board and a former Foreign Service Officer employed by the Department of Agriculture, Theodore Horoschak, passed on. He is missed by us both personally and professionally and we wish to recognize his enormous contributions to the Board and the degree to which he enriched us and our decisions over the years.

As of October 1, 2009, the Board consisted of the following 15 Members:

Ira F. Jaffe (Chairperson)

Gail M. Lecce (Deputy Chairperson)

James E. Blanford

John Campbell

Garber A. Davidson

Harriet E. Davidson

Lois E. Hartman

Alfred O. Haynes

Arthur A. Horowitz

Arline Pacht

Jeanne L. Schulz

Nancy M. Serpa

Elliot H. Shaller

Richard J. Shinnick

Susan R. Winfield

A majority of our Members live 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.

The majority of cases are decided without hearings 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 does hold hearings, however, in appropriate cases. Two full hearings lasting a total of seven days were held in 2009. A third hearing was scheduled, but was suspended when the parties entered into mediation prior to the start of a formal 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 and logistical 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).

### **2009 Case Load**

The number of new cases docketed at the Board in 2009 was 43, down slightly from the number of cases filed annually in the prior four year period. Given the small size of the cases docketed, however, and the variability in case filings shown over the years, it is premature to draw any conclusion from this single year decline. As in the past, the vast majority of cases were filed by Foreign Service Officers with the Department of State, a fact that mirrors the relative number of Foreign Service employees at the State Department when contrasted with those employed by other foreign affairs agencies.

The proportion of cases settled and/or withdrawn remains high, which is desirable. Approximately one-third of the cases filed last year were settled prior to decision by the Board. There was no significant change in the mix of grievance appeals filed with the Board in 2009 as compared to the mix of grievances appealed to the Board

in recent prior years. The bulk of the cases filed in 2009 involve challenges to Employee Evaluation Reports (EERs), disciplinary action, or financial claims (consisting either of objection to salary offsets imposed by the agency or claims for pay, including allowances or differentials).

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

Three cases were issued in 2009 by the courts involving challenges to actions taken by the Board. None of those holdings involved significant changes to the jurisprudence surrounding the Board's role under the Foreign Service Act.

1) Olson v. Clinton, 602 F. Supp. 2d 93 (D.D.C. 2009), reconsideration denied, 630 F. Supp. 2d 61 (D.D.C. 2009)

The court noted that the Foreign Service Act provides that the Administrative Procedure Act shall apply without limitation or exception to a district court's review of a decision by the FSGB and that, under the APA, an agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." After reviewing the record evidence and applying that standard of review, the Court in 2009 upheld the Board's decision.

The case has a lengthy factual history. A Foreign Service Officer filed an appeal with the Board, claiming that certain EERs were inaccurate and of a falsely prejudicial character, omitted favorable information, contained inadmissible comments, and were the result of anti-homosexual bias on the part of his rater and reviewers. The Board denied Olson's claims. He appealed to the District Court, and, on February 3, 2005, the court granted in part and denied in part his Motion for Summary Judgment, finding arbitrary and capricious the Board's conclusion that the evidence of anti-homosexual bias

demonstrated at post was not relevant to its determination that the EERs were not inaccurate or falsely prejudicial. The case was remanded to the Board to consider the effect of the bias.

On remand, the Board concluded that the EERs were fair and accurate, were corroborated by evidence from other employees, and were not tainted by or the product of bias. The Board again denied the grievance appeal. Olson appealed that decision to the District Court which found in its 2009 ruling that the Board's decision was adequately explained and supported by the record and was not arbitrary and capricious.

Olson moved that the court reconsider its decision. The court denied that motion. In the request for reconsideration, the employee objected to the Board having made credibility findings on the basis of the Record of Proceedings and without a hearing. This claim was rejected by the court which found that there was substantial support in the record for the Board's findings.

2) Henderson v. Ratner, 2009 U.S. Dist. Lexis 121377 (D.D.C. 2009)

A former State Department employee filed suit against Jacqueline Ratner, a Department employee who previously served as Executive Secretary of the Board, and John Naland, then-President of AFSA. Henderson had been involuntarily separated from the State Department in 1981. In 1994 he applied for retroactive disability retirement benefits; State denied the application in 1996 as untimely filed. Henderson appealed this decision to the Board, stating (contrary to fact) that the State Department had never responded to him. In her capacity as Executive Secretary, Ms. Ratner informed the plaintiff that the Board lacked jurisdiction over his claim because he had not exhausted his administrative remedies. Mr. Henderson filed the suit in District Court against

Ms. Ratner in both her “personal and professional capacities,” claiming that she had failed to respond to him.

The court dismissed the claim against Ms. Ratner acting in her official capacity, finding that it was either a suit against the United States, which as a sovereign was immune, or, under a different construction of his claim, he had failed to exhaust his administrative remedies, which were now untimely. The court found no basis for a claim pursuant to the Federal Tort Claims Act. It also dismissed the claim against Ms. Ratner in her personal capacity, stating that, “The FSGB is an adjudicatory body whose members enjoy absolute immunity from damages suits in their personal capacity for the Board’s adjudications.” The court also found that, wholly apart from considerations of immunity, Ms. Ratner had not acted improperly towards Mr. Henderson.

The suit against Mr. Naland was also dismissed based upon the court’s determination that AFSA did not owe Mr. Henderson any representational obligation.

3) Baltimore v. Clinton, Civil Action No. 09-0458 (Hon. John D. Bates)  
(November 16, 2009)

Ambassador Baltimore was issued a 45 day suspension for three offenses:

1) misuse of official position; 2) failure to report a gift; and 3) willful misuse of a government owned vehicle. The Board, following a hearing, upheld the suspension and denied the grievance appeal.

After the decision issued, Ambassador Baltimore discovered that the Department had published in the Federal Register on June 15, 2006, that the gift he was charged with accepting (a rug) was a gift made to the United States. He sought to have the record reopened and sought additional discovery and argument with respect to the effect of that published notice upon the original decision of the Board.

The Court directed that the matter be remanded to the Board to provide the opportunity for the Board to give appropriate consideration, if any, to the Federal Register entry. Interestingly, the grievant's request was made initially to the court, rather than having initially moved before the Board that the matter be reopened.

### **Significant or Noteworthy Board Decisions in 2009**

Two cases resolved by the Board last year addressed the fundamental differences between the Foreign Service and Civil Service personnel systems and were particularly significant in the extent of their reach.

In FSGB Case No. 2008-056 (April 10, 2009), AFSA filed an institutional grievance against the Foreign Agricultural Service (FAS), alleging that FAS had violated the collective bargaining agreement when it assigned three Civil Service employees to Agricultural Trade Office positions (Hong Kong, Tokyo, and Riyadh). FAS argued that neither the collective bargaining agreement nor the interpretation of it through past practice supported a preference for Foreign Service Officers in the first round of bidding for such positions. The Board found that a first round bidding preference for Foreign Service Officers was consistent with Section 502(b) of the Foreign Service Act, which provides, in pertinent part, "Positions designated as Foreign Service positions normally shall be filled by the assignment of members of the [Foreign] Service to these positions." 22 U.S.C. § 3982(b). FAS' management rights did not override the provisions of the collective bargaining agreement or its own past practice that had acknowledged this preference. The Board directed FAS to rescind the assignments and re-open the bidding for the positions.

FAS appealed the decision to the Foreign Service Labor Relations Board (FSLRB). This was only the fifth such appeal to the FSLRB in its history and the first such appeal since 1998.

In a decision dated December 7, 2009, the FSLRB upheld the FSGB's decision. It upheld the Board's finding that the provisions of the Agreement and the past practice constituted an appropriate arrangement enforcing an applicable law that affected the management right to fill vacancies. It also noted the distinction between the Foreign Service and Civil Service personnel systems and rejected FAS' argument that the effect of the three Civil Service assignments was de minimis and had "no reasonable foreseeable impact" on Foreign Service Officers who were bidding on assignments. The FSLRB affirmed the FSGB's reasoning that in the "highly competitive up-or-out" Foreign Service personnel system, Foreign Service Officers would be disadvantaged by first round appointments of Civil Service employees to positions designated as Foreign Service.

In the second case, FSGB Case No. 2008-040 (June 16, 2009), sixty-eight Senior Foreign Service Officers (the Cohort Grievants), collectively grieved a decision by the Department of State to deny them the opportunity to compete for performance pay in 2007. The regulations governing eligibility for consideration for performance pay require only that the Officers be members of the Senior Foreign Service at the end of the rating period and that they have an evaluation covering a minimum period of 120 days. However, the Department interpreted a provision of the Foreign Service Act requiring that it "take into account" the criteria OPM had established for the SES performance pay system to require, in addition, that SFS Officers have been members of the SFS for a

minimum of 120 day at the close of the rating period to be eligible to be considered for performance pay. The OPM criteria cited by the Department required SES employees to have been members of the SES for 90 days<sup>1</sup> before being eligible for performance pay. At the end of the 2007 rating period, the Cohort Grievants had been members of the SFS for 111 days.

The Board found insufficient support for the Department's unwritten policy applying this particular Civil Service criterion to the Foreign Service performance pay system. The Civil Service system is a rank-in-position system. Civil service employees do not perform at the SES level until they occupy an SES position. The Foreign Service, on the other hand, is a rank-in-person system. There is not the same correlation between becoming a member of the SFS and occupying a SFS position as there is in the Civil Service. Many Foreign Service Officers will have already been occupying SFS positions at the time they were promoted into the SFS. Those who are not generally will not have the opportunity to move into an SFS positions until the summer months when the bulk of the reassignments take place.

Furthermore, applying a 120-day eligibility requirement would result in an arbitrary and capricious outcome. The Senior Threshold Board makes its recommendations for promotion generally not later than October. Those recommendations are vetted in the State Department, then must be confirmed by the Senate and attested to by the President. In most years, this process has been concluded more than 120 days prior to the April 15 end of the rating period, and the newly promoted SFS members were thus eligible for performance pay. In 2007, however, the process

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<sup>1</sup> The minimum period of time required for Civil Service employees to receive an evaluation is 90 days. For the Foreign Service, it is 120 days. The application of the 120-day requirement to the SFS apparently was derived from the correlation between these timeframes.

lagged, resulting in the time-in-grade for members falling just nine days short of the 120-day period as of the end of the evaluation period. The timing of confirmation is out of the hands of the members, and has no effect on their job responsibilities. The Board directed the Department to reconsider the members of the Cohort for possible performance pay awards in the subject year.

### **EERs and OPFs**

As has been the case in recent years, a high percentage of the cases considered by the Board this year involved challenges to decisions by the promotion and retention boards that were based on the grievant's Employee Evaluation Reports (EERs) and official performance files (OPFs). The Board's decisions upheld the agencies' decisions in approximately half of these cases and found in favor of the grievants in the other half.

Two cases involved the unusual circumstance of State Department employees who had been criticized in Inspector's Evaluation Reports (IER). The Office of the Inspector General (OIG) routinely carries out periodic assessments of posts, which include reports on post management (the Ambassador and Deputy Chief of Mission). These reports are then included in the OPFs of the officials. The overriding purpose is to assure that upper level post management is not immune to criticism as a result of their positions of authority and physical distance from their own supervisors. However, the OIG may also issue "corrective" IERs for other employees, when information surfaces that the EERs for such employees are inaccurate, either in a positive or negative direction.

The grievant in the first case, FSGB Case No. 2008-012 (April 17, 2009), was a political officer who received a "corrective" EER criticizing his managerial performance

while head of the Political Section at post. The IER, based on comments provided by confidential sources, concluded that the assessments of grievant's managerial skills in his EERs were too positive and did not present a balanced picture.

Although the Board reaffirmed that while due process did not preclude the inclusion in IERs of critical comments from anonymous sources that had been guaranteed confidentiality, care had to be exercised when these IERs were placed in the employee's OPF. When challenged, such statements needed to be sufficiently corroborated by named sources to allow the grievant a meaningful opportunity to challenge the truth of the criticisms. In this case, the Board found that some of the negative findings and conclusions in the IER were sufficiently corroborated, and others were not. It also found that grievant had no knowledge of the deficiencies noted in the IER and had never been counseled with regard to them, violating his substantive right to be counseled and given an opportunity to improve. The Board ordered that the IER be expunged from grievant's file.

In the second case, FSGB Case No. 2008-018 (February 11, 2009), the IER assessed the performance of an FS-02 political officer during the ten-month period he acted as Chargé at post. The grievant presented evidence that contradicted the criticisms included in the IER. The Board found that the Department could not rely solely on the summaries of confidential sources in the face of direct refutation. Fairness required that grievant either be given an opportunity to discover and challenge the confidential sources or to confront independent corroborative evidence. The Board directed that the IER be expunged from the employee's OPF.

A number of cases involved alleged procedural errors in the promotion process. Following the rule enunciated in Reiner v. United States, Civil Action No. 78-0616 (D.D.C. 1979) now embodied in Board regulation (22 C.F.R. §§905.1(b) and (c)), once the grievant establishes that the procedural error was of such a nature that it may have been a substantial factor in the agency action complained of, the burden then shifts to the agency to demonstrate that, even absent the error, the same action would have resulted. In two cases decided last year, FSGB Case Nos. 2008-009 (February 23, 2009) and 2009-003 (October 13, 2009), the Board found that the grievants carried their burdens in establishing a material error that may have affected their promotions, and that the Department failed to carry its burden, presented in the form of statistical evidence, that grievants would not have been promoted even if the error had not occurred. In both cases, the Department was directed to form reconstituted selection boards (Recon Boards) to review grievants' corrected files.

### **Financial Cases**

Seven cases decided by the Board last year fell into the category termed "financial."

In FSGB Case Nos. 2007-042 (August 8, 2009) and 2008-032 (August 9, 2009) the grievants, Diplomatic Security (DS) Agents, claimed that the Department had not taken their prior military experience into account adequately in establishing their initial salaries when it automatically accorded only 20% credit for time spent as Marine security guards. The Board found that the Department's unwritten practice of according a fixed 20% credit for Marine security guard service without reviewing the actual duties performed and their relevance to the duties of a DS Agent violated its own regulations.

It directed the Department to conduct a new individual evaluation of both grievants' prior military experience for purposes of determining the appropriate initial salary credit that they should have received under the Department's regulations.

In other cases, the Board directed the Department of Commerce to pay a Residence Transition Allowance; directed the Department of Commerce to pay language incentive pay to a grievant assigned to Belgrade; directed USAID to pay a performance bonus, when it failed to carry its burden of proof that the award would have been denied even absent the agency's procedural error; and found that the Department of State had not erred when it charged the grievant for damages to his government-leased quarters.

### **Disciplinary Cases**

The Board decided 11 cases in 2009 in which grievants challenged disciplinary action by the agency. In five of those cases, the Board upheld the discipline imposed. In six cases, it upheld the discipline in part, sustaining some, but not all, charges and/or mitigating the penalty. The cases involved a variety of circumstances, including improper use of diplomatic security identification credentials to utilize the Law Enforcement Officer entrance at an airport; loss of control of a government-issued weapon; altering language in an EER after it had been finalized; misusing the diplomatic pouch by importing a computer duty free for a Foreign Service National employee; engaging in sexual relations with prostitutes (separation for cause); lack of candor with a supervisor; violating the Department's Policy on Consensual Relationships between Supervisors and Subordinates; violating the Department's Workplace Violence Policy; undertaking unauthorized business activities in the officer's country of assignment; and failure to secure classified materials. Many of the cases implicated questions as to

whether the penalty meted out to the grievant was consistent with penalties issued to employees in prior similar cases.

### **Miscellaneous Cases**

Four cases fell outside the above categories. Two (FSGB Case Nos. 2007-007 (August 21, 2009) and 2008-044 (November 11, 2009)) involved allegations that USAID and the Department had breached the terms of settlement agreements. In FSGB Case No. 2009-002, the grievant charged retaliation by the Department in refusing to make a TDY assignment and threatening separation. In FSGB Case No. 2008-008 (May 8, 2009), grievant challenged the Department's actions in curtailing him from a one-year limited non-career appointment.

The Board denied the grievances in all four cases.

### **General Observations**

We continue to strive to close cases and issue decisions with greater dispatch. Among the many factors that may slow down case disposition are the complexity and number of issues presented, and the time taken by the parties for the discovery process. Additionally, this year there was a significant turnover among the arbitrators on the Board, who act as panel chairs. Several panels had to be reconstituted in midstream as a result.

Respectfully submitted this 26<sup>th</sup> day of February 2010.



Ira F. Jaffe  
Chairperson, Foreign Service Grievance Board

## Annual Report 2009 – Statistics

A. Total cases filed 43

B. Types filed

EER	16
Financial	7
Disability	0
Discipline	13
Separation	4
Assignment	2
Implementation Dispute	0
Other	1

C. The following dispositions were cited for the 53 cases closed in 2009:

Agency Decision Affirmed	16
Agency Decision Reversed	14
Partially Affirmed/Partially Reversed	7
Settled/Withdrawn	16
Dismissed	0

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 it lacked jurisdiction to proceed.

D. Oral hearings 2 (for a period of 7 days)

E. Mediations 2

F. Interim relief 12

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

H. There were 41 cases pending before the Board as of December 31, 2009.

I. The new cases docketed in 2009 were filed by Foreign Service employees in the following agencies:

Department of State	35
Department of Commerce	6
Agency for International Development	1
Peace Corps	1

No cases were filed in 2009 by Foreign Service employees of the Foreign Agricultural Service or the Animal and Plant Health Inspection Service (both part of the Department of Agriculture) or by Foreign Service employees of the Broadcasting Board of Governors (which includes Voice of America, Radio Free Europe, Radio Free Asia, TV Marti, and the Middle East Broadcasting Networks).