

# **FOREIGN SERVICE GRIEVANCE BOARD**

## **ANNUAL REPORT FOR THE YEAR 2012**

### **Makeup and Operation of the Board**

It is my privilege to transmit the Annual Report of the Foreign Service Grievance Board for 2012. As in previous years, the Report summarizes the operations and responsibilities of the Board during calendar year 2012 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 2012, 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 sole independent, administrative adjudicatory body for the Foreign Service, and the majority of cases before the Board are appeals from agency decisions. In addition to the grievants, the Board deals with the Foreign Affairs Agencies within our jurisdiction,<sup>1</sup> the American Foreign Service Association (AFSA), the exclusive bargaining unit for the Foreign Service, private attorneys who represent certain grievants, and the public. The Board's decisions are based on the Record of Proceedings (ROP) which includes all materials received or obtained by the Board in a case with the exception of materials deemed to be irrelevant, immaterial or unduly repetitive.

The FSGB is composed of two types of members. One is a group of experienced, dedicated retired Foreign Service Officers from the various Foreign Service agencies. The second group is made up of attorneys, judges and other legal professionals who have extensive experience in presiding over and deciding labor relations and employment disputes. It has historically been Board practice to utilize three-member panels for all grievances, including grievances involving hearings that are statutorily mandated to include three members. Panels are typically made up of a presiding member selected from the pool of labor law professionals and two members selected from the Foreign Service retiree pool. Although the Chairperson of the

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<sup>1</sup> Agencies within FSGB jurisdiction include 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.

Board has statutory authority to select the panel members for each grievance, the Chair 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 combination of experience between the labor law expert members and the Foreign Service retirees provides a process that draws upon the applicable legal and regulatory framework of the Foreign Service personnel system as well as the unique practices and culture of the Foreign Service itself. The panel chairs, all of whom have had extensive experience in arbitrating and litigating personnel disputes, provide the Foreign Service members with guidance and advice on the legal and regulatory framework that the Board needs in order to formulate and issue a variety of orders and decisions.

The Board operates through a combination of in-person and virtual interactions both internally and with the parties. The members work according to individual case time-lines, and typically interact with other members and the parties from a distance. We continue to rely on a variety of modalities to facilitate our review of the ROPs and to reach decisions. When necessitated by hearings or by pre-hearing or status conferences, the Board possesses a video-conferencing system to facilitate live interactions between the panels, the grievants, AFSA, the agencies, and their representatives.

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 H. Shaller, an attorney and professional arbitrator and mediator of labor and employment disputes, has been a member of the Board since October 2009 and has served as Deputy Chair since October 1, 2011.

Christopher E. Wittmann, a Foreign Service Officer with over 30 years of State Department Service, has served as the Board's Executive Secretary since August 2012. Mr. Wittmann will depart from the Board in March 2013, and retire from the Foreign Service. A new Executive Secretary has been identified and will join the staff soon.

Gail Lecce, a former Deputy Chairperson of the Board, has served as the Board's Appeals Counsel since October of 2011 and assists the Chair, Deputy Chair and panel chairs with legal research and analysis when requested. She also assists with the Board's collection of legal and regulatory resources, facilitating independent research by individual Board members and training new members in accessing FSGB research materials both on the Board's website and in its headquarters office.

Two Special Assistants, Carol Gullion, a Foreign Service Officer with the Department of State, and Joseph Pastic, a retired USAID Foreign Service Officer, provide case management and resource support to the Board's panels. The Board also utilizes two permanent support staff members, Elena Cahoon (a Civil Service employee with the Department) and a newly appointed Office Management Specialist (OMS) with the Department, Marie Willadsen, who joined the staff in February 2013. Jeremiah A. Collins, a partner with the law firm of Bredhoff & Kaiser, continues to serve as outside counsel to the Board.

Given the increased caseload of grievance appeals experienced by the Board in recent years, in October 2012 the Secretary of State augmented the Board with five new members, three of whom are labor law experts and two Foreign Service annuitants. The Board now consists of the following 20 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 J. Hudson  
Margaret E. Keeton  
Warren R. King  
Cheryl M. Long

William B. Nance  
William E. Persina  
Harlan F. Rosacker  
Jeanne L. Schulz  
Nancy M. Serpa  
John M. Vittone  
Susan R. Winfield

The majority of the Board's members live in the Washington D.C. area, and Board meetings are held quarterly at the Board's headquarters office in Arlington, Virginia. Members who live in the area may use the Board's offices for reviewing the ROPs, for panel meetings, status conferences, as well as for full hearings. The majority of cases are decided on the record without hearings in accord with the preferences of the parties. In separation for cause proceedings, unless waived by the charged employee, the Board holds hearings as mandated by law. Hearings are also held at 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 held when, in the judgment of the Board, a case can best be resolved by a hearing or presentation of oral argument.

The Board is mindful of the impact that the grievance process may have on grievants' career paths, and therefore strives to improve timelines where feasible. We are pleased that in 2012 the Board improved on the time required to dispose of cases. The average number of weeks from filing to resolution of cases averaged 33 in comparison to 41 weeks in 2011. While these numbers can still be improved upon, we believe certain initiatives taken during the year will continue to yield a more timely work product. In a continuing effort to increase the efficiency of the grievance process, the Board has taken several steps to streamline procedures and expedite the process. During the year, the Chairperson selected a committee headed by the Deputy Chair to revise and update the Board's policies and procedures which cover procedural areas such as discovery, motions practice and relevant timelines. A Foreign Affairs agency roundtable was sponsored by the Board<sup>2</sup> which *inter alia* solicited views from the participating agencies and AFSA on the Board's practices and procedures prior to the revisions, and the

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<sup>2</sup> Roundtable meetings had taken place in the past, but the Board had not invited agencies to such a meeting for some time. The 2012 meeting was viewed as the resumption of a useful modality for the exchange of information on procedures and process.

agencies and AFSA were given an opportunity to comment on the draft revised procedures. The comments were considered, and Board members formally adopted the revised policies and procedures. They will be effective as of March 1, 2013. The procedures emphasize the use of status conferences in order to expedite case processing, to identify key issues, and to minimize and expedite discovery disputes. The revised policies now require a conference between the parties prior to the filing of Motions to Compel Discovery in an effort to resolve some of the issues prior to such a motion. The policies also encourage mediation in appropriate cases.

During the year, the Board staff worked to implement and refine the new electronic Record of Proceedings (eROP) which had been instituted in 2011. The transition from a paper driven operation to electronic records has been difficult in some ways since the staff does not have an IT expert, but the end result has been a more agile system that can be more easily accessed by staff, the members, and the outside parties. The new eROP system now permits panels to hold conference call meetings with every member having rapid access to sometimes voluminous records during panel discussions. It also affords the Board much greater flexibility in handling the ROPs, both internally and when necessary for outside dissemination.

We were not able to advance to an acceptable stage in the refurbishing of our outdated and overburdened website, but we have managed to continue to post grievance decisions and other essential information both for the public and for use by the members. At the beginning of 2013, we finally entered into an agreement with the Department's IRM team by which the website will be finally converted to Sharepoint and in due course will be made more accessible both in terms of information as well as research facility.

We anticipate that 2013 will be an active year for resolving grievance appeals by Foreign Service officers, and we are dedicated to maintaining the high standards and record of fairness and due process that has distinguished this Board since its inception.

### **2012 Caseload**

Seventy-four new cases were filed with the Board in 2012, maintaining the increased levels the Board experienced in 2011 (70), compared to 56 new cases in 2010 and 43 in 2009. Sixty-four of these cases were filed by officers with the Department of State; five by employees

of USAID; three by employees of the Department of Commerce; and one each involved employees of the Department of Agriculture and the Peace Corps.

Twelve cases involved the proposed separation of the employee. These included separation for cause, expiration of time in class, and failure to achieve tenure. Twenty discipline cases were filed this year, a significant increase over the 15 filed in 2011.

Sixty-nine cases were closed during the year, also a significant increase over 2011, when 52 cases were closed. In part, this was due to the high number of cases settled (20) and dismissed for lack of timeliness or jurisdiction (8). The average number of weeks taken to resolve a case was 33, significantly less than in 2011 (41 weeks) and other recent years. Even factoring out the cases that were settled or dismissed, which in general had shorter disposition times, the average time to disposition was just 41 weeks. Sixty-seven cases were pending at the end of the year.

## **Board Decisions in 2012**

### **EERs/IERs/OPFs**

The Board decided 16 cases in which the grievants contested some aspect of material in their Official Performance Files (OPF), which provide the basis for promotions and other career decisions. The cases included a variety of claims: late and missing awards; falsely prejudicial material; lack of prior counseling on perceived performance deficiencies; and procedural errors. The Board affirmed the agency's decision in eight of the cases; reversed the agency in five cases; and partially affirmed/partially reversed in one case. One case was dismissed for lack of jurisdiction, and two were settled.

In one case, the Board reversed a decision by the agency that the grievant had not met the standards of her class. The Board found that the agency had violated several of its own regulations by not providing grievant written notice of performance deficiencies or adequate counseling. It also found that the record did not support the conclusion that the grievant had not met the standards of her class. The Board made the relatively unusual recommendation in this case that the agency grant the grievant a retroactive administrative promotion.

In another case, the Board found that the many procedural errors incurred in processing the grievant's OPF for tenure review cast serious doubt on whether the grievant had received a fair review in a year in which he was denied tenure. As a remedy, it directed that the grievant's OPF be placed before reconstituted tenure and selection boards.

## **Financial Cases**

The Board resolved 20 cases involving financial disputes this year, as compared to eight cases the previous year. It affirmed the agency decision in 13 of those cases, and partially affirmed and partially reversed in three cases. Three cases were settled and one was dismissed for lack of jurisdiction.

The three cases in which the agency was partially reversed involved reimbursement for the cost of vaccinations; credit for prior work experience in setting initial salary; and reimbursement for the shipment of HHE effects to grievant's separation address upon his retirement. Six of the cases in which the agency decision was affirmed also involved challenges to the grievant's starting salary.

One of the more complex financial cases involved the shipment of wood flooring, doors, and door frames by grievants in their household effects. The agency characterized the items as construction materials rather than household effects, and charged grievants for their shipment. The Board upheld the agency's finding that the items could not properly be considered HHE. (In a separate action, USDA found the wood to be an endangered species that could not be imported legally unless it was part of HHE, and the items were eventually confiscated and destroyed.)

## **Disciplinary Cases**

The Board decided 12 disciplinary cases this year involving a range of issues: inappropriate behavior toward women; extramarital relationships; lack of candor; drinking while armed; failure to report contacts; unauthorized travel; violation of the agency's Cyber Security Policy; violation of an embassy vehicle use policy; drunk and disorderly conduct; and misuse of USG equipment. The Board affirmed the agency decision in four cases; partially affirmed and partially reversed in two cases; and reversed in one case. Five of the cases were settled.

## **Separation Cases**

The Board addressed 12 cases involving the potential separation of the employee. Four of the cases involved separation for cause for misconduct. The other eight involved recommendations for separation by the Performance Standards Board for failure to meet the standards of the class; failure to become tenured; failure to meet an agency's language requirements; and suspension of the employee's security clearance. Eleven of these cases were settled and/or withdrawn. In the remaining case, the Board affirmed the agency's decision to separate the employee for cause. No hearing was held, however, because the employee was living outside the country and failed to respond to repeated attempts by the Board and the agency to schedule a hearing.

## **Assignment**

Three grievants claimed that assignment actions violated agency regulations and policies. One grievant challenged the agency's decision to direct a third assignment when his second assignment as a junior officer was curtailed for medical reasons. A second grievant objected to the agency breaking a linked assignment to a follow-on post when he curtailed from Afghanistan under conditions that were considered both medical and voluntary. The Board affirmed the agency decision in both cases. The Board dismissed the third grievance, in which the grievant claimed that the agency had violated merit system principles by not giving him an at-grade assignment, for lack of jurisdiction.

## **Other**

Five cases fell outside the above categories. These cases involved claims regarding non-selection for a position as an Eligible Family Member; an improperly delayed investigation by Diplomatic Security that resulted in a disrupted career and legal fees; statements made in a Report of Investigation that allegedly discriminated against grievant on the basis of disability and mental illness; improper calculation of grievant's Time in Service date; and the agency's improper failure to extend grievant's retirement travel date. Three of the cases were dismissed for lack of jurisdiction and/or timeliness. One was settled. The Board affirmed the agency decision in the final case.

## **Judicial Actions Involving Board Rulings**

There was judicial activity related to four Board cases in 2012.

Karl 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 subsequently filed a Title VII suit against USDA, claiming discrimination on the basis of race, retaliation for engaging in protected activity, and a hostile work environment. Last year the District Court for D.C. granted USDA's motion for summary judgment on nine of the ten counts alleged, and later dismissed the tenth count. *Karl Hampton v. Tom Vilsack*, 760 F. Supp. 2d 38 (D. D.C. 2011). Hampton appealed that decision. In a de novo review, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District Court's ruling. *Karl Hampton, Appellant v. Tom Vilsack, Secretary, United States Department Of Agriculture, Appellee*, 685 F.3d 1096; (U.S. App. D.C. 2012).

The plaintiffs in *Richard Lubow, et al., v. United States Department of State, et al.*, 2013 U.S. Dist. LEXIS 10780, (D.D.C. 2013) were five Diplomatic Security Agents who had served in Iraq in 2004. They grieved the Department's application of a cap on their premium pay and its decision not to grant them a waiver of repayment of the amounts that the Department had paid them in excess of that cap. The FSGB concluded that, contrary to the Department's findings, the grievants were not at fault in incurring the overpayments and thus were eligible for a waiver of their debts. However, the Board also found that it was within the Department's discretion to decline to grant the waivers, and that the Department had appropriately considered the relevant factors and had not abused its discretion in denying the waivers. The District Court affirmed those findings and granted summary judgment in favor of the Department.

In an order dated September 25, 2012, Judge Rosemary Collyer of the District Court of D.C. dismissed three counts of the plaintiff's claims in *Jeffrey Glassman v. the U.S. Department of State, et al.*, Civil Action No. 10-1729, as well as both the Department of State and the Foreign Service Grievance Board as defendants, on procedural grounds. Glassman is a former officer of the Department of State who grieved his involuntary retirement, claiming it was a result of his disability and therefore illegal. The Board denied Glassman's claim. Glassman appealed that decision to the district court, while also independently claiming a violation of the

Rehabilitation Act. While dismissing three counts and two defendants, the court ordered the case to proceed on Glassman's remaining claim, that the Foreign Service precepts have a disparate impact on him and others with disabilities because of their emphasis on unusually difficult or dangerous assignments, in violation of the Rehabilitation Act. The Secretary of State, as head of the agency, remained as the sole defendant.

In *Richard Baltimore, III v. Hillary Clinton*, 2012 U.S. Dist. LEXIS 153253 (D.D.C. 2012), former Ambassador Baltimore appealed a decision by the FSGB sustaining charges by the Department of State involving misuse of an official vehicle and failure to report the gift of a rug, that resulted in a 45-day suspension without pay. Baltimore challenged the Board's decision as arbitrary and capricious. The D.C. District Court upheld the Board's reasoning and decision.

On November 19, 2012, Jeremy Yamin petitioned the D.C. District Court to review the FSGB's May 23, 2012 order denying in part his request for attorney fees incurred in a grievance appeal. Yamin is a Department of State officer who had received a one-day suspension in a disciplinary action. In his appeal to the FSGB, the Board upheld the charge, but found the one-day suspension to be excessive and reduced the penalty to an admonishment. Yamin requested attorney fees and expenses in the amount of \$71,645.48. The Board approved \$12,385.03, denying the rest. Yamin requested a review of this decision.

Respectfully submitted this 1<sup>st</sup> day of March, 2013.

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Garber A. Davidson  
Chairperson  
Foreign Service Grievance Board

## Annual Report 2012 – Statistics

A. Total cases filed 74

B. Types filed

EER/OPF	19
Financial	17
Disability	0
Discipline	20
Separation	12 <sup>3</sup>
Assignment	1
Implementation Dispute	0
Other	5

C. The following dispositions were cited for the 69 cases closed in 2012:

Agency Decision Affirmed	30
Agency Decision Reversed	6
Partially Affirmed/Partially Reversed	5
Settled/Withdrawn	20
Dismissed	8

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 substantial part. Dismissals refer to cases in which the Board found no proper basis to proceed (e.g., mootness, lack of jurisdiction or timeliness, denial of a motion for reconsideration, etc.)

D. Oral hearings 1 (2 days)

E. Mediations 1

F. Grants of Interim Relief (in cases closed) 18

G. Average time for consideration of a grievance from time of filing to a Board decision (or dismissal or withdrawal) was 33 weeks.

H. There were 67 cases pending before the Board as of December 31, 2012.

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<sup>3</sup> Although there appears to be a significant increase in separation cases over last year, the Board may not have used consistent labeling in this category over the two years. Last year's cases included only those involving separation for cause. Separation for other reasons may have been included in other categories.