

FOREIGN SERVICE GRIEVANCE BOARD

2014 ANNUAL REPORT

RECIPIENTS: Committee on Foreign Relations
 United States Senate

 Committee on Foreign Affairs
 United States House of Representatives

 Director General of the Foreign Service
 United States Department of State

February 2015

The Board's Organization and Operations

I am privileged to present the Annual Report of the Foreign Service Grievance Board (FSGB) for calendar year 2014. The Report is submitted pursuant to Section 2205(f) of the Foreign Service Act (22 U.S.C. §4135(f)) and includes the most significant operations of the FSGB during 2014 as well as a brief description of the grievances decided during 2014. The Board functions as the sole, independent grievance appeals forum of the Foreign Service. Most cases are appeals from agency grievance decisions, and the Board deals with the foreign affairs agencies within its jurisdiction,¹ the American Foreign Service Association (AFSA, the exclusive bargaining unit for the Foreign Service), private attorneys who represent certain grievants, and the public. Although most grievances come to the Board as appeals, the Board considers the evidence *de novo* and bases its decisions on a record of proceedings (ROP) that includes materials filed with or obtained by the Board.

Members of the FSGB, who are appointed by the Secretary of State, are “independent, distinguished citizens of the United States well known for their integrity.” Members are selected from among experienced, retired employees of the foreign affairs agencies² and a pool of legal professionals that includes attorneys, judges and arbitrators. The Board utilizes three-member panels that consist of a legal professional (presiding member) and two foreign affairs members for deciding grievance appeals. The combination of expertise and talent from both groups has provided a balance of perspectives on both the facts and the law that has proven beneficial. The presiding members are able to advise on legal and regulatory matters, bringing their collective experiences from both the private and public sectors on cases involved with employment and related disputes. The retired

¹ Agencies within the Board's jurisdiction include the Departments of State, Commerce and Agriculture, the U.S. Agency for International Development, the U.S. Peace Corps (separation for cause cases only) and the Broadcasting Board of Governors.

² While typically these are retired Foreign Service Officers, the Secretary occasionally has appointed retired Civil Service employees to the Board. Such members normally have extensive experience with the Foreign Service in one capacity or another.

foreign affairs members inform the process with understanding and experience from their service in the various foreign affairs agencies and their knowledge of the laws and regulations that pertain specifically to personnel issues that arise in the context of the Foreign Service.

The Board uses various methods to facilitate its review of the Record of Proceedings (ROP) and reach its decisions. Typically, the Board's panels research, deliberate and draft decisions from their own homes or offices. Members are equipped with access to the Department of State's OpenNet system that permits them to communicate and obtain research materials remotely. Most pre-hearing or status conferences, as well as hearings, are held at the Board's headquarters, and panels sometimes meet at the headquarters for deliberations. The Board's quarterly meetings and occasional roundtables that involve the foreign affairs agencies and AFSA are held in Arlington at the FSGB office, as well. The Board decides most of the grievances on the written record without oral testimony but holds hearings in separation for cause proceedings (unless waived) as mandated by law. It likewise holds hearings at the grievant's request in disciplinary cases as well as in cases involving separations for expiration of time in class or relative performance. In its discretion, the Board may order a hearing when a grievance can best be resolved by the presentation of oral testimony, although it rarely does so in practice.

The Board's newly refurbished websites constitute the primary source of research and other information for Board members, grievants, their representatives, AFSA, the agencies and the public. The members access the secure website that contains unredacted Board decisions and orders (dating from 1972), relevant laws, regulations and procedures, as well as other information. The public site includes, *inter alia*, decisions and orders that are redacted to ensure privacy. Both websites include links to other useful resources as well as to government agencies.

Garber A. Davidson has served as Chairman of the Board since October 1, 2011, and was reappointed to serve until October of this year. He is an attorney and former Senior Foreign Service Officer with the U.S. Agency for International Development. Elliot Shaller, an attorney and professional arbitrator and mediator of

labor and employment disputes, has been a member of the Board since 2009 and has served as Deputy Chair since October 2011.

Mark Johnsen, a Foreign Service Officer with over 20 years' experience as a Management Officer, currently serves as the Board's Executive Secretary. Mr. Johnsen is in charge of the FSGB staff, which is comprised of three direct-hire employees and two contractors. He was assigned to the Board in 2013 and will serve until September 2015.

Gail Lecce, a former Deputy Chair of the Board and USAID Senior Foreign Service Officer, has served as the Board's Appeals Counsel since October 2011. She assists the Chair, Deputy Chair and panels with legal research and other information as requested. She also assists in training new Board members in conducting their own research and acquaints them with the Board's procedures. Jeremiah A. Collins, a partner with the law firm of Bredhoff & Kaiser, continues to serve as outside counsel.

The Board has two Special Assistants (SAs) who provide support to the grievance panels. They are responsible for organizing the ROPs as grievance filings are received by the Board, and they manage the grievance process until final decisions are issued. They arrange for panel phone conferences at which members deliberate on decisions and decide on drafting matters; the SAs then follow up with the panel chairs or designated drafters to ensure compliance with timelines, and to facilitate any additional support required. The SAs also liaise with AFSA, private attorneys and the parties to maintain timelines, explain Board policies and procedures, and ensure the integrity of the appeal process. Lisa Bucher, a law graduate and a Foreign Service Officer for over two decades, joined the staff as an SA in September 2013. She has been designated to become the Board's Executive Secretary in September when Mark Johnsen departs. Joseph Pastic, a retired USAID Foreign Service Officer, also an SA, has been with the Board since July 2003.

The Board has one Foreign Service Office Management Specialist, Marie Willadsen, who has served since 2013 and whose experience includes various overseas postings. Elena Cahoon, a member of the Civil Service, has served at the Board as receptionist and secretary since 1999.

The Board currently has 19 members, with 12 retired foreign affairs members and 7 legal professionals. The Board members serving in 2014 were as follows:

Garber A. Davidson (Chairperson)
Elliot H. Shaller (Deputy Chairperson)
Bernadette M. Allen
James E. Blanford
Barbara C. Cummings
Lois E. Hartman
Arthur A. Horowitz
William J. Hudson
Margaret E. Keeton (resigned in April)
Warren R. King
Cheryl M. Long
Gregory D. Loose
J. Robert Manzanares
William B. Nance
William E. Persina
Harlan F. Rosacker
Jeanne L. Schulz
Nancy M. Serpa
John M. Vittone
Susan R. Winfield

A primary goal of the Board continuing during this past year (and in prior years) has been to improve its timeliness in terms of issuing its orders and

decisions. The Board is acutely aware of the short timeframes that impact the careers of Foreign Service employees, and especially the schedules of various agency-appointed boards that grant tenure, decide on promotions, rank (and “low rank”) employees, and make other career-defining personnel decisions. While the Board does not fully control the entire grievance appeal process, e.g., the period during which the parties engage in sometimes lengthy discovery or file time-consuming motions, it has put in place procedures to expedite where possible those actions it does control. During the year, the Board focused on improving its internal systems to gain greater efficiency in its processing of grievances. With the updating of the FSGB’s websites and the improved access to legal authorities and procedures as a result of the upgrades, Board members were able to access essential material for the drafting of decisions more rapidly. The Appeals Counsel formulated research portfolios on issues that recur frequently in grievance appeals, and, posted on the FSGB’s internal website, these have become valuable tools for the Board’s panels. The portfolios, along with links to federal statutory, regulatory and policy sources, afford members access to a comprehensive library of resources for carrying out their work. Members also have access to *Lexis Advance* for legal reference. Due to the approval of the Board’s records disposition plan by the Department of State and U.S. Bureau of Archives last year, the FSGB staff has been able to eliminate voluminous paper files from our own archives and in the process identify and add heretofore missing, critical documents to the Board’s electronic databases and public website.

The three-member panels selected to decide grievance appeals continued to work effectively during the year, producing several orders and decisions with significant issues of first impression or complexity. Social media has had an impact on some of the Board’s grievance appeals, and is likely to expand as a growing presence in both professional and personal interactions among Foreign Service employees. The increased exposure of what may have been considered private communications in the past has produced challenging questions regarding standards for personal and professional conduct of Foreign Service personnel,

including the issue of what is a reasonable expectation of privacy; similarly, rapid changes in technology, in particular the growth of digitally based communications and cyber tools such as cloud computing, have altered methods of information storage, access and security that undoubtedly affect Foreign Service operations. These developments, along with rapidly evolving social and demographic changes, both within the Foreign Service and the society at large, are likely to influence to some degree future grievance disputes. A major challenge for the Board is to maintain its level of institutional and technological awareness to keep pace with the dynamic environment in which future dispute resolution will be necessary.

2014 Caseload

Fifty-three new cases were filed with the Board in 2014, comparable to the number filed the previous year (54). Over the past six years, the number of new cases has ranged from a high of 74 to a low of 43. Of the 2014 cases, 47 cases were filed by employees of the Department of State (or survivors of State Department employees); five by employees of USAID; and one by AFSA. No cases were filed by employees of the other agencies under the Board's jurisdiction.

The Board resolved 58 cases in 2014, somewhat below the number for 2013 (73). Twenty-two cases were dismissed prior to a decision on the merits, compared to 30 the previous year (12 settled and withdrawn; 10 dismissed for other reasons). The average time for resolution of a case from filing to issuance of a decision was 45 weeks. As was true last year, three cases were unusually complicated and time consuming. Factoring out those three cases, the average time for resolution was 41 weeks. Several Motions for Reconsideration of orders and decisions were also filed and resolved, some very complex in nature.

Cases involving Inspector's Evaluation Reports (IERs) issued by the State Department Inspector General continued to receive attention. Two IER cases, discussed below, were resolved during the year.

Timeliness of disciplinary actions, as governed by agency regulations, also continued as an issue of concern to employees. In three new cases filed, the employees alleged that delays ranging from 14 to 36 months violated Department regulations and disadvantaged them. Two cases involving timeliness were decided by the Board this year. In the first case, the Board found that a three-year delay was prejudicial to the employee and dismissed the charges. In the second, a two-year delay was deemed not to be prejudicial, but the charges were dismissed as not proven.

Eight of the new cases filed involved a claim that a disability, Post Traumatic Stress Disorder (PTSD), or other medical condition affected the employee performance or conduct that resulted in a separation recommendation. Four involved allegations of alcohol abuse. The largest number of grievance appeals by office were those filed by employees of the Department's Bureau of Diplomatic Security (31% of the total).

A number of individually noteworthy cases were filed in 2014:

- A USAID case involved the starting salary of a new hire, whose documentation of his previous salary while self-employed was alleged to be fraudulent. The grievant was one of several USAID new hires who were issued bills of collection for overpayment of salary following an agency audit of the starting salaries of new hires. Regulations for establishing starting salaries primarily took into account standard salary histories, and did not address factors stemming from self-employment or lower salaries/stipends earned while an applicant was earning an advanced degree.
- The daughter of a State Department employee contested a bill of collection issued by the Department for \$311,000 in overpayment of a survivor annuity and denial of a waiver for the overpayment. The grievant was unaware that she needed to notify the Department upon the death of her mother. Survivor

annuity payments were deposited into a joint account for several years before the error was discovered.

- AFSA filed an implementation dispute challenging the Department's decision to deny payment of Meritorious Service Increases (MSIs) to outstanding employees identified by the selection boards in 2013. AFSA maintained that its agreement to defer such payments during sequestration of the budget in 2013 did not extend to a discretionary decision by the Department to withhold such payments permanently after the funds were available.
- A former president of AFSA contested the propriety of an email sent out by senior Department staff criticizing her for an op-ed piece she had co-authored with two former ambassadors. The op-ed piece, published in the *Washington Post*, expressed the authors' perception that State was inappropriately placing an increasing number of civil service and political appointees in the highest leadership positions. The grievant also challenged the failure of one of the authors of the email to recuse herself from service on the grievant's promotion board that year.
- A retired Foreign Service Officer filed a grievance alleging that remedies granted to him pursuant to the first grievance ever filed, in 1972, under authorities preceding the establishment of the Foreign Service Grievance Board, had never been implemented. He is seeking monetary relief.
- A grievant who in 1998 claimed bias on the basis of sexual orientation and a procedural error, and who appealed the FSGB decisions to both the district court and court of appeals, filed a new grievance claiming that Time-In-Class (TIC) and Time-in-Service (TIS) extensions awarded in that case had never been properly implemented, resulting in his impending separation for expiration of his TIS.

Board Decisions in 2014

Discipline

The Board resolved 12 appeals from discipline imposed by the Department of State. There were no appeals from disciplinary decisions of other agencies. In discipline cases, the agency has the burden to prove that the charge is factually correct; has a nexus to employment; and that the penalty is appropriate. The appeals covered a range of issues: alcohol- and/or weapons-related incidents (five cases); filing false claims for reimbursement; false statements given to explain an absence from work; failure to maintain control of a diplomatic pouch; interfering with an investigation; the appearance of prostitution (two cases); and a security violation. In eight of the cases the charged employee alleged that the penalty was too harsh. In five of the discipline cases the Board affirmed the Department's decision; in two it found in favor of the charged employee; in one it partially affirmed and partially reversed; and four cases were settled before reaching a decision on the merits. Nine of the cases involved employees of the Office of Diplomatic Security.

In one discipline case and a handful of others, the employees claimed that the incidents were related to the stress of service at hardship posts. As more employees are assigned to posts in countries where violence is endemic, the Board will be sensitive to similar conditions in appeals arising from this issue.

Separation

Eight cases involved separation actions. In three cases the agencies recommended that the employees be separated for cause, which requires a hearing and confirmation by the Board. In two of those, the employee resigned before the Board processes were completed, and the cases were dismissed. In the third, the employee, who was charged with being absent without leave, failed to appear for the hearing, and the Board found sufficient cause for separation. Two cases

involved recommendations by the Performance Standards Board to separate the employees for failure to meet the standards of their class. Both were settled before reaching a decision on the merits. The other three cases involved failure to renew a limited career appointment; failure to achieve tenure; and expiration of time-in-class.

Assignment

In general, the Board does not have jurisdiction over assignment actions. However, the Board may hear appeals in which the employee alleges a procedural violation of the assignment process. Two such cases were resolved last year. The first case stemmed from the 2012 violence in Benghazi. The employee alleged that he was removed from his position based on ill-founded conclusions by the Benghazi Accountability Review Board, and that he had been made a scapegoat as part of a politically motivated damage control effort. Prior to the conclusion of the appeal process, the grievant retired from the Department. The Board found that most of the remedies he had requested were no longer viable post-retirement, and it therefore drew no conclusions based on the merits. In the second case, the Board also found that the requested remedy, a change in eligibility requirements for long-term training, was outside its authority and dismissed the case for lack of jurisdiction.

Financial

Eight appeals involving financial claims were resolved by the Board last year, each presenting different, complex issues:

- In an appeal challenging denial of a medical evacuation allowance, the Department followed a long-established Standard Operating Procedure in denying medical evacuation for a high-risk pregnancy prior to the 24th week of gestation. The employee was directed to seek instead the lower separate maintenance allowance, even though all medical personnel agreed that grievant's spouse needed to return to the U.S. in the 10th week of pregnancy.

The Board found that the Department's practice was inconsistent with its own regulations and directed the Department to recalculate grievant's per diem based on the medical evacuation rate.

- Six Security Engineering Officers (SEOs) challenged the Department's decision to limit hiring of their class to an FP-06 pay level, while hiring preceding classes with similar qualifications up to the FP-04 level. In addition to charging a violation of merit principles, the grievants claimed that there were no jobs available at the lower level, so they were unjustly required to work at a higher pay grade than they were being paid. The case was resolved with respect to four grievants when they withdrew their appeals. The appeal of the other two is pending.
- A career Civil Service employee was given a Limited Non-career Appointment in the Foreign Service, then granted a conversion to career Foreign Service. While in the U.S. working to satisfy the language requirement for a pending overseas FS assignment, grievant's position was first designated FP-02, then retroactively downgraded to GS-12. The Department required her to reimburse the overpayment in salary resulting from the initial designation. The Board found that, while the Department's regulations regarding conversions are unclear, in this case the downgrade without notice was an improper application of the relevant laws and regulation, and the employee was entitled to recover the funds repaid to the Department.
- The Department denied a cash award to an employee for a suggestion he had made and that it had implemented. The primary basis for denial was that grievant had received a cash award for a similar reason, and thus was not permitted a second cash award for the suggestion. Grievant also claimed that the official who denied the award was the deciding official in a disciplinary action pending against him, and thus should have recused himself. The

Board found that the two awards were for different purposes and thus not prohibited by the regulation, and agreed that the deciding official should have recused himself from the award decision. It remanded the case to the Department to reconsider its original decision.

- A Diplomatic Security agent was required to surrender his law enforcement credentials and was denied law enforcement availability pay (LEAP) when the Secret Service investigated him regarding a collectible coin that he had purchased and sold, which turned out to be counterfeit. The investigation remained pending for a number of years, with no charges brought against the agent. During that time, his LEAP pay remained in abeyance. The Board found that although the Department did not have regulations addressing these circumstances, it had implemented a clear and consistent policy and did not act arbitrarily in denying grievant LEAP pay.
- A retired criminal investigator with the USAID Inspector General's Office alleged that the State Department miscalculated his retirement annuity by applying a pay cap imposed by the USAID IG through a 2006 memorandum. The Board found that the Department's reliance on the memorandum was proper, and denied grievant's claim to a higher annuity. The grievant has appealed this decision to the D.C. district court.

EER/OPF/IER

Eighteen appeals involving inaccuracies, omissions, prejudicial statements, or prejudicial errors in employees' Official Performance Files that could affect their promotion and/or tenuring competitiveness were decided by the Board. The Board affirmed the agency decision in ten of the cases; reversed in two; and partially affirmed, partially reversed in three cases. Two appeals were settled, and one was withdrawn.

Two of the appeals contested IERs issued by the Office of the Inspector General, one involving an ambassador and the second a public affairs officer. In the first, the Board found that the right to counseling applied equally to ambassadors as to other employees. Although the bar may be higher in what an ambassador is expected to know, the Board found that in this particular case the ambassador had no reason to know of the deficiencies identified in the IER, and, therefore, lack of counseling by her supervisors prior to inclusion of the criticisms in the IER and her OPF was not harmless error. The Board also found that several comments in the IER about another, identifiable employee should not have been included in the ambassador's OPF. The Board ordered that the IER be removed from the ambassador's OPF. The second case was settled and withdrawn prior to a decision on the merits.

Fourteen of the appeals involved claims that EERs or other information in the OPF were inaccurate or falsely prejudicial. Several made additional claims, most prominently bias or discrimination on the part of the rater or reviewer. One appeal challenged the lack of an EER for periods spent under different supervisors; one alleged that a selection board member was biased and should have recused himself; three involved low rankings, one where the employee charged that the low ranking was based solely on a disciplinary letter; and one case alleged a disadvantage resulting from missing documents.

Other

Ten appeals did not fall into any of the above categories. The Board affirmed the agency's decision in three cases; partially affirmed and partially denied the decision in one case; dismissed four; and two were settled.

In one case, a junior officer who had a directed assignment to a country that was notoriously slow in granting visas sought to have long-term TDYs to other countries, undertaken pending issuance of his visa, counted toward the time required for his directed tour. The Board dismissed the case, finding that the

Department policy did not permit such a measure and the Board did not have authority to change policy.

In a second appeal, the employee had been assigned to a senior job in an international organization for five years by virtue of separation/transfer with reemployment rights. Under that particular arrangement, his OPF was not reviewed for promotion for those years, and he was reemployed by State at the same grade as when he had left. Grievant contested the legality of that policy. The Board found that, although there was confusion within State about the ramifications of different transfer/secondment actions and grievant had not always been given consistent information, the precepts were clear and no remedy was warranted. Grievant has two related cases pending.

A third case of note was a follow-on to a previous case in which the grievant contested an EER and curtailment based on information included in a Report of Investigation (ROI). In that case, the Department granted all remedies requested by the grievant and the appeal was dismissed. In the follow-on case, the grievant again charged that the information included in the ROI was falsely prejudicial and damaging to his career, and thus should be expunged from his security file and any other files in which it appeared. The Board found in grievant's favor and ordered the ROI expunged. The Department sought clarification of the order that would allow it to retain the information for select purposes. The grievant continued to challenge the Department's perceived lack of compliance with the Board's order.

Other cases involved a request for the Board to categorize a trust as an "excepted trust" and thus not subject to disclosure under the annual Public Financial Disclosure Report required by the Department; challenge of a curtailment of an employee on a Limited Non-Career Appointment to Baghdad; and a claim by a Foreign Service Construction Engineer Specialist (FSCES) that a reorganization within the Bureau of Overseas Building Operations (OBO) disadvantaged his promotion potential and that, in general, the Department failed to provide adequate information regarding the FSCES career path. An employee separated from the

Department in 2003 also filed his eighth request for reconsideration, on the basis that a recent IG report identifying systemic flaws in State's investigative process constituted new evidence in his case. The Board denied the request.

Judicial Actions Involving Board Rulings

One new case was filed in the District Court for the District of Columbia last year. Gregory Picur, retired from USAID's Office of Inspector General, appealed the Board's decision to uphold the Department's calculation of his retirement annuity. A decision is pending.

Three other cases are pending decisions in federal court:

- The five plaintiffs in *Richard Lubow, et al. v. United States Department of State, et al.* (923 F. Supp. 2d 28 (D.D.C. 2013)), retired and active duty Diplomatic Security agents who served in Iraq in 2004, appealed a district court decision granting summary judgment to the Department. The plaintiffs had grieved the Department's application of a cap on their premium pay during their time in Iraq and its decision not to grant them a waiver of repayment of the amounts they had been paid in excess of that cap. The Board had affirmed the Department's decision applying the cap and denying the waiver.
- In November 2012, Jeremy Yamin petitioned the D.C. district court to review a FSGB order denying in part his request for attorney fees incurred in a grievance appeal.
- In January 2011, Joan Wadelton appealed a Board decision ordering six new reconstituted selection boards be convened as the remedy for three prior grievances. Ms. Wadelton's appeal contests the Board's decision to order a new round of reconstituted boards, rather than direct a promotion, as she had requested. Ms. Wadelton is separately engaged in litigation against the Department concerning compliance with three related FOIA requests she

filed seeking certain Department records about her. The Department has completed its production of documents pursuant to those requests and is currently engaged in briefing related to motions for summary judgment.

Respectfully submitted this 27th day of February, 2015.

Garber A. Davidson
Chairperson
Foreign Service Grievance Board

Attachment: Annual Report 2014 – Statistics

Annual Report 2014 – Statistics

A.	Total cases filed	53
B.	Types filed:	
	EER/OPF	10
	Financial	7
	Disability	0
	Discipline	11
	Separation	15
	Assignment	2
	Implementation Dispute	1
	Other	7
C.	Total cases resolved	58
D.	Types resolved:	
	EER/OPF	18
	Financial	8
	Disability	0
	Discipline	12
	Separation	8
	Assignment	2
	Implementation Dispute	0
	Other	10
E.	Dispositions of cases resolved in 2013:	
	Agency Decision Affirmed	24
	Agency Decision Reversed	5
	Partially Affirmed/Partially Reversed	12
	Settled/Withdrawn	7
	Dismissed	10
F.	Oral hearings	2
G.	Mediations	3
H.	Grants of interim relief	15
I.	Average time for disposition of a case, from time of filing to Board decision, withdrawal, or dismissal, was 45 weeks.	
J.	There were 41 cases pending before the Board as of December 31, 2014.	