

FOREIGN SERVICE GRIEVANCE BOARD

2015 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 2016

The Board's Structure and Operations

I am privileged to offer the Annual Report of the Foreign Service Grievance Board (FSGB) for the year 2015. The Report is submitted pursuant to Section 2205(f) of the Foreign Service Act [22 U.S.C. §4135(f)] (FSA) and includes significant operations that took place as well as summaries of grievances decided during 2015. The Board hears grievance appeals from the foreign affairs agencies within its jurisdiction¹ and functions as the sole, independent grievance appeals forum of the Foreign Service. 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). Grievants are advised by representatives of the American Foreign Service Association (the exclusive bargaining unit for the Foreign Service) or private attorneys, or sometimes come to the Board *pro se*.

The members of the Board are appointed by the Secretary of State, and in accordance with the FSA are selected as “independent, distinguished citizens of the United States well known for their integrity.” The members are experienced, retired employees of the foreign affairs agencies² as well as outside legal professionals such as attorneys, judges and arbitrators. In adjudicating grievance appeals, the Board selects three-member panels that include a legal professional as the presiding member and two foreign affairs members. The integration of skills and experience of the former foreign affairs members and the legal professionals has proven highly beneficial to the adjudicatory process. The presiding members bring both private and public sector experience on disputes involving employment, labor and related law, while the retired foreign affairs members inform the process with their experience in and knowledge of the Foreign Service.

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 only) and the Broadcasting Board of Governors.

² Most of these members are retired Foreign Service Officers, but some retired Civil Service employees have also been appointed. Such members typically have extensive experience with the Foreign Service.

The Board decides most of the grievance appeals on the written record without oral testimony. Hearings are mandated by law in separation for cause proceedings, unless waived, and grievants may request hearings in disciplinary cases as well as cases involving separations for expiration of time in class or relative performance. The Board may also order a hearing when it deems the taking of oral testimony necessary, though this is rare in practice. Except for hearings and pre-hearing and status conferences, which are held at the Board's headquarters in Arlington, the members perform their duties at their homes or in private offices. They are equipped with remote access to the Department of State's OpenNet system, which permits them to communicate with each other and obtain research materials.

The Board supports two websites, one for Board use only and one that provides access to grievants, their representatives, AFSA, the agencies and the public. The Board's site contains unredacted Board decisions and orders covering the last 45 years; relevant laws, regulations and procedures; and other information. The public site includes, *inter alia*, Board decisions and orders that are redacted to ensure privacy as well as other research resources and links to various government agencies.

Garber A. Davidson has served as Chairman of the Board since 2011, and was reappointed in 2015 to serve until October 2017. He is an attorney and former Senior Foreign Service Officer with the U.S. Agency for International Development. Elliot Shaller, an attorney, professional arbitrator and mediator of labor and employment disputes, has served as Deputy Chair since October 2011 and was also reappointed in 2015 until October 2017.

Lisa Bucher, J.D., serves as the Board's Executive Secretary as provided for in 22 CFR §902.3. A Department of State Foreign Service Officer since 1994, Ms. Bucher was a Special Assistant to the Board from 2013-15. She supervises the FSGB staff and office operations.

Gail Lecce, a former Deputy Chair of the Board and USAID Senior Foreign Service Officer, serves as the Board's Appeals Counsel. She assists the Chair, Deputy Chair and the Board's panels with legal research and other information as requested. She also assists in preparing training materials and in training new Board members in conducting their own research, and works with the Deputy Chair in implementing the Board's drafting and related guidance. Jeremiah A. Collins, a partner with the law firm of Bredhoff & Kaiser, serves as outside counsel to the Board.

The Board has two Special Assistants (SAs) who provide guidance and support to the Board's grievance panels. The SAs are primarily responsible for case management, an essential part of the grievance process. This responsibility involves all actions necessary for the timely and effective production of grievance appeal rulings from the filing of the original appeal to the issuance of the final decision or order. The SAs liaise with AFSA, private attorneys, the grievants and the foreign affairs agencies to manage discovery and other aspects of the appeal process. Katherine Kaetzer-Hodson, a Foreign Service Officer in the field of Public Diplomacy, joined the staff as an SA in August 2015. 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 (OMS), Marie Willadsen, who has served since 2013 and whose experience includes several overseas posts. She will depart the Board in May for Cairo, where she will serve as OMS to the Management Counselor. Her replacement, Vicki Byrd, joined the FSGB staff in early 2016 and brings experience from various overseas posts as well as prior experience in both the education and private sectors. Elena Cahoon, a member of the Civil Service, serves as secretary and receptionist and is the longest serving member of the FSGB staff. She has been with the Board since 1999 and will retire in April 2016 after 48 years of U.S. government service.

The Board in 2015 had nineteen members, with twelve retired foreign affairs members and seven legal professionals. The members in 2015 were:

Bernadette Allen
James Blanford (retired September 30, 2015)
Barbara Cummings
Garber Davidson
Arthur Horowitz
William Hudson
Warren King (retired September 30, 2015)
Cheryl Long
Gregory Loose
J. Robert Manzanares
William Nance
William Persina
Harlan Rosacker
Jeanne Schultz
Nancy Serpa
Elliot Shaller
John Vitton
Susan Winfield
Mary Witt

The Board's Mission

The FSGB, as the primary appeals tribunal for Foreign Service Officers, is in many cases the tribunal of last resort for a wide variety of disputes that arise in the context of employment in the Foreign Service. Although the Board's decisions may be appealed to the Federal District Courts, such appeals are rare. Therefore, the Board holds sway over decisions that may not only adversely affect Foreign Service careers but that may be fatal to such careers. Adverse personnel actions arising out

of alleged infractions of conduct codes, inaccurate or otherwise prejudicial evaluation materials or other personnel records, as well as implementation disputes that affect a class of officers, may, if not carefully adjudicated, produce a lasting, negative impact on careers. The Board takes seriously its obligation to ensure due process to all grievants, and strives to provide fairness, transparency and timely decisions to all parties that come before it as well as ensuring compliance with applicable statutes, regulations and policies. At the same time, the Board is mindful of the significance of management prerogatives in the foreign affairs agencies, and the importance of respecting such prerogatives when appropriate.

In order to achieve its goals of providing fairness and comprehensive treatment of grievance appeals, the FSGB has worked to compress the timelines of the grievance appeal process. Foreign Service careers depend upon the “up or out” system built into the statutory framework that underpins the Service, and such a system operates on a strict calendar of promotion, tenure, assignment and other career actions considered by boards that meet periodically. The FSGB’s actions may result in sustaining an agency decision that will influence one of the boards to deny tenure or even terminate an employee. Conversely, the FSGB may issue a decision that will delete the record of an adverse action from an employee’s official personnel file, potentially resulting in the granting of tenure or promotion. Consequently, the timeliness of the Board’s decisions and orders is often critical, particularly in view of the time-sensitivity built into the cycle of review by the selection and other boards.

As noted in the sections below, during 2015 we achieved significant progress in reducing the timelines from the inception of the appeal (or the filing of the grievance with the Board) to the issuance of the final decision. Taking into consideration certain anomalies (cases settled, withdrawn, etc.), the grievance processing time was reduced from an average of 41 weeks in 2014 to 34 weeks in 2015. While there are many factors that affect the time in which a grievance is processed, including the volume of discovery sought by the parties, the number of

pre-decisional motions filed by the parties, or the complexity of the grievance appeal, the FSGB has worked to streamline and make more efficient its processes relative to the decisions it issues. Some grievances are more complex and time-consuming than foreseen at the outset, but I am gratified that during this past year the Board has achieved marked improvement in its issuance of timely decisions.

The Board is constantly mindful that external trends and societal changes that affect the Foreign Service have a bearing on dispute resolution. In that regard, we have encouraged internal discussion and on occasion invited outside experts to make presentations on topics that we consider relevant to the Board's core functions. For example, this past year the Board held a panel discussion on the impact of social media on diplomacy, including such issues as expectations of privacy and security of communications in a much more active cyber environment. We also invited four distinguished individuals to engage the Board in a wide-ranging discussion on disability and its impact on the Foreign Service. The discussion ranged from a report on what the Department of State is doing to provide accommodations for various employees who are disabled to the diagnosis and treatment of PTSD. These issues, along with a myriad of other conditions caused by service in stressful, dangerous and unhealthy posts abroad, have significant impact on behavior and performance and are often addressed by evolving laws and regulations; they are therefore relevant to the overall mission of the Board. My expectation is that the Board will continue to encourage discussion of issues that influence Foreign Service careers, and that will enlarge the Board's understanding of the growing complexities in the practice of diplomacy and the legal framework that surrounds it.

2015 Caseload

The Board resolved 55 cases in 2015, close to the 58 resolved in 2014. Twenty-nine cases were dismissed prior to a decision on the merits, compared to 22 the previous year (21 settled and withdrawn; eight dismissed for lack of timeliness, lack of jurisdiction, or other reasons). The average time for resolution of a case from filing to issuance of a decision or order was 39 weeks. One case took a particularly long time to reach final resolution on the remedies. Factoring out that case and two others that were withdrawn very soon after filing, the average time for resolution was 34 weeks. By both measures the Board improved upon last year's resolution time, although we acknowledge that when the percentage of cases settled and dismissed increases, it tends to reduce the average time of disposition.

Fifty-nine new cases were filed with the Board in 2015, compared to 53 filed the previous year. Forty-seven were filed by the Department of State or employees of the Department (or the survivor of a State Department employee); 11 by USAID or employees of USAID; and one by the Peace Corps. No cases were filed by the other agencies under the Board's jurisdiction or their employees.

Board Decisions in 2015

EER/OPF/IER

Twelve cases involving grievants' Official Personnel Files (OPFs) were resolved during the reporting period. Most of these challenged all or parts of an Employee Evaluation Report (EER). Some also contested a resulting low ranking. In four cases, the agency decision was affirmed; in one, it was partially affirmed and partially reversed. Six cases were settled and withdrawn before final disposition.

One complex case arose from the circumstances following the September 11, 2012, attack on an American diplomatic post in Benghazi. The reviewing officer of a senior DS Agent was placed on administrative leave during the last four months of

the rating period. No communication was allowed between the rated employee and reviewer during that time. Additionally, the rated employee was subsequently responsible for implementing many changes in procedures that had been in place under the reviewer who was placed on leave. The employee assumed that the person acting in the original reviewer's stead would provide the reviewing statement for his EER. However, the Department determined that his former reviewer would write the reviewing statement, since that officer had not been formally reassigned and was familiar with grievant's performance during most of the rating period. Grievant claimed that this decision, along with the Department's decision to assign no reviewer for his subsequent Interim EER, contrary to grievant's expectations, disadvantaged him in the highly competitive promotion process at the senior levels. The Board found that although the Department had contravened the regulations regarding reviewing officers, grievant, who had been recommended for performance pay, had not demonstrated actionable harm, and the grievance was denied. FSGB Case No. 2015-022.

A second grievance illustrated an issue involving informal counseling that occurs with some frequency in cases that end up at the Board. Grievant, an untenured officer, challenged several EERs and a low ranking on a number of grounds, among them that he had not previously been counseled on deficiencies identified in his EERs. After a thorough review of the record, including contradictory statements by the employee and raters, the Board found that, with one exception, grievant had been counseled, albeit informally, but not in writing on the official counseling form as provided by Department regulations. In accordance with Board precedent, the Board found that such informal counseling was acceptable, although not the best practice. FSGB Case No. 2013-046.

FINANCIAL

The 10 appeals requesting a monetary remedy that were resolved by the Board this year all involved different issues, except for two that were originally filed

as one appeal. The Board affirmed the agency's decision in five of the cases; two were settled; and three were dismissed for lack of timeliness or jurisdiction.

The appeal with the largest sum at stake was filed by the daughter of a deceased Foreign Service Officer. The Department sought to collect over \$300,000 in annuity payments that it had continued to deposit to the account of the deceased's wife (the grievant's mother) for over a decade after the mother's death. The grievant alleged that her mother had told her that the payments would be continued, and that she should use them for the benefit of her minor nephew, whose father had also died. When the Department requested repayment, grievant asked for a waiver. The Department denied the application for waiver on the basis that it (the agency) was prohibited by regulation from waiving repayment of overpayments made to an estate. The Board affirmed the Department's findings. The grievant has appealed the decision to district court. (See Judicial Actions Involving Board Rulings, below.) FSGB Case No. 2014-018.

In a second, unusual, case, the grievant was a Department employee who had filed the first Foreign Service grievance in 1972. At that time, he was due to be separated as a result of expiration of time in class, and would have received no retirement benefits. The grievant protested that the separation was really due to policy differences with his superiors. During the proceedings, grievant was separated and hired into a Civil Service position. He ultimately won the grievance, but was never reinstated in accordance with the remedies granted. Grievant requested that the Board negotiate a revised annuity based on the original grievance decision. The Board found that the passage of over four decades since the original grievance made the new grievance untimely, and it dismissed the case. FSGB Case No. 2014-042.

Two related grievance appeals were filed by six recently hired Security Engineering Officers (SEOs). The grievants, already federal employees, responded to vacancy announcements hiring at only the FP-06 level. After they were hired,

they discovered that previous announcements had permitted hiring at a range between FP-04 and -06. They protested that there were no actual assignments at the FP-06 level, and that, based on their prior federal service; they should have been hired at their previous, higher salaries. The Department settled both cases under confidential terms. FSGB Case Nos. 2014-015 and 2015-039.

The other financial cases involved claims that the Department incorrectly put a promotion on hold when an employee's security clearance was placed on probation; that it should have paid for the storage of effects an employee inherited while on long-term TDYs to Priority Staffing Posts; that a post incorrectly implemented time and attendance policies; that the Department incorrectly withheld Law Enforcement Availability Pay (LEAP) following a DS Agent's required Fitness for Duty Evaluation; that the Department improperly denied hardship differential to an employee after his post had assured him he would receive all benefits if he returned after home leave to provide essential coverage; and that the Department incorrectly denied an officer certain benefits associated with reemployment following assignment to an international organization.

DISCIPLINE

Eleven discipline cases were resolved during the year, with mixed outcomes. Three agency decisions were affirmed; three were partially affirmed/partially reversed; two were reversed; and three were settled and withdrawn. The cases involved a range of issues: various forms of improper personal conduct and poor judgment; misrepresentation on an official form; failure to follow regulations; lack of candor; misuse of government resources; and failure to comply with instructions. The cases depicted not only personal misdeeds on the part of grievants, but also difficulties encountered in carrying out complex and critical programs under the high stress and sometimes understaffed conditions that exist in many overseas posts.

In two cases, the grievants alleged that their discipline was not carried out in a timely manner as required by Department regulations – a theme flagged in last year’s report. In the first case, the Board found that a three-year delay in proposing a three-day suspension was unreasonable and had no acceptable rationale. Furthermore, the Board found that, within the context of the Foreign Service’s competitive promotion system, the delay harmed grievant’s prospects of being promoted. It therefore dismissed the charge. FSGB Case No. 2013-053. In a second case, there was again a three-year delay between the violation alleged and the proposal for discipline. That case was settled and withdrawn before final disposition. FSGB Case No. 2015-007.

A third case involved both a two-and-a-half-year delay in proposing discipline and post-traumatic stress disorder (PTSD), an issue that has arisen with increasing frequency in grievances. The grievant was a DS Agent who allegedly suffered from PTSD following an earlier military deployment to Iraq. The Department charged that grievant failed to inform it about the PTSD during the hiring process, and that he was taking prescription medication without notifying DS as required by the Foreign Affairs Manual (FAM). The Board sustained both charges but did not sustain two of the specifications under one of the charges, and remanded to the Department to reconsider the penalty. The delay was not found to have harmed or prejudiced the grievant in this case. FSGB Case No. 2014-020.

The Board did not sustain seven of the eight specifications of charges of improper personal conduct and poor judgment in a case where the employee had allegedly made harsh and profane statements and demonstrated an unprofessional and discriminatory attitude toward naturalized American citizens. The Board found that one specification involving alleged misconduct during an after-hours party lacked a nexus to the efficiency of the Service, and that six specifications had not been adequately proven. The Board also found that the Department had improperly applied discriminatory harassment as an aggravating factor in determining the

penalty while not actually charging grievant with that offense or proving the elements. FSGB Case No. 2014-041.

The Board sustained charges against a DS Agent for shipping his weapon improperly; against a DS Agent for groping a female employee at a Marine House party; and against a Public Affairs Officer for failing to follow contracting rules. FSGB Case Nos. 2014-022, 2014-049, and 2014-045.

SEPARATION

Sixteen cases concerning separation actions were resolved this year. Nine of those cases involved denial of tenure. Two similar cases entailed untenured DS Agents who were to be separated for failure to complete Basic Special Agent Course (BSAC) training. Agencies recommended two employees for separation for cause. The Department proposed one employee for separation for failure to meet performance standards, and another for expiration of Time in Service (TIS). The agencies involved in separation actions included State, USAID, and the Peace Corps.

The parties ultimately settled and withdrew nine of these appeals. The Board dismissed the TIS case for lack of jurisdiction. Neither of the separation for cause cases went to final disposition: one was settled, and the agency withdrew the other one. Of the five cases that went to final disposition, the Board affirmed the agency decision in four cases and reversed it in one.

Of the 11 appeals involving untenured employees, four claimed that disabilities and/or medical issues were the root causes of separation. One grievant, a DS Agent, claimed that the Department failed to accommodate her asthma, as required by the Americans with Disabilities Act (ADA) and Rehabilitation Act, when she failed to pass the timed running test in basic training. The Board found that grievant had not proven that her asthma qualified as a disability under these circumstances, and that the timed running test was a validated job-related

prequalification that the Department was not required to waive to accommodate the alleged disability. The grievant has appealed that decision to district court. (See Judicial Actions Involving Board Rulings, below.) FSGB Case No. 2014-003.

In a second case involving a claimed disability, the grievant maintained that his inability to attain the foreign language proficiency required for tenure was a result of a learning disability that should have been accommodated. That case was settled. A third grievant claimed that her attention deficit hyperactivity disorder was the cause of the performance deficiencies that led to her tenure denial. The Board upheld the agency's decision not to grant tenure in that case. FSGB Case Nos. 2014-021 and 2015-003.

This year, the Board addressed for the first time the status of the Tenure Evaluation Form (TEF) used by USAID in its tenuring process. The TEF provides a snapshot of employees by their supervisors at the point they are being referred to a tenure board. It is intended as a complement to the regular Annual Evaluation Forms (AEFs) but has less defined procedures and safeguards. The grievant in this case claimed that the tenure board relied on a TEF that was falsely prejudicial and lacked balance, and that he had not been counseled with respect to performance deficiencies included therein. The Board ruled that TEFs were subject to the same due process standards as AEFs. It ordered the subject TEF expunged and the denial of tenure reversed. FSGB Case No. 2014-035.

ASSIGNMENT

One case involving the appeal of an assignment was closed this year. Grievant claimed regulatory and policy violations, as well as retaliation, occurred in a directed assignment. He had also filed a whistleblower reprisal complaint with the Office of Special Counsel (OSC) involving the same issues. Grievant withdrew his grievance appeal in order to pursue the OSC complaint. FSGB Case No. 2014-025.³

³ Paragraph revised July 13, 2016.

IMPLEMENTATION DISPUTES

During the past year the Board resolved two implementation disputes filed by AFSA.

The first involved the meaning of language in the 2013 Precepts governing the award of Meritorious Service Increases (MSIs). AFSA and the Department had for many years negotiated the Procedural Precepts concerning MSIs. The Precepts had historically called for awarding MSIs to all employees recommended by the Selection Boards, up to a set percentage of employees in each competitive class. Due to the sequester of funds government-wide in 2013, the negotiated language permitted withholding payment of the MSIs. When the sequester was lifted, the Department nevertheless continued to withhold payment of the awards. AFSA argued that refusal to pay at that point violated the terms of the Precepts to which they had agreed. The Board found in AFSA's favor, based on the parties' past practice. The Department has appealed this decision to the Foreign Service Labor Relations Board, which has not yet ruled. FSGB Case No. 2014-028.

In the second implementation dispute, AFSA alleged that the Department had failed to hold negotiations and/or reach agreement with it on an Embassy London change in practice relating to the deductions Embassy London employees could make from the salaries of their own domestic employees when those employees were given room and board in embassy-provided housing. AFSA contended that the embassy's unilateral change violated the FAM and the parties' 1987 Framework Agreement. The Board found that the appeal was filed late and dismissed it for lack of timeliness. FSGB Case No. 2015-005.

OTHER

The Board resolved three cases during the year that did not fall into any of the above categories.

In one case, the grievant had supervised five offices. After receiving negative information about the director of one of those offices, including allegations of discrimination, he instituted closer oversight over the human resources activities of all the offices under his supervision. When he did so, his own supervisor removed the problematic office from his supervision. Grievant alleged that his supervisor's action was taken in retaliation for his whistleblower activities and for his objecting to discrimination, an action that would be in violation of statute. The case was settled and withdrawn before the Board reached a decision on the merits. FSGB Case No. 2014-013.

The grievant in a second case objected to the Department's refusal to defer his home leave after his return from a one-year TDY to a Priority Staffing Post. The Board found that the Department violated no regulation, SOP, or announced benefits package in denying grievant's request. FSGB Case No. 2014-019.

In the third appeal, the grievant claimed that he had been subjected to a hostile work environment and wrongful disciplinary action when, upon his return from paternity leave, the Acting DCM made allegations of abuse of leave and attempted to remove him early from post. Ultimately, the allegations were disproven and grievant departed post as scheduled. The Board found that there had been no disciplinary action against grievant; the facts did not establish harassment or other harm; and the other remedies requested were beyond the scope of the grievance process. It therefore dismissed for lack of jurisdiction. FSGB Case No. 2014-044.

Cases Filed in 2015

A number of interesting cases filed in 2015 had not yet been resolved by the end of the year:

- AFSA filed a second implementation dispute challenging the Department's awarding of Meritorious Service Increases (MSIs) in 2014. The Department had wanted to include the same language in the Precepts that the parties had included in 2013, discussed above. AFSA did not agree, so the 2012 language was instead included by default. Although the language included a cap of 10%, the Department opted to cap the awards in 2014 at 5%. AFSA argues that the Department does not have the option to apply a lower cap. FSGB Case No. 2015-006.
- USAID sought to suspend a Management Officer assigned to a conflict zone for negligent contracting actions that it alleged led to the costly collapse of a roof on a new USAID building. The collapse took place in 2009; discipline was proposed in early 2013. As of mid-2015, the agency had not yet issued a final decision on the discipline; however, it was withholding the grievant's promotion, recommended in 2013, pending that decision. The grievant challenged the agency's action as untimely and also claimed as a defense that his alleged negligence was due to his PTSD. The case appeared to be near an agreed resolution last year when a second investigation of the grievant halted negotiations between the parties. FSGB Case No. 2015-020.
- The Department imposed a five-day suspension on a senior officer for Inappropriate Comments, Poor Judgment, and Inappropriate Conduct, based on an Office of Civil Rights (OCR) investigation that took place 12-15 months after most of the alleged occurrences. The grievant challenges the validity of the charges and penalty on a number of grounds, including lack of timeliness in carrying out the investigation. FSGB Case No. 2015-023.
- A DS Agent of Eastern European origin invited a family friend to visit for a second time in the U.S. and sent a letter to the consulate in the friend's country of residence outlining the circumstances of the proposed visit and

- their relationship. When the visa was denied twice, the Agent wrote to the Deputy Chief of the Consular Office, complaining that the denial may have been based on bias against him because of his own national origin and the fact that he was a DS Agent. The Department subsequently charged the Agent with misusing his position for trying to influence the visa decision, and proposed a four-day suspension. FSGB Case No. 2015-028.
- Grievant, an untenured DS Agent who spoke fluent Chinese, applied for an upgraded security clearance pursuant to a pending assignment to China. In mid-2013 he was informed that his Top Secret clearance was being suspended based on issues surrounding his personal conduct and his foreign preference and influence. The Department also suspended his law enforcement duties and LEAP, assigning the Agent to unclassified duties. Although the Agent was recommended for tenure the same year, tenure was withheld pending resolution of the security issues, and he was low ranked. Grievant challenges these actions on procedural grounds. FSGB Case No. 2015-034.
 - One grievant filed three appeals during 2015, all stemming from the same circumstances. The cases have been consolidated into one appeal. The grievant is an untenured officer who was serving as a first-tour consular officer when her supervisor alleged that she had committed a number of Visa Lookout Accountability (VLA) violations. The Bureau of Consular Affairs (CA) confirmed four violations. The grievant was denied further access to the visa system and curtailed her tour. She received an extremely negative EER for her last three months at post and was later disciplined. The grievant challenges all aspects of her EER and discipline, including the CA findings. Among her allegations are gender and age discrimination. FSGB Case No. 2015-035C.
 - An employee posted to South America with USAID stopped on his way home by a local bar/grocery store, where, he alleges, his drink was drugged by a young woman who joined him. He claims that he awoke the next morning in

- a strange place, feeling ill and disoriented, and found that \$5,000 had been charged to his debit card. The grievant and his wife state that he continued to hallucinate and be paranoid for two days, supporting their conclusion that he had been drugged. He reported the incident to the RSO and was later recommended for separation for cause based on two charges: 1) Conduct Unbecoming, for having had commercial sex in violation of Department policy; and 2) Dishonesty, for having reported his credit cards stolen, when he still had them in his possession. FSGB Case No. 2015-048.
- In one of the last cases filed in 2015, the employee, an Economic Officer, grieved the aftermath of the agency's 2009 suspension of his security clearance. In 2011 the Director of DS recommended that his clearance be revoked; however, the revocation process was never completed. Since 2009, the grievant has been assigned almost exclusively to a job working on maintenance of the Department's regulations publications, despite bidding on other jobs. Grievant was low-ranked in 2014 and was scheduled to be separated because his Time in Class was expiring. He contests the low ranking and separation, asserting that his assignments have not allowed him to demonstrate his potential. FSGB Case No. 2015-049.

Judicial Actions Involving Board Rulings

Three appeals of FSGB decisions were filed in the District Court for the District of Columbia in 2015:

- In May, Paul Fritch appealed the Board's decision in FSGB Case No. 2013-005. The circumstances of that case revolved around his transfer to the Organization for Security and Cooperation in Europe (OSCE) for four-and-a-half years, and reemployment by the Department of State. Mr. Fritch's district court appeal claims that the Department, affirmed by the Board decision, denied him benefits upon his return to which he was entitled by law, including promotion opportunities, housing expenses, lost contributions

to his Thrift Savings Plan account, and position seniority. A decision is pending.⁴

- In November, SharLyn Foo appealed the Board's decision in FSGB Case No. 2014-018, described above under financial cases resolved last year. The Board affirmed the Department's denial of a waiver of repayment of annuity payments in excess of \$300,000 deposited into Foo's deceased mother's account over more than a decade. A decision is pending.
- Also in November, La Rufus Mitchell filed an appeal of the Board's decision in FSGB Case No. 2014-003. Ms. Mitchell claims that the Department violated the Americans with Disabilities Act and the Rehabilitation Act when it separated her for not having passed the timed running test required for Diplomatic Security Agents. The Board had upheld the Department's decision. (See the case description under Separation cases, above, for greater detail.) A decision is pending.

In other cases:

- In an appeal filed by Gregory Picur, the district court vacated the Board's decision in FSGB Case No. 3013-031. Mr. Picur, a retired criminal investigator with USAID/OIG, appealed the agency's decision, upheld by the Board, to reduce his annuity payments based on the application of a cap on his special differential pay that had not actually been applied when his salary had been paid. The district court found that, regardless of whether the cap should have been applied, retroactive adjustments could not be made as part of the process of calculating his annuity. On remand, the Board has recently issued a decision in accord with the court's findings.
- The U.S. Court of Appeals for the District Court of Columbia Circuit upheld the district court's summary judgment decision in favor of the Department in *Richard Lubow, et al. v. United States Department of State, et al.* This case has been active for several years. Appellants had grieved the Department's

⁴ Paragraph revised July 13, 2016.

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.

- Decisions in appeals filed by Jeremy Yamin (involving attorney fees) and Joan Wadelton (involving reconstituted selection boards), discussed in the Board's 2014 Annual Report, are still pending.

Appeal to the Foreign Service Labor Relations Board (FSRLB)

- In October, the Department of State filed an appeal to the FSRLB of the Board's decision in the implementation dispute filed by AFSA in FSGB Case No. 2014-028. The FSGB found that the Department had violated negotiated Procedural Precepts when it failed to pay Meritorious Service Increases (MSIs) to members of the Foreign Service in 2013. The Department has alleged that the Board relied on erroneous facts and factual premises not in evidence, and disregarded the express terms of the collective bargaining agreement when it based its decision on past practice. (See Implementation Disputes, above, for greater detail.)

Respectfully submitted this 25th day of February, 2016.



Garber A. Davidson
Chairperson
Foreign Service Grievance Board

Attachment: Annual Report 2015 – Statistics

Annual Report 2015 – Statistics

A.	Total cases filed in 2015	59
B.	Types filed in 2015:	
	EER/OPF	18
	Financial	14
	Disability	0
	Discipline	12
	Separation	10
	Assignment	1
	Implementation Dispute	1
	Other	3
C.	Total cases resolved in 2015	55
D.	Types resolved in 2015:	
	EER/OPF	12
	Financial	10
	Disability	0
	Discipline	11
	Separation	16
	Assignment	1
	Implementation Dispute	2
	Other	3
E.	Dispositions of cases resolved in 2015:	
	Agency Decision Affirmed	18
	Agency Decision Reversed	4
	Partially Affirmed/Partially Reversed	4
	Settled/Withdrawn	21
	Dismissed	8
F.	Oral Hearings	0
G.	Mediations	5
H.	Grants of Interim Relief	14
I.	Average Time for disposition of a case, from time of filing to Board decision, withdrawal, or dismissal was 39 weeks.	
J.	There were 45 cases pending before the Board as of December 31, 2015.	