

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceedings
No. G-91-031-State-23

[Grievant]

Date: June 9, 1992

Grievant

ORDER ON DISCOVERY -
EXCISION

and

The Department of State

For the Foreign Service Grievance Board:

Presiding Member:

John **J.** McCarthy

Board Members:

Geraldine Sheehan

Special Assistant
to the Board:

Michael **J.** Gould

Representative for the Grievant:

Self

Representative for the Department:

Joanne **M.** Lishman,
Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

DISCOVERY ORDER

Having considered the grievant's interrogatories, dated March 26, 1992, the Department's objections, and grievant's motion to compel further answers, dated April 27, 1992, we make the following rulings.

Questions seeking to elicit information tending to show that [Name] directed abusive language and improper behavior toward grievant and others are disallowed in view of the agreement of the Department not to contest grievant's allegations that such behavior occurred. See [Grievant's] memorandum of March 14, 1992 to the Board, paragraphs 7, 8 and 9, and Lishman memorandum to the Board, dated March 20, 1992. However, interrogatories designed to show how [Name]'s behavior toward grievant accounted for any inaccuracy, omission, error, or falsely prejudicial information in the contested EER will be approved. In this regard, we take note of grievant's memorandum of March 23, 1992 to Ms. Lishman, explaining in what manner Mr. [Name]'s behavior was relevant.

Questions for [Name]

1-3. Concerning the interrogatories to [Name], we deny the grievant's motion to compel answers to 1, 2 and 3. It has not been demonstrated, nor is it apparent, how the information sought relates to the thrust of the grievance. However, we grant the motion as to parts of 1 and 2, namely, the questions concerning the actions taken by [Name] and [Name] at the time of the two incidents. These questions appear relevant to the EER statements concerning grievant's shared

responsibility for the conflict between her and [Name], her inability to do anything to resolve it, and the efforts of the rater and reviewer to mitigate the effects of the conflict.

4. Granted. The information sought is relevant to the reviewer's statement in the EER that he and [Name] did their best to mitigate the effects of the conflict between grievant and the other employee. The questions should be answered to the extent that full answers have not already been given in [Blank].

5. Denied as immaterial and, in any event, likely to be unduly repetitious of no. 4.

6-7. We fail to see how the information sought by #6 and 7 is material; we therefore will not require answers to those questions.

8. Denied.

9. Denied as immaterial.

10-12. Granted. Answer to no. 11 will be deemed sufficient if it provides a reasonable number of examples illustrating the behavior described in the interrogatory. 13. Denied. The interrogatory is too broad and is immaterial to the issues raised by the grievance.

[Name]

Unless grievant can show that [Name] is an employee of the State Department, we cannot compel the Department to provide answers to these interrogatories. Grievant is free to send questions to this witness or any other witness and to request the cooperation of the Department in locating witnesses.

Questions for [Name]

1-3. Questions I, 2 and 3 are denied.

4. Denied as immaterial and overbroad.

5. Granted as generally relevant to grievant's charge that lack of counseling kept her from achieving a higher level of performance.

6-7. We sustain the Department's objections to nos. 6 and 7.

8. Wilson has responded to no. 8.

9. The witness is required to answer no. 9 as to any occasions when he observed [Name] failing to recognize, or take action to protect grievant from, harassment by [Name].

10-13. Grievant is entitled to details concerning comments the witness has made about grievant's behavior toward others. The motion is granted as to questions Ia, II, 12 and 13. Answers will be deemed sufficient if they provide a reasonable number of illustrative incidents concerning behavior of grievant in the time periods specified.

Questions for [Name]

1-6. The motion is granted with respect to questions 1 through 6, but responses are required only with regard to the witness' actions. However, a description of each incident is not required, since grievant has related the incidents. We find these matters relevant in view of the review statement he signed, in which he assigned to grievant a share of the blame for difficulties growing out of an "unresolvable" personality conflict with another employee, and for the inability of the

two employees to do anything to resolve it. The issue is whether this was an accurate and fair criticism of the junior officer if, as grievant alleges, her rating and reviewing officers did little or nothing to resolve this serious problem. The witness, on the other hand, claims in the review statement that he and the rating officer did their best to mitigate the effects of the conflict.

7. Denied. The Department does not dispute allegations concerning [Name]'s behavior toward grievant and others. The witness' reaction to incidents not involving grievant is irrelevant and immaterial to the grievance issues.

8-9. Denied. We sustain the Department's objections.

10. These questions were answered in [Name]'s statement of April 29, 1992.

11. Denied as immaterial.

12. Granted. We find the questions relevant to criticisms in the review statement concerning grievant's problems in interpersonal relations and her supervision of FSNs.

13. Answered in [Name] statement of 4-29-92.

14. The questions are broad and likely to be burdensome, covering as they do day-to-day incidents. However, this interrogatory is allowed to the extent that the witness will be required to answer by giving specific examples rather than exhaustive descriptions of all incidents observed. See similar ruling on [Name] interrogatory no. 11.

15. Denied as immaterial.

16. Denied as repetitious of interrogatory 14. Granted as to questions 3 and 4 in light of grievant's allegation that [Name]'s harassment affected her own behavior. We find that the Department's objections are based on too narrow a view of the issues and of grievant's allegations regarding this area of the EER criticisms.

17. Granted as to 17(a) and (b); denied as to (c).

18. Granted as to (a) except with respect to problems with [Name]. The balance (b, c and d) are denied as repetitious. 19. Denied. This interrogatory covers allegations which the Department has agreed not to contest. See paragraphs 7, 8 and 9 of undisputed allegations.

20. Granted as to band c. The questions are relevant to criticism in the review statement implying equal fault. Denied as to a.

21. Granted as to d; a, band c are denied as immaterial. 22-

23. Denied as immaterial.

Questions for [Name]

_1-2. Denied as immaterial.

3. Granted as relevant to reviewer's statement in EER that he did his best to mitigate the effects of the conflict.

4. The Department stated it would send this interrogatory to the witness.

5. Denied as irrelevant. The opinion of the witness concerns the functioning of the GSO section, whereas the criticisms in the EER are directed at grievant's interpersonal

relations and performance of her supervisory responsibilities. Though the rater seems to comment on grievant's "managerial skills," in context her remarks relate to supervisory skills.

6. Denied as immaterial.

7. Granted. The question elicits details concerning a relevant matter -- the witness supports criticisms in the EER. 8. Granted, subject to the limitation that the witness need give only a reasonable number of examples.

* * * * *

In her memorandum of April 27, 1992, requesting the Board to compel the Department to answer her interrogatories, grievant questions what action the Board is authorized to take in the event the Department fails to comply with a discovery order. Since the regulations of the Board (sec. 903.9(d)) authorize the Board to take into account an agency's denial of access to records that are found to be relevant and material, we believe the Board may exercise similar authority if an agency refuses to comply with an order of the Board to provide answers to a grievant's interrogatories. This means that the Board may, in its discretion, draw factual inferences favorable to grievant with respect to the answers a witness might have furnished to such interrogatories.