

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between:

Grievant

and

The Department of State

Record of Proceedings
No.G-91-031-State-23
Date: July ;13, ;1993

ORDER -
EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

John J. McCarthy

Board Members:

Calvin C. Berlin
Wayne W. Sharp

Special Assistant
to the Board:

Cary Kassebaum

Representative for the Grievant:

Self

Representative for the Department

Joanne M. Lishman,
Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

ORDER

1. INTRODUCTION

On June 2, 1993, [grievant], filed a request with the Board to reopen her grievance and to reconsider its decision of May 20, 1993 on the basis of new evidence that, she says, was previously unavailable to her. Grievant alleges in support of her request that certain evidence she assumed to be in the Record of Proceedings (ROP) was, in fact, not in the record and was, therefore, not considered by the Board. The missing evidence consisted of cable traffic relating to her case and replies to interrogatories. She expected, after talking in 1991 with the special assistant to the Board who was assigned to the case, that such documents would automatically be routed to the Board and become part of the ROP. However, when she received the Inventory of Documents from the Board in December 1992, she found that none of the documents on which her case primarily rested was listed in the inventory.

Grievant further alleges that she then called the special assistant, and that he assured her that she had submitted sufficient items for the Board's perusal. Even so, she told him that if there were any doubt about the items she had identified she would submit any and all documentation. Since she was not asked to submit anything further, she assumed that what she had provided was sufficient.

Apparently, grievant was prompted to seek reconsideration when she found language in the Board's decision which referred to grievant's "indirect evidence" and noted her failure "to establish by a preponderance of probative

and credible evidence that the rating and reviewing officers showed bias in writing her EER."

II. DISCUSSION

A. The New Evidence

The Board may reconsider any decision upon presentation of newly discovered or previously unavailable material evidence. (Section 1106(9) of the Foreign Service Act of 1980, 22 U.S.C. 4136(9); section 910.1 of the Board's regulations, 22 CFR 910.1.) Reopening of a grievance after the Board issues its decision is thus permitted if a party presents new evidence that had not been considered by the Board but would have influenced the Board's determination had it been in the record, provided that the party could not have discovered the evidence prior to the decision by exercising reasonable diligence. We shall first determine whether the documents itemized by grievant were in the record and, if some were missing, why they were not placed in the record.

We find that, of the 39 documents listed by grievant as missing from the record before the Board, 21 were (and still are) in the ROP and 18 were not. Of the 18 not present, 14 are cables. The other four documents not in the ROP are notes of interviews by the grievance staff representative, Mr.

O'Herron. The only missing documents that contain substantive evidence are five of the cables and two sets of O'Herron's notes of interview. With regard to cables it should be noted, first, that cables related to a grievance are normally sent via the grievance channel (AGS channel) with confidential handling and restricted access and do not come to the Board without being directed to the Board specifically.

Discovery by interrogatories and other means of requesting information ("discovery") from another party to the grievance is initially a

matter between the parties (as it is in the Federal judicial system) and does not involve the Board, except to monitor deadlines or to rule on questions on which the parties disagree. Discovery requests and information given in response by the other party need not be submitted to the Board either before or after the exchange. In fact, the Board's "Grievance Time Limits", sent to grievants, states: "Responses to discovery requests are to be delivered to the requesting party within 20 days after receipt of the request, if possible." (Page 5).

Since the special assistants to the Board are familiar with discovery procedures in grievances and with the restrictions placed on access to cable traffic in the grievance channel, grievant's belief that all cables and interrogatories concerning her grievance were automatically routed to the Board must be based on a misunderstanding arising from her conversation with the special assistant in 1991. While the special assistants are undoubtedly careful to avoid acting as legal advisors to grievants, it is understandable that grievants might ask them to clarify matters of procedure. It is regrettable that grievant may have misinterpreted statements of a member of the Board's staff in her case.

Later, in December 1992 when grievant saw in the official Inventory of Documents that documents she assumed would automatically be routed to the Board and thus entered into the record were not there, she states she again talked with the special assistant and accepted his assurance that she "had submitted sufficient items for the Board's perusal."

The Board can give little credence to this version of a conversation grievant had with an experienced special assistant. Board personnel are conscious of the prohibition against ex parte communications between Board personnel and parties concerning the merits of a pending case, though this

does not apply to communications about the status of a case, or procedural matters. (22 CFR 910.2) Given the meticulous and detailed presentation of her case in all other respects, it is surprising to find that grievant chose to let the Board decide her case on a record that lacked "the evidence on which [she] had primarily based [her] conclusions." We believe it was incumbent on grievant to see to it that the record contained all evidence she wished the Board to consider, particularly when she believed that some of the documents she thought significant were not listed. ¹ Accordingly, we conclude that the documents listed by grievant as missing from the ROP cannot be considered "previously unavailable" evidence warranting reconsideration of the Board's decision.

Apparently grievant did not personally examine the ROP when she received the Inventory of Documents issued on December 17, 1992, though there was adequate time for her to do so before the Board issued its decision. She would have found that a substantial number of the documents she listed as missing are in the ROP, and that the O'Herron notes were not part of the record (since one of the parties must submit evidence if it is to be considered by the Board.) It is regrettable that due to misunderstanding grievant believes her case was decided by the Board without having before it the evidence she considers the most important. We will review the evidence to see whether it might have affected the Board's determination.

B. Materiality of the Evidence

In her request to reconsider the grievance, grievant cited parts of the Board's discussion and findings which, she apparently feels, tended to

¹ The Board memorandum transmitting the Inventory of Documents cautions the parties: "The inventory should be carefully reviewed to ensure that all parties have been served copies of documents entered into the Record of Proceedings."

discredit and devalue evidence she submitted to show her supervisor and the reviewing officer were biased in evaluating her performance. The Board characterized much of the bias evidence offered by grievant as "indirect evidence." This may be a source of grievant's assumption that the Board did not give any weight to this evidence because it consisted of her notes recording or summarizing the relevant portions of conversations she had with some of her witnesses. While, technically, this evidence was hearsay, it was described as "indirect evidence," not because it was hearsay, but because it was submitted to show that the rater and reviewer displayed bias in other matters, in other places, or at other times -- not involving the evaluation of grievant's performance. Hence, this evidence was called indirect because the factual conclusions it was offered to support depended upon inference derived from collateral circumstances. The opinion of the Board, thus, should not be read as rejecting grievant's notes as unworthy of belief, but rather as insufficient in light of all the evidence, to show the EER was infected with bias.

We have reviewed the "missing" evidence to see whether it might have affected the Board's decision on the grievance. The substantive evidence consists of the following documents as numbered by grievant in her request for reopening: 8, 10, 14, 20, 25, 33 and 35. We conclude that if this evidence had been in the record it would not have changed the Board's decision. While one of the seven statements commented that grievant's rating officer [name] was unfair and unreasonable in writing his, the witness's EER, and that he had problems with [name]'s supervision of him similar to those grievant related to him, he added that he had never met grievant and could not comment on grievant's relationship with [name] or [name]. The other witnesses, in sum, did not support grievant's allegation that her EER

contained false and inaccurate statements and omissions concerning her performance, accomplishments and potential and was affected by the bias of the rating officer. Indeed, most of the statements in those documents tend more to support the Department's position than grievant's on these issues. Thus, our evaluation of the evidence convinces us that had the evidence in question been before the Board at the time of the decision, the outcome would not have been different.

For the reasons stated the motion to reconsider is denied.