

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

Decision Chron
#2147
1247

In the Matter Between

~~██████████~~

Grievant

and

The Department of State

Record of Proceedings
No. G-91-032-State-24

Date: April 28, 1992

ORDER ON DISCOVERY
AND SCHEDULING

For the Foreign Service Grievance Board:

Presiding Member:

Mollie H. Bowers

Board Members:

Stanley J. Siegel
Calvin C. Berlin

Special Assistant
to the Board:

Michael J. Gould

Representative for the Grievant:

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Attorney

Representative for the Department:

Joanne M. Lishman,
Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

ORDER ON DISCOVERY AND SCHEDULING

In this consolidated grievance we address first grievant's motion to compel answers to certain interrogatories, the Department's objections thereto, and then scheduling the remaining submissions.

INTERROGATORIES.

Grievant [REDACTED] submitted his first interrogatories and request for production of documents to the Department on July 12, 1991. When the Department did not respond for more than a month, grievant submitted additional interrogatories on September 4, 1991. Pending interrogatories were either responded to or denied by the Department on December 10, 1991, after which grievant filed his motion to compel discovery in January of 1992. The motion included "follow-up" interrogatories.

On March 2, 1992, the Department denied 14 of grievant's then pending interrogatories and, two days later, filed its response to grievant's motion to compel, expanding on some of its March 2 objections. At that time, it agreed to permit grievant's counsel and the Board to read but not to keep copies of a confidential cable regarding U.S. policy on contacts [REDACTED]. (The Board read the cable on March 24, 1992 at its offices.) While the Board was finding its way through the several submissions, grievant filed his latest motion to compel on March 23, dropping some of his original requests for documents and supplementing his first justifications.

We consider the grievant's requests and the Department's objections in general and then by interrogatory number.

A. Grievant's request for sanctions. Grievant contends that the lateness of the Department's objections violates Board rules and that its objections therefore should be overruled.

On August 9, 1991, grievant filed a second grievance with the Board, which concerned his designation for selection out. In that filing, under "Prior Proceedings," he acknowledged that: "Proceedings in the grievances have been complicated because [REDACTED] began the grievance process promptly in the midst of events which, as it turned out, were continuing to occur." He then provided a chronology showing that he filed his first grievance with the Department in June 1990, amended it on July 27, 1990, and then "supplemented" it on October 23, 1990. In April 1991, he again amended the grievance before the Department to assert that his selection out was due to the erroneous IER, the subject of the original filing.

The Department, which had begun writing its decision in the first grievance, "[REDACTED]," labeled the April filing as "[REDACTED] II." On April 24, grievant amended the April 15 filing, then substituted for that a May 15 filing, which the Department referenced as "[REDACTED] III." In the wake of those filings, the Department issued three separate decisions, one on April 22, one on June 7 and the third on June 19, 1991.

Eventually, all three grievances reached the Board and we consolidated them in our order of October 1, 1991. In that same order we noted that the Department had assured the Board that it

was in the process of responding to grievant's interrogatories. Following that order, the parties mutually agreed on two ROP extensions, one in October and a second in December, 1991.

In view of the above chronology, the amendments and supplements to three cases, three agency decisions, and the number of interrogatories and potential respondents, there is no basis for sanctioning the Department.

B. Specific current interrogatories.

1. & 2. Number of State positions lost to FCS and number of State officers transferred to FCS. Relevant to the issue of an "unfocussed career." Timeliness is not a factor -- [REDACTED] is not grieving the 1979 transfers, he is citing the facts as evidence.

9. Was [REDACTED] briefed on inspector's finding re the consular section? Denied. We assume he was, but find the information irrelevant.

9b. Was [REDACTED] criticized in any [REDACTED] EER on him concerning [REDACTED] or the consular section? Denied - violation of section 604 of the Foreign Service Act.

10. Briefings of Ambassador [REDACTED] by inspectors. Denied. Assuming that the inspectors briefed the ambassador on all of the subjects of the inspection, the best evidence of the inspectors' views are in the IER and that portion of the report concerning the consular section.

11a, b and c. Did the ambassador ask grievant for his version of the [REDACTED] luncheon or did he believe there had been a

political dialog? Who reported the matter to the ambassador?
Denied. Irrelevant. Grievant's official version of the lunch is embodied in a contemporaneous memorandum he wrote to the regional security officer and the political section on the day of the lunch. According to grievant, he wrote the memorandum at the suggestion of the assistant regional security officer. [REDACTED] what was discussed, who reported the matter to the ambassador and what grievant may have said to the ambassador, are all irrelevant.

12. Did [REDACTED] allow grievant to reply "to the charges" before issuing written "reprimand" concerning the lunch?
Denied. Irrelevant. Since the Department has admitted there no official reprimand and [REDACTED] made sure it was not sent to Washington for inclusion in grievant's file, grievant had no regulatory right of reply before the DCM sent him the memorandum of December 11, 1989. In addition, grievant seems to have submitted his version of the facts in his memorandum noted above.

13. and 14. Was grievant required to take [REDACTED] language training before postings to [REDACTED] and [REDACTED]?
Denied. The Board will assume that such training was required, and will give that assumption due consideration.

C. Specific interrogatories from grievant's January 14, 1992 motion to compel.

4. All records of Department and post concerning [REDACTED].
Denied. Irrelevant. Grievant has not denied that he knew [REDACTED] was a [REDACTED] member when he invited her to lunch. Her

rank, her previous record and details of her visa applications are all irrelevant to the single issue involved, noted above.

5. All of the inspectors' notes and records pertaining to the inspection of the consular section and to the IER. It is incumbent on a rater to provide details sufficient to permit the ratee to identify with some certainty the criticisms leveled at him. To that extent, grievant has a right to question the inspectors concerning those IER statements he identifies on page 14 of his January 14 motion to compel. Interrogatories limited to those statements may be addressed to each inspector. To the extent the inspectors rely upon records, notes, and reports for their responses, they must attach copies of those documents to the responses to the interrogatories.

8. Written post policy [REDACTED] concerning contacts [REDACTED]. Relevant. Because Ambassador [REDACTED] was the President's designated contact [REDACTED] it is relevant to know what restrictions embassy personnel were under other than those noted in the cable noted above.

11. Written complaints concerning [REDACTED], [REDACTED] FSN, from January 1, 1998 to the present. Denied. The issue is whether grievant deferred [REDACTED] evaluation because "an accurate evaluation would have been unflattering." If grievant perceived the situation in that way, he, as [REDACTED] supervisor and rating officer, must have known of shortcomings in [REDACTED] performance as well as the complaints of others.

15. a, b, c, d. Cables praising grievant's performance in various areas. Denied. Irrelevant. Grievant claims that the inspectors ignored or overlooked his accomplishments, of which the cables are prime evidence. The inspectors stated in the IER that it was written to balance grievant's laudatory evaluation by ██████████ the previous DCM. This is one of the bases authorized in 3 FAM 521.3(b) for writing IERs. The Department contends that an IER written to balance an overly laudatory EER need not itself be balanced. According to the OIG handbook instructions for preparing IERs, a review statement by the inspection team leader is mandatory to confirm that the IER "complies with requirements for thoroughness, objectivity, and soundness." Grievant claims that because his IER contains no reference to the positive aspects of his performance at post, it is not thorough, objective or sound.

"Thorough, objective and sound" does not require "balance" in the unusual circumstance where an IER is written only to serve as a balance to a post EER already in grievant's file. The two documents were presumably read by the selection board and the PSB, who would have noted the inspectors' reason for writing the IER. The handbook requirement did not require that the inspector repeat the praise of the EER it was "balancing," and did not require that the inspector seek out praiseworthy elements of grievant's performance.

16. Department written guidance describing easier procedure for approval of ████████ NIV applications or waivers.

Relevant. The IER criticized grievant for the handling of visas for [REDACTED] applicants.

18. Record of Inspector [REDACTED] consular inspections from December 1, 1988 to December 1, 1989. Denied. Grievant asks for IERs which [REDACTED] may have written during other inspections. That would violate section 604 of the Foreign Service Act. Grievant's mere assertion that a colleague told him that [REDACTED] had a reputation for being unduly critical in [REDACTED] inspections is not a sufficient basis for permitting the wide-ranging inquiry posed by the questions in this interrogatory.

20. Questions concerning [REDACTED]'s status in the [REDACTED] whether she had received a waiver of ineligibility for a visa, etc. Denied. Immaterial to the issue of whether grievant violated U.S. policy when he invited her to lunch. The policy cable referred to in the introductory section of this order does not differentiate [REDACTED] members based on individual status, eligibility for non-immigrant visas or other criteria.

22. Were the two FSNs in the consular section downgraded in the 1970s or 1980s? Denied. Immaterial to the issue of whether grievant had delayed the evaluation for [REDACTED]

25. (Revised). To DCM [REDACTED]: a. 1) and 2) concerning the luncheon episode. Relevant. 3) Sweatshirt episode(s). Relevant. 4) [REDACTED] official. Relevant.

To Amb. [REDACTED] (b)1) Lunch with [REDACTED] Relevant.
2) Cable re Amcit matter. Denied. Not relevant to the IER.

To [REDACTED] 1.a and b. Same cable as 2) above.

Denied.

28. Concerning whether grievant submitted representation voucher for [REDACTED] lunch. Denied. Immaterial.

30. [REDACTED] "saved" rate of pay. Denied. Immaterial.

Follow-up questions to Mr. [REDACTED]

11. Concerning annotations and handling of NIV applications. Relevant and material to rebut IER statement that grievant was guilty of negligent handling.

12. Only 12 h. is relevant; 12 a. through g. are denied.

13. a. through c. Relevant to IER comment that grievant was the source of tension.

14. Instruction through copies of regulations. Relevant to IER comments on lack of training.

To [REDACTED]

17, 18, and 19. All relevant to criticisms in IER.

To [REDACTED]

1 through 6c. Relevant to question of who was responsible for tension in the office.

7a. through j. Denied. Irrelevant to the single issue of whether grievant invited a [REDACTED] official to lunch, which he has admitted in writing.

To [REDACTED]

See ruling above for interrogatories to [REDACTED] which these duplicate.

SCHEDULING.

1. The Department has 25 days from receipt of this order to respond to the indicated interrogatories.

2. Grievant will have 15 days after receiving the Department's answers to submit his arguments.

3. Department will have 10 days after receipt of grievant's submission to reply.

For the Foreign Service Grievance Board.

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