BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{Grievant}

and

The Department of State

Record of Proceedings
No. G-91-048-State-38

Date: April 15, 1992

ORDER ON
MOTION TO COMPEL
- EXCISION

For the Foreign Service Grievance Board:

Presiding Member: Leroy Merrifield

Board Members: Paul A. Modic
Marilyn Johnson

Special Assistant
to the Board: Michael J. Gould

Representative for the Grievant:

Bridget R. Mugane,
Attorney

Representative for the Department:

Joanne M. Lishman,
Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

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ORDER ON MOTION TO COMPEL

On April 2, 1992 grievant filed a Motion to Compel Discovery Responses (II) which refers to a discovery request submitted on November 5, 1991. He states that the Department had not previously responded or objected to these, despite a request in his March 13 response to two Department memoranda that he do so and that he did not move to compel on this issue earlier because of the difficulty the parties had in "understanding the import" of the Board's first ruling on jurisdiction. He explains that this discovery request had not been included in his March 10 amended motion to compel because clarification of the Board's ruling was not issued until March 31.

The Board's February 21 interim decision on jurisdiction of G-91-048-38 found that section 1104 (a) of the Foreign Affairs Act of *1980*, which bars a grievance not filed within three years after the occurrence(s) giving rise to it, applied to certain allegations concerning the pattern of grievant's assignments dating back to the 1960s. It thus declined to take jurisdiction of those barred by the three-year limit.

In response to requests from the parties for clarification of this ruling, the Board issued a second interim decision on jurisdiction on March 31. It reaffirmed its earlier decision and enumerated the issues in the consolidated grievance. The sixth issuer grievant's pattern of assignments, is the one on which he now requests additional discovery.

Because of the complexity of the record and developments following various motions to compel discovery which grievant had filed, the Board requested, on February 28, that grievant review his file and determine what discovery items were still required. It asked that he file a new, consolidated motion which would "overtake and supercede the previous motions."

Grievant responded with a new motion to compel, amended to March 10, which withdrew three of the discovery requests included in his October 7, 1991 motion and confirmed the remaining eleven. The Board ruled on March 31 that all issues for discovery were time barred except for interrogatory number 10, relative to the processing of a 1989 Group Superior Honor Award. It ordered the Department to respond to that request within two weeks and set the date for submission of grievant's closing brief as two weeks from the date of the Department's response.

On April 2 grievant filed the Motion to Compel Discovery Responses (II), the one at issue here, which refers to requests in a November 5 motion. The Department's response of April 3 urges the Board to deny this motion as untimely filed. It argues that the discovery request has been overtaken and superceded by grievant's March 10 amended motion. It also objects to a request in the motion for postponement of the due date for grievant's closing brief until after the Board has issued a ruling on the motion and on consolidating a third grievance. As in its argument against consolidation of

grievant's first two grievances, the Department asserts that granting grievant's April 2 requests would result in prolongation of the ROP schedule and of grievant's prescriptive relief.

We agree with the Department's argument on both requests. Grievant placed a footnote in his March 10 amended motion which asserts that the background section of the request does not "supersede grievant's prior statements of his grievance and requests for remedies and does not limit or alter them." He also asserts that the discovery request was timely filed on November 5, 1991 and can be raised now because of the Department's lack of response and questions about the Board's initial ruling on jurisdiction. We find that it should have been included in his consolidated March 10 Motion to Compel.

In its February 21 interim decision on jurisdiction the Board stated that it would not take jurisdiction of grievant's allegations concerning the pattern of assignments which are barred under the three-year rule. It did not address those issues within the three-year period, which should have been included in grievant's consolidated motion to compel. Despite these statements, we believe that grievant's Motion to Compel amended to March 10 should have included all his discovery requests at that time. The Board's February 28 memorandum requested that grievant "review his file and determine what discovery items are still required" and file a consolidated motion which "will overtake and supercede the previous motions."

In light of the understanding of both the Board and the Department that grievant's March 10 Motion to Compel included all preceding discovery requests which were still relevant and outstanding, we are unable to accede to grievant's request to compel discovery on interrogatories in his November 5, 1991 motion.

We note a statement in the final paragraph of grievant's April 2 motion that he reserves the right to depose officials responding to certain discovery requests and to depose other officials, as well, and to file additional discovery requests. We are conscious of grievant's rights to due process and his desire to buttress his argument with additional evidence, but we are also conscious of the Department's concern about continuation of the prescriptive relief granted to grievant pending resolution of this grievance.

Grievant's motion to compel the Department to respond to further discovery requests is denied. Grievant shall submit his closing brief prior to close of business April 24, 1992.