

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████  
Grievant

and

Department of State

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Record of Proceedings  
Case No. 98-087

Date: June 13, 2000

**ORDER**

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Margery F. Gootnick

Board Members:

Gail P. Scott  
Caroline V. Meirs

Senior Advisor:

Barnett Chessin

Representative for the Grievant:

Self

Representative for the Department:

Joanne M. Lishman  
Director  
Grievance Staff

Employee Exclusive Representative:

American Foreign Service  
Association

## ORDER

### I. ISSUE

On April 22, 1999, ██████████, an FS-03 employee with the Department of State (Department/agency) filed a motion with the Board to compel the Department to respond to several discovery requests he filed on December 15, 1998, December 16, 1998, and April 22, 1999. The Department denied all but one of the requests on the basis that the information sought was protected by the Privacy Act, privileged, repetitive, irrelevant or immaterial. The Department has requested that the Board dismiss the Motion to Compel as untimely filed.

### II. BACKGROUND

On May 22, 1998<sup>1</sup>, ██████████ filed a grievance with the agency in which he alleged that the EERs prepared for the period August 28, 1994 to April 15, 1995 and April 16, 1995 to April 15, 1996, from ██████████, are inaccurate, falsely prejudicial, show errors of omission, and contain inadmissible and vague statements. ██████████ contends that some of these criticisms and errors resulted from the rater's and one of his reviewers' <sup>2</sup> biases

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<sup>1</sup> At the request of the Department, grievant submitted follow up, clarifying submissions on July 27, 1998, and July 28, 1998.

<sup>2</sup> ██████████ served as the rater for both EERs; ██████████ served as reviewer for the contested 94-95 EER.

against his sexual orientation. He also “reserved the right to grieve . . . in the future” his failure to receive a required EER for the period April 16, 1996 to August 30, 1996.

As relief, ██████ requested that the negative comments in the EERs be removed, that the error of omission regarding his contribution to the successful initiative to liberalize ██████ visa policy be corrected, and that the amended file be reviewed by the 1995, 1996 and 1997 selection boards. In the alternative he requested: (a) expungement of the 1994-1995 EER; (b) another year of Time-in-Class (TIC); (c) removal of the inadmissible and “ambiguous” comments from the 1995-1996 EER; (d) correction of the omission mentioned above; (e) review of the amended file by the 1996 and 1997 selection boards; and (f) other relief as may be just and proper.

As a separate matter, citing 3 FAM 4426.1(b)<sup>3</sup> in his agency-level grievance, ██████ requested a copy of a cable from ██████ to the Department which he alleges caused his file to be referred to the Bureau of Diplomatic Security in August 1994, as well as the Department’s response. He stated that he needed this information to determine whether his reviewer for the 1994-1995 EER, ██████, had any negative opinion regarding his sexual orientation. He also requested that the Department provide copies of relevant email messages and explain why no State Department regional psychiatrist was sent to ██████ during his tour.

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<sup>3</sup> Right of grievants to access certain agency records during the pendency of the agency level grievance.

On July 27, 1998, the grievant renewed his requests for agency records and information. On July 28, 1998, the agency responded, stating that while there was no provision for grievants to file discovery requests at the agency level, it would nevertheless address the three requests for information. It informed grievant that it had contacted the office in Diplomatic Security responsible for maintaining and securing files and that this office could find no cable from [REDACTED] dated July/August 1994 with information relating to him. The agency responded that it could not obtain copies of email messages regarding the cable he mentioned. In addition, the agency stated that it found the request relating to the psychiatrist to have no relevancy to his grievance.

On September 30, 1998, the agency denied the grievance in greater part but did provide relief in the form of a four-and-one-half-month time-in-class (TIC) extension, because it found procedural error in the lack of an interim employee performance report for the period April 16, 1996 to August 30, 1996.

Grievant appealed to the Board on November 25, 1998, claiming that the agency decision was erroneous. He renewed his request for relief as originally presented to the agency, and noted his intention to submit discovery requests and a supplemental submission. With respect to the

agency decision regarding the missing EER, he requested “additional relief above and beyond merely extending my single and multi-class TIC . . .”

On December 15, 1998, grievant filed 12 discovery requests,<sup>4</sup> followed by 14<sup>5</sup> on December 16, 1998. On March 19, 1999, the Department provided grievant a Department notice in partial compliance with one of the December 15, 1998 requests, but rejected all others.

On April 6, 1999, the grievant informed the Board that he received the agency’s March 19, 1999 response on April 5, 1999, and would submit a formal Motion to Compel shortly.

In the interim, in a letter dated April 22, 1999, a copy of which was received by the Board on April 27, 1999, ██████ submitted additional discovery requests to the agency. On this same date, he filed, with the Board, a request for an extension of time in which to file his Motion to Compel until May 3, 1999 - citing technical difficulties with a safe which contained documentation necessary to prepare his Motion. ██████ also advised the Board that he might be able to submit the Motion to Compel earlier, noting that the agency required more than 20 days to prepare its initial response,<sup>6</sup> he expressed his hope that the Board would “extend the

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<sup>4</sup> Grievant labeled 12 requests but there are several subparts. Two of the requests were labeled no.4.

<sup>5</sup> Grievant’s numbering indicates 14. However, he mislabeled the question following number 12 as 14. In addition there are several subparts.

<sup>6</sup> In accordance with Foreign Service Grievance Board Policies and Procedures Regarding Discovery and Grievance Time Guidelines, responses to discovery requests are to be delivered to the requesting party within 20 days after receipt of the request, if possible. If full response is not possible within that time, the responding party will acknowledge receipt of the request within 10 days and at the same time propose an alternate date for full

same courtesy to me.” Before the Department could respond to the April 22, 1999, follow-up discovery requests, and request for an extension, in another letter dated April 22, 1999, received by the Board on April 27, 1999, ██████ filed this Motion to Compel response to the discovery requests submitted in December and April 22, 1999. Grievant stated that based on the agency’s negative response to the requests filed on December 15 and 16, 1998, he had no basis to believe that the agency would comply with the follow up requests dated April 22, 1999, therefore he thought it made “the most sense just to go straight to the Motion to Compel response right now.”

In a letter dated April 26, 1999, and received by the Board on April 29, 1999, the agency objected to grievant’s April 22, 1999, extension request, stating that under the Board’s rules for discovery he should have filed his Motion to Compel on April 15, 1999, thus his request coming after this date, to extend time in which to file the Motion To Compel should be denied. The agency argued further that the request was internally inconsistent.

In a letter dated April 28, 1999, the agency requested the Board to deny the Motion to Compel as untimely filed, essentially reiterating the arguments it made when objecting to the extension request. The agency

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response. If a party objects to all or any part of the discovery request, a written statement of the specific reasons the requested information cannot or should not be furnished shall be given to the requesting party within 20 days. Extension of a deadline must be requested of the board or agreed to by the parties. There is no evidence in the record to suggest that the agency requested an extension. The agency’s response, therefore, was due o/a January 5, 1999.

questioned the reasons cited in the extension request, pointing out that the request for an extension until May 3 was overtaken by the actual filing of the Motion to Compel on April 22, 1999. In this same letter the agency rejected the April 22, 1999, discovery requests, stating that they were repetitive to the ones it responded to in its March 19, 1999, decision and untimely filed under the Board's rules for discovery.

On June 2, 1999, grievant responded to the agency's April 28, 1999, letter, which he states he received May 28, 1999 after a TDY in [REDACTED]. On December 23, 1999, grievant submitted a follow up to his pending Motion to Compel in which he challenged the "privileged information" argument the agency raised with respect to the rater in its March 19, 1999, response. On January 26, 2000, grievant submitted further comment for attachment to the pending Motion to Compel.

### **III. POSITIONS OF THE PARTIES, DISCUSSION AND FINDINGS**

In view of the fact that neither party has adhered to the Board's time limits for discovery, and because of the time involved in addressing this matter, the Board accepts this Motion to Compel.

By way of context, the Board notes the broad discretionary authority it possesses in the areas of discovery, as well as the significant rights of access to materials granted to grievants. See FSGB No. 96-083 (Order dated November 24, 1997). When addressing discovery issues, the Board is not constrained by the Federal Rules of Civil Procedure, although the rules may

provide helpful guidance. See FSGB No. 93-049 (Order dated November 15, 1993); FSGB No. 92-001 (Order dated April 6, 1993) and FSGB 96-083. Nor is the Board limited by legal rules of evidence, although these too, may guide Board practice. In ruling on discovery requests, the Board will recognize asserted privileges from disclosure in appropriate cases. In general, only non-privileged information that is relevant and material to the issues presented in a grievance may be discovered. Relevant and material information is that which tends to prove or disprove a fact that is of consequence, which may affect the disposition of a grievance.<sup>7</sup> The Board's statutory authority to compel disclosure is independent of the access rights available to employees under the Freedom of Information Act (FOIA) and the Privacy Act.

Under Section 1108(b) of the Foreign Service Act, and 22 CFR 903.9, the Board has access to, and may direct disclosure to grievants of, any relevant and material agency records, subject only to limitations where the foreign policy or national security of the United States would be adversely affected or disclosure is prohibited by law. In addition, section 604 of the FSA and the Privacy Act, provide that certain otherwise protected governmental records relating to a member of the Foreign Service shall be disclosed upon written request by that member.

Finally, 22 CFR 903.6 states that each party shall be entitled to serve interrogatories upon another party, and have such interrogatories answered

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<sup>7</sup> Foreign Service Grievance Board Policies and Procedures Regarding Discovery

by the other party unless the Board finds such interrogatories irrelevant, immaterial, or unduly repetitive.

With this framework in mind, we turn to the Motion To Compel. What follows is a statement of each of the denied requests dated December 15 and 16, 1998, followed immediately by the grievant's position as contained in these requests and the Motion to Compel, the Department's position as contained in its March 19, 1999 response, and the Board's analysis and decision. The follow up discovery requests dated April 22, 1999, will be discussed separately.

#### **Discovery Request dated December 15, 1998**

**No. 1.** I request a copy of the cable which responded to [REDACTED] [REDACTED]. I also request response of [REDACTED] to the following interrogatories, after reviewing the documents attached at Tab 1:<sup>8</sup>

Question: Do you recognize or recall this cable from [REDACTED], and the case file control sheet showing that you reviewed my security file 04 August, 1994?

Question: If so, what was the response of the Department of State to that cable? Is a copy available, or where could one be located? Approximately when would it have been sent out?

Question: If not, what response would you have recommended?

Question: During your tour in [REDACTED], did you ever have a similar inquiry from a post or other State Department organization? What were the responses?

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<sup>8</sup> [REDACTED] attached a copy of [REDACTED] and a copy of the Bureau of Diplomatic Security's Case File Control Sheet to his request which showed that his security file was referred to [REDACTED] on August 5, 1994. The cable went out under the name of [REDACTED], grievant's reviewer for the 94-95 EER.

Question: Are any written statements or guidance on the subjects described in [REDACTED] available? May I please have a copy?

[REDACTED] states that this request concerns the documentary proof of his allegation that, at least in part, some of the negative terms in his EER stem from bias with respect to his sexual orientation. He argues that the issue is whether the Consul General sent a cable to the Department claiming that he was a homosexual security risk, based on his showing of a G-rated movie by a transvestite disco singer at his home, and cites this incident as proof of a discriminatory attitude on the part of post management. He states further that in its decision, the agency denied every factual allegation he had made, even going so far as to quote in its decision the statement of the Consul General, denying any knowledge of a telegram sent to Washington in early August 1994. He states that his discovery request concerns the response to that cable which was also discussed in the Consul General's statement. He contends that his copy of the cable, "the very document whose existence the agency denies," conclusively proves that the Consul General is not telling the truth and casts doubt on everything he said in his statement; as well as providing reasonable grounds to expunge his review statement and the rating officer's statement.

The Department denied this request. It stated that there were no security issues in his grievance and thus the request was not relevant and material to the grievance.

Pursuant to Section 1108(b)(1)(A) of the Foreign Service Act, as implemented by 22 CFR 903. 9, the Board determines that the cable responding to [REDACTED] and guidance or written instructions on the subject matter of the cable may be relevant and material to the grievance and that this information should be forwarded to grievant. If the agency contends that the release of this information is not permitted, pursuant to 22 CFR 903.9(b)(3) the Secretary of State or the Deputy Secretary of State must personally certify in writing to the Board that disclosure would adversely affect the foreign policy or national security of the U.S. or is prohibited by law.

These two requests are directly related to grievant's allegation that the criticisms and errors in the two EERs resulted in part from management's, specifically [REDACTED] and [REDACTED], bias against his sexual orientation. First, in his grievance, in support of this allegation, grievant cited, among other examples, a luncheon at his home which he thinks led to an investigation by Diplomatic Security regarding his sexual orientation. Second, when grievant filed the agency level grievance, he requested that the agency obtain the cables on his behalf. He explained at that time that he needed the outgoing and incoming cables in order to determine if [REDACTED] had a problem with his sexual orientation. The agency refused to provide other information that grievant had requested on the basis that it was irrelevant; however, it attempted to obtain the cables, demonstrating the

relevancy of this requested information to the issue raised in his grievance. Finally, when addressing the issue of sexual orientation bias in its decision letter, the Department queried several witnesses regarding the cable. The Consul General, [REDACTED], under whose name the cable was sent to the Department, responded that the allegation was “preposterous.”

The questions grievant proposes for [REDACTED], a Foreign Service Officer presently assigned to another post as [REDACTED] are not to be answered. We have already instructed the agency to provide a copy of the cable responding to [REDACTED] and any guidance or written instructions. The other questions he poses are not relevant or material to the grievance. [REDACTED] probable response to the outgoing cable and her possible knowledge of others have no relation to grievant’s assertion that management officials at [REDACTED] were biased.

**Request No. 2 (as modified in the Motion to Compel).** I request access by appointment to review the following files in ARA/BSC (formerly ARA/BR) for the periods indicated:

- Consular and visa management files for [REDACTED] (1991-98)
- Consular and visa management files for [REDACTED] (countrywide) (1991-98)
- Consular and visa management files for [REDACTED] (1988-1998}
- Consular and visa management files for [REDACTED] (1989-1998)

Worldwide statistics for the top ten NIV-processing posts for the period 1993-98. For each post, I would like the following: Post, total NIV cases processed, total issuances and total refusals (Issuances and refusals should add up to total NIV cases processed.). In the alternative, I request complete copies. Basically, I would like to obtain copies of official communications documenting the decision to change the validity of U.S. visas effective July 1994, and the warnings that no additional resources would be provided . . .

To justify this request, grievant explained that a key issue in this grievance is the “insanity” and “unreasonableness” of the workload, taking into account that there would be no additional resources provided to support the visa reciprocity initiative. A second issue, he states, which justifies going back to 1991, is the “no documents” policy at ██████████ which he states is incorrectly attributed to him. He states that he fully supported that policy for the reasons it was initially implemented at post prior to his arrival: it improved the overall decision-making processes and was far more efficient. He states that he needs copies of official communications (e.g., cables) to document this fact, because his claims alone are not being believed.

Grievant states further that as the Department favorably described ██████████ performance in many years of consular service, he has the right to comment on the accuracy of that description. Since ██████████ Desk records for the relevant time period are no longer kept at the ██████████ Desk, all he requests is access by appointment at the records facility. He complains that the agency summarily denied everything by simply claiming that the insanity of the workload was a not a legitimate topic for his grievance.

The Department argues that the “topics” mentioned by grievant as the reasons for needing the material, i.e. to demonstrate the “insanity and unreasonableness of the workload” and to elucidate a certain policy concerning visa record keeping are not related to any issues in the grievance, and declined to respond. It also advised grievant that discovery does not

require a responding party to compile statistics or undertake any other research.

The Board denies this request. One of the issues raised in the grievance is the general allegation that the workload and resources available to post were not taken into account when preparing grievant's EER, resulting in falsely prejudicial comments in the EER. However, the Board finds that there is sufficient information on record concerning the new visa policy and its impact on the workload and post's limited resources,<sup>9</sup> and we see no merit or relevancy in further pursuing this issue.

Regarding the "no documents" policy, both the rater, [REDACTED] and [REDACTED] predecessor, whom grievant requested the Department to contact on this point, acknowledge that some form of the policy was a hold over from [REDACTED] tour as section chief. The record sufficiently documents this point, and any additional discovery on this issue would serve no useful purpose in our judgment.

**Request No. 3** I request a copy of all complaints and negative statements of any type regarding the management or conduct of [REDACTED] in [REDACTED] (1988-91), [REDACTED] (1991-94) and [REDACTED]

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<sup>9</sup> Under "Special Circumstances Influencing the Work Program" both EERs describe how understaffed the NIV section is, the increase in workload and how the section has one of the highest case per officer workloads in the world. The reviewer for the 94-95 EER sets the background for his review by describing the effect of visa policy changes on the workload of the understaffed section. See also statements by [REDACTED] Deputy Principal Officer, [REDACTED] and [REDACTED]. In addition a communication from the Assistant Secretary for Consular Affairs commended post for agreeing to shoulder a much greater workload while the more restrictive schedule was in place.

██████████ (1994-97). This includes grievances, administrative actions, sexual harassment complaints, etc., as well as his own EERs.

Grievant states that working with ██████████ was a totally horrible experience, and that he was not the only member of the Foreign Service who suffered such an experience. He states that the agency simply does not believe him when he makes such a claim, therefore he needs this information to document it, and it is otherwise not available to him.

The agency declined this request on the basis that it has no obligation to do research in response to discovery. Further, it found that the requests were not directed at any contested issue in the grievance, since they did not address the criticisms of his performance as found in the EERs at issue. Finally, it stated that all of the material sought is protected by the confidentiality requirements of Section 604 of the Foreign Service Act of 1980 and the Privacy Act.

The Board denies this request. It is irrelevant and immaterial, as it does not corroborate any issue central to the grievance. The Board understands that it is grievant's intent to demonstrate a past practice of negative management practices by the rater. However, the fact that others might have had difficulty with the rater has no bearing on grievant's assertions that he was the subject of sexual orientation bias, or that the criticisms of his performance in his EER are invalid.

**No. 4(a)** I also request a list of all persons who served in [REDACTED] [REDACTED] from 1991 to 1994, and in [REDACTED] from 1988 to 1991.

**No. 4(b)** I request a copy of all (other) grievances filed out of [REDACTED] [REDACTED] regarding situations arising during the period September, 1993 to August, 1996.

Regarding 4(a), grievant states that the Department of State has cited in its decision [REDACTED] 22+ years of consular experience. Accordingly, he states that he has the right to impeach that citation. It is his understanding that [REDACTED] had several serious difficulties in his previous posts, a fact which he states the Department conveniently ignored when assigning him to [REDACTED]. He stresses that he needs this information to serve as detailed evidence of the grievant's contention that, in [REDACTED] during his assignment, "[REDACTED] was a verb. Regarding No. 4(b), [REDACTED] states that the information requested should help to clarify how "insane" everything was during that time.

In his Motion to Compel grievant states that No.4 in general addresses a similar situation as described in No. 3-- both the performance of one of the witnesses, [REDACTED] who adversely commented upon his performance, and the overall atmosphere at post. He states that it will become clear upon reviewing this information that the absence of any sort of consistent policies (outside his office) caused significant and substantial unnecessary stress which adversely affected the overall work environment. He stated that he has a Top Secret Security clearance, notwithstanding [REDACTED] 1994

“calumny,” so there would be no difficulty in arranging for him to utilize this information, name-deleted if necessary.

**Regarding 4 (a)** The agency declined to release this information stating that, even if grievant were to prove that [REDACTED] is considered by some to be a poor manager, this would not shed light on the subject of his grievance, which is the validity of the criticisms of his performance as described in his EERs. Regarding 4(b) the agency states that grievant has not explained how his reason for needing this information—that it should help to clarify how insane everything was during that time— relates to the issues of his grievance. Further, it pointed out, Section 604 of the 1980 Foreign Service Act guarantees the confidentiality of grievances, which precludes disclosure.

The Board denies this request. Neither the information that grievant seeks (a list of personnel from different posts and grievances filed) nor its intended use (to impeach the performance of the rater) is relevant to the issues raised in his grievance.

**No. 5** [REDACTED], in his statement (page 35 of the agency decision), states that I posed for “a large photo of [REDACTED] with his friend in full regalia.” [REDACTED] statement implies that such a photograph was published in newspapers. I request a copy of that photograph.

**No. 6** [REDACTED], in his statement (page 11 of the agency decision) states that “a former Foreign Minister and Ambassador to the United States who was so incensed that he wrote an irate letter of complaint which was published in [REDACTED].” I request a copy of that letter.

Grievant states that this photograph may be very difficult to produce, since it does not exist. Nevertheless, as the Department specifically cited it in its decision, he requests proof that this evidence actually exists. Grievant states that he has no recollection of a letter being published in [REDACTED], though a former Foreign Minister did present an extremely vicious complaint to the Consulate General about the non-immigrant visa services. The complaint, he contends, focused on questions found on the non-immigrant visa application form, not on the operations of the section. Grievant states that as the OF-156 is designed in Washington, not by the post, [REDACTED] attribution to him of the source of the complaint is not accurate. In the alternative he moves that the particular “evidence” be removed from consideration. If the information is not “relevant and material” to the grievance, he then argues that the agency should not have discussed it in its decision.

The Department states that it does not have a copy of the photo or the letter, and found them in any case to be irrelevant to the grievance since they were not mentioned in the EERs at issue. It commented further that the photo and letter are only mentioned in correspondence between [REDACTED] [REDACTED] and the grievance staff and discovery does not extend to the Grievance staff’s investigation of the grievance.

The Board denies this request. Discovery extends to the production of relevant documents or other significant information in the possession or

control of the agency. The agency states that it does not have a copy of these documents, and we have no reason to doubt these assertions.

**No. 7** (withdrawn)

**No. 8** I request the opportunity to review the visa office computerized file system (at least formerly known as VICTARS) to obtain a file under the name [REDACTED]

Grievant states that this is a specific case that prompted a very vicious response from [REDACTED], which was fully justified, except that he was entirely blameless. He states that the case had been mishandled by others for over ten years, at least once by [REDACTED]. Only grievant was able to get the Department, Embassy [REDACTED] and Embassy [REDACTED] to make a final decision that allowed everyone to move on. He argues that the Department is using general statements against him while denying him the opportunity to look at the record of a reasonably specific case. He contends that the Department's reliance on the "confidentiality" provisions related to visa records denies him the opportunity to defend himself. He compels response, under appropriate safeguards to preserve the visa applicant's confidentiality, so that he might present his case.

The Department states that even if it were true that grievant resolved the case, this has no bearing on the issues in the grievance. The agency also argues that it cannot put visa case files into the record, as they are confidential under "our" law.

The Board denies this request. It is not relevant or material. There is no mention of this case in the record. [REDACTED] does not address this case either in his review or in the clarifying statement that accompanied the Department's March 19, 1999, decision. Thus, we can find no relevancy in allowing grievant to access the computerized file system for the purpose of obtaining a file which will neither substantiate nor disprove any fact that might affect the disposition of the grievance.

**No. 9** The Department has acknowledged that an EER was required but not prepared for the period 16APR-30AUG96, with [REDACTED] as rating officer and [REDACTED] as reviewing officer. I specifically brought this fact to the Department's attention 22MAY98, as background. The Department on its own initiative took what it stated is appropriate action. The following questions are addressed to an appropriate Department official.

Why did the Department consent to [REDACTED] retirement when he had not prepared all required EERs? In the almost seven months since I reminded the Department that a required EER was not prepared by [REDACTED], nor reviewed by [REDACTED], thus being "late," I would like to know what administrative or disciplinary actions have been considered with respect to [REDACTED] related to this matter. Have any final decisions been made? What about with respect to the review panel chairperson ([REDACTED]) or the Administrative Officer ([REDACTED])? Are any deletions still pending?

**No. 10.** [REDACTED] blames an unnamed TDY secretary for not finalizing the EER in question before he retired. Please provide information regarding all TDY secretarial assignments to [REDACTED] during FY-97.

Grievant argues that he is seeking to prove that [REDACTED] refusal (or failure) to provide an EER for the period April 16-August 30, 1996, was not a simple oversight; rather, it was a deliberate policy decision by post and post management. He states that the Director General himself has stated that

persons responsible for “late” EERs will be sanctioned. Since the EER was never prepared, at a minimum, it would be considered late. If the agency refuses to respond to this request he will consider that the agency deliberately decided not to provide an EER.

The Department states that if the information were to exist, it would be protected by the Privacy Act. In addition, the Department points out, it has granted relief in this matter by extending grievant’s maximum time in class (TIC) by 4-1/2 months, the length of the unevaluated period. His questions, thus do not address any pending issues in the grievance, and need not be answered

The Board denies the requests. They are irrelevant and immaterial. The Department in its response acknowledges that the EER was not filed and proposed a remedy. Grievant in his appeal claims that the remedy is insufficient and requests additional relief above and beyond merely extending his single and multi-class TIC. The issue before this Board is whether the remedy provided by the Department was adequate. Information regarding the rater’s retirement, disciplinary action taken against the reviewer, and information regarding the review panel chairman and the Administrative Officer have no relation whatsoever to grievant’s dissatisfaction with the TIC extension remedy granted by the Department, which is the basis of the appeal.

**No.11** The following are questions for an appropriate Department official, perhaps M/MED: Given the stressful situations described in this grievance, which had to be known in [REDACTED] and Washington, why was no Regional Psychiatrist sent to [REDACTED] during my tour? Why was [REDACTED] absent from post during June 1996? Did this have anything to do with the behavior during a Consular Conference in [REDACTED], during April or May of the same year? Did then CE/EX Deputy Executive Director [REDACTED] have any involvement in this Decision? What was it?

Grievant argues that the Department's refusal to send an appropriate medical professional to [REDACTED] constitutes, at a minimum, total indifference to a very difficult and serious situation there. He needs this information to determine whether a deliberate action or inaction was involved. Absent a useful agency response, he will consider that the agency deliberately sought to change his medical condition and did not care about the consequences. He believes this has serious implications about the quality and competence of the management of the post and the mission, including those witnesses who commented negatively on his performance.

In declining to answer the interrogatories, the Department stated that the questions concern management of the Department and do not address any issue in the grievance.

The Board denies this request as being irrelevant and immaterial. Grievant has not established that there is any connection between the failure

of the Department to send a medical professional to post and the issues raised in the grievance.

### **Discovery Requests of December 16, 1998**

**No. 1.** I request a copy of relevant EERs of the Consular Section Chief in [REDACTED] at the time, [REDACTED], to whom I am obviously being compared as she is the PER/G Grievance Analyst assigned to this case. (Once I concluded that her overall judgment was being affected in some way, I requested that the matter be reviewed in light of her personal connection to the rating officer. This was denied.)

[REDACTED] complains that the agency decision specified the rating officer's many years of consular management experience as a qualification to criticize grievant's performance. He believes that one factor in evaluating the rater's management experience as a countrywide Consul General for [REDACTED] is the 1992 [REDACTED] visa backlog which was the subject of a GAO report. Grievant states that the overall objective in his own assignment to [REDACTED] was directly related to the [REDACTED] fiasco: the desire to avoid backlogs at all costs. Thus, he contends, this request is relevant. Grievant states further that in the agency consideration phase, he concluded that [REDACTED], the Grievance Analyst handling the case, was not acting rationally in refusing to pursue his allegation, now confirmed, that the post had sent a cable requesting an investigation of him as a homosexual security risk. He states that he requested that someone else be assigned to the case, but the

grievance staff director [REDACTED] refused. He contends that the agency decision includes numerous statements that basically seem to compare him to [REDACTED], who was NIV chief in [REDACTED] during the period in which a serious backlog developed. He states that this never happened in [REDACTED] on his watch, because “no backlog” was his highest priority. He further contends that his performance is obviously being compared to hers, so this request is legitimate.

The Department declined to respond stating that discovery does not extend to handling of grievances by the grievance staff. In addition it argued that the request does not address the validity of the criticisms in the EER, which is the matter at hand in the grievance. Further, the provisions of the Privacy Act prevent release of any other employee’s EER to grievant.

This Board denies this request. The information sought is irrelevant, and immaterial. Grievant’s objectives in being assigned to [REDACTED] have no relation to the issues raised in his grievance. Grievant has not offered a plausible foundation for the allegation that [REDACTED] EER is being compared to his. In any event, [REDACTED] EER will not prove or disprove any facts that may affect the disposition of the grievance.

**No. 2.** I request that an appropriate Department official respond to the following interrogatory which concerns acceptable performance in light of very strict regulations. The Department may note that 9 FAM 41.101 (a) (2) (copy attached at Tab 2) was not added to the FAM until 01NOV96, after my departure from [REDACTED] and most certainly due to my continuing efforts there. Question: Although 9 FAM

41.101, N2.3 (copy attached at Tab 3) includes the phrase, " Under no circumstances whatsoever." Under what circumstances should a consular officer nevertheless violate it? Are there any? Please describe in as much detail as possible.

Grievant states that this particular regulation was a source of significant aggravation during his tour in [REDACTED], yet nobody cared enough to do anything about it. He asked the Department to change it and it was changed shortly after he departed. He contends that this case is full of criticisms about public relations and that this particular regulation caused many of these difficulties. He states that if the Department refuses to answer this question, he will argue that "the criticisms are invalid because the regulation itself does not allow any exceptions 'under no circumstances whatsoever.'" (sic)

The Department declined to respond, stating there was no relation between this matter and the issues in the grievance.

The Board denies this request. The information is immaterial to his grievance. Neither the rater, nor the reviewer allude to this regulation or to grievant's misapplication of it. Neither mentions it as a basis for including comments regarding his public relations image in the EER

**No. 3** Withdrawn

**No. 4.** I request that an appropriate Department official explain why [REDACTED] did not present to [REDACTED] a Group Meritorious Honor Award at AmConGen [REDACTED] in August, 1996.

Grievant states that the awards ceremony in August 1996 was a very public snub of [REDACTED] by [REDACTED]. He states that this snub contrasts very much with the universal praise in many of the statements, but is quite consistent with the other documentary information that he is requesting to show how difficult it was for everyone to work for him. If the agency refuses to respond or it is considered not relevant, then he will use this fact in his supplemental submission.

The Department declined to answer, stating that there is no relation between this matter and the issues in the grievance.

The Board denies this request. The request is irrelevant and immaterial. There is no relation between [REDACTED] failure to receive an award in 1996 and the complaints in the grievance regarding a faulty EER and sexual orientation bias.

**No. 5.** I request that the Department confirm with Ambassador [REDACTED], former Principal Deputy Assistant Secretary of State for Consular Affairs and, later, Ambassador to the [REDACTED], our telephone discussion in mid-June, 1995, concerning the continuing pending legislation in the [REDACTED] tourist visas for Americans. He called me to discuss the subject. I had explained to him that the [REDACTED] Senate was still in session; he mentioned to me that drastic USG action might have been necessary if the Senate passed without taking a vote on that legislation. CA Front Office telephone records from June 1995 should provide confirmation of the conversation.

Grievant states that this request is very relevant as it supports his allegations of serious Washington awareness of the problems in [REDACTED]

principally caused by the workload and the reciprocity issue, and documents his story. He notes that the Office of the Independent Counsel used telephone records liberally to reconstruct events; he is making only one such request, with reasonably specific dates.

The Department refused to respond stating that the matter was not related to issues in the grievance.

The Board denies this request. As we stated in No.2 of the December 15, 1998 request, there is ample evidence on record, including a cable from the Assistant Secretary for Consular Affairs, regarding the workload problems and the visa reciprocity issue. No purpose will be served in requiring the agency to obtain this information from [REDACTED]. Grievant is reminded that he is free to seek a voluntary statement from [REDACTED] or from any other person independent of the discovery process authorized by Board regulations and procedures.

**No.6.** I request a copy of the USIS [REDACTED] media coverage report from 30MAY-02JUN95 which included the ugly television coverage of a riot outside the Consulate General due to the public not being aware of the \$20.00 [REDACTED] application fee. Please let me know if any further information is necessary to locate the appropriate file in USIA Washington Headquarters.

Grievant states that this fiasco was a major disaster for which [REDACTED] bore full responsibility. He contends that it is also relevant to the delay in preparing his Employee Statement for the first disputed EER.

Grievant argues that if the agency is going to use media to criticize him, then he is entitled to use media to criticize the rating officer.

The Department states that this request has no relation to the issues raised in the grievance.

This request is denied as being irrelevant and immaterial. The grievant's desire to obtain information in order to criticize the rater via the media has no relation to any issue raised in his grievance.

**No.7.** [REDACTED], in his statement (page 35 of the agency decision), states that I issued a visa to a "drag queen" and that Ambassador [REDACTED] stated that this was an "embarrassment to the United States." The following question is directed to an appropriate Department official:

Question: Given that Congress, in the Immigration Act of 1990 (taking effect in June of 1991) repealed the former INA 212 (a) (4), which made "sexual deviation" a ground of exclusion, on what basis should such a visa application have been refused?

Grievant acknowledges that the agency has little or no control over what a witness, such as [REDACTED] includes in his statement. However, he maintains that the agency does have control over what portion of the witness statements it quotes in its decision. He argues that once the agency quoted from [REDACTED] statement, it could not argue that there is no relation between the matter and the issues raised in the grievance. Otherwise, their quoting [REDACTED] is "a gratuitous, homophobic and drag-phobic insult, which is unworthy of the U.S. Department of State." The Agency response, he concludes, makes no sense.

The Department refused to respond to the question, stating that the matter was not relevant to the issues raised in the grievance.

The Board denies this request as being irrelevant and immaterial. When read in its proper context, grievant's actions are not being commented upon because he issued a visa to a "drag queen;" rather, the statement focused on grievant's making use of a change in visa policy to hold a media event.

**No.8.and 9.withdrawn**

**No.10.** I was named as defendant in a lawsuit filed in a local court by a [REDACTED] who had been denied entry by INS Los Angeles even though both his passport and his visa were valid. Although I followed proper procedure in notifying appropriate Mission offices of the case (basically, [REDACTED] and the [REDACTED] Personnel Officer, who is the designated point of contact for all litigation against the USG in [REDACTED] courts, whether or not related to FSN personnel issues), I was not kept informed of the progress of the litigation. Why?

Grievant claims that this question is very relevant as the agency discussed issues related to public relations. In this case, he is named as a defendant because a [REDACTED] citizen was turned around by INS Los Angeles, kept in prison for three days, and then returned to [REDACTED] without INS canceling his visa. Grievant states that he was the only US Official who agreed to speak to him, hence he was the only named person who could be sued. This was very relevant to the overall issue of insanity and post/mission managerial competence, since a key problem in dealing with both [REDACTED] [REDACTED] (a witness in this grievance) and the Embassy was their inability to

comprehend proper procedure. The Department's refusal to keep him informed had to have been deliberate, gratuitous and insulting.

The Department declined to respond on the basis that the matter is unrelated to the grievance.

The Board denies this request. Grievant's speculation regarding the Department's motives in not informing him of a lawsuit has no relation to the issues raised in his grievance.

**No. 11.** For [REDACTED], Director, PER/G:

Question: Your attention is invited to two letters from your office and a copy of pertinent grievance regulations from 3 FAM 4426.1 (attached at Tab 4). Why did you tell me, in writing that there are no provisions for discovery at the agency level when the regulation in question states precisely the opposite?

Grievant states that this is a basic request for a Board ruling on whether the grievance regulations in 3 FAM 4426.1 mean anything at all. Grievant states that the agency's attitude, at least with respect to sexual orientation issues involving males, denies to grievants in that class the benefits and protections of 3 FAM 4426.1. He contends that this has been consistently implemented by State PER/G for some time. Accordingly, he requests a ruling from the Board regarding whether males raising sexual orientation issues are formally excluded from 3 FAM 4426.1 or whether the agency is bound to follow the regulations for everyone.

The Department argues that it is improper for the grievant to pose questions to the Director of the Grievance staff, because such questions concern the processing of the grievance, not the validity of the criticisms in the EERs. The agency noted that it did provide replies to three of the interrogatories propounded at the agency level.

The Board denies this request. Discovery is the process a party may use to obtain information in the control of the other party. This Board is not a party to the process at its inception. Therefore, any interrogatory or request for a ruling addressed to the Board via this Motion is inappropriate. The Board does not issue advisory or interpretive opinions, but acts on controversies as presented for resolution within a grievance. Further, the question regarding the Department's statement that there is no provision for discovery at the agency level has no bearing on the issues raised in the grievance and is therefore irrelevant and immaterial.

**No.12.** For PER/G [REDACTED]: In considering my grievance, it is evident that you did not share with [REDACTED], former DCM in [REDACTED] our e-mail exchange from June of 1995. Consequently, his statement was very general; I had never met him and only communicated directly with him twice, once via e-mail as stated. Why was this not provided to him?

In his Motion to Compel grievant moves that the agency staff conduct of the investigation be subject to interrogatories through the discovery process. Grievant states that it is quite clear that male grievants raising issues related to sexual orientation are being ignored by PER/G. A

contemporaneous e-mail message documenting one of his two interactions with a witness, which resulted in his single greatest accomplishment during his three-year tour in [REDACTED], should not have been summarily dismissed by the agency grievance staff. (He states that he will provide complete details in his supplemental submission). He states that a key issue for the Board is this: If there is indeed a problem in PER/G with respect to sexual orientation issues involving males, then at what point will the Board consider that the question is worthy of further inquiry? How many examples should be provided?

The Department states that the conduct of its investigation is not subject to interrogatories. It stated that in a letter dated July 28, 1998, [REDACTED] [REDACTED] responded to a six-page letter of inquiry from PER/G regarding specific questions on the issue grievant raised in the grievance.

The Board denies this request. Questions as to why the grievance staff did not provide email messages to the former DCM to [REDACTED] are not relevant to any issue raised in the grievance. Grievant is free to transmit these messages to [REDACTED] on his own. Further, in accordance with the ruling made in No.12, this is not the proper forum for directing interpretive questions to the Board. Discovery is the method used to obtain facts.

**No.14.** For an appropriate Department official: The agency decision (pp. 32-38) dismisses my efforts to go to bat for an American citizen living with HIV/AIDS with approximately twenty lines of bureaucratic

legalese, implying that the Consulate General actually had “a serious public relations problem” from my handling of the matter.

Question: Is it the official policy of the U.S. Department of State that such efforts as mine (and my staff) to assist American citizens in distress are to be summarily dismissed, as they are in the agency decision?

Question: Can the U.S. Department of State imagine what the reaction to [REDACTED] would have been had this incident been publicized? Or, the reaction to perceived Consulate General indifference, had I actually followed the advice implicit in the agency decision?[Comment: I will include similar press coverage involving American Airlines in the supplemental submission. (End Comment).

Grievant states that these are legitimate policy questions for the Department of State and are directly related to a specific incident critically discussed in the agency decision. If the agency in its decision stated that he erred, then the agency should also entertain logical questions about what should have been done.

The Department states that the questions are argumentative and subjective and are not appropriate for discovery. It need not reply.

The Board denies this request. Grievant is requesting the Department to admit to clearly contentious and debatable propositions. Subjective inquiries such as these are not productive and need not be answered. The purpose of discovery is to elicit information.

### **Follow-up Discovery Request of April 22, 1999**

Question 1:

Background: In the second paragraph of your March 19, 1999 combined response, you use the term “assertion” in the phrase “your assertion you should have received an additional EER there (a matter which we believe has been resolved).” Although I did not specifically grieve that omission, the Department voluntarily extended TIC by the four and one half months for which an EER was not provided.

Question: Why did you use the term “assertion” in that sentence? Do you not believe that I was telling the truth when I raised that example? If not, why did the State Department extend my TIC by four and a half months based only on what you are now labeling an “assertion?”

Question 2:

Background: In your response to my Discovery Request of December 15, 1998, you declined to respond to **Paragraph No. 1** based on your claim that “there are no security issues in [my] grievance.” I also note that Executive Order 12968, Access to Classified Information (copy attached), Sections 3.1 (c) and (d), indicate that sexual orientation is not considered relevant with respect to access to classified information.

Further Background: The issue here is whether, as I claim, the Consulate General sent a cable to the Department, under the scenario I outlined, claiming that I was a homosexual security risk. I cited this incident as proof of a discriminatory attitude on the part of post management. In my discovery request to you, I even produced the smoking gun, namely, a copy of the cable, which [REDACTED], the Consul General, had specifically and categorically denied ever existed. Thus, it appears that [REDACTED] was not telling the truth.

Question: With respect to official matters, do you have some sort of a problem with sexual orientation issues involving males? Even with an Executive Order and a specific factual discrepancy, already demonstrated by my producing the cable whose existence the Consul General denied, why did you summarily dismiss my very legitimate discovery request? Do you treat every grievant in this manner? Or just males raising sexual orientation issues?

Question 3:

Background: In your response to **Paragraph 2** you state that the workload information I have requested is “not related to any issue in the grievance.” I disagree, but in the alternative request an admission.

Question: Do you concede that the non-immigrant visa workload in [REDACTED], taking into account also the number of staff and the physical facilities, was totally absurd and insane, to the point that no one could reasonably have been expected to do everything perfectly?

Question 4:

Background: I sincerely doubt that you will agree to Question 3, but this may be easier to obtain:

Question: I request complete copies of the consular package statistics for [REDACTED], from FY-1993 through FY-1997 (inclusive).

Question 5:

Background: In your response to **number 5 and number 6**, you state that “Discovery does not extend to the Grievances Staff’s investigation of the grievance.”

Question: Has the Foreign Service Grievance Board confirmed your assertion that “Discovery does not extend to the Grievance Staff’s investigation of the grievance?” Please provide details.

Question 6:

Background: In your response to **number 8**, you state that “visa case files are confidential under our law.” You also state in your response to **number 4** above, Section 604 of the 1980 Foreign Service Act guarantees the confidentiality of grievances, which provides disclosure.”

Question: How can I be expected to present evidence to the Board about my work on visa cases without specific access to specific files? Would not the confidentiality provisions of the 1980 Foreign Service Act also protect the confidentiality “under our law” of visa case files, thus allowing me access under such confidentiality provisions?

Question 7:

Background: Contrary to your statement in the second paragraph of your letter (subject of Question 1 of this discovery request), your responses to **numbers 9 and 10** indicate that you accept as a fact my statement that I never received an EER for the period April 16 to August 30, 1996.

Question: Why the difference in your attitude? What is the problem?

Follow-up Question: Given that the ALDAC cable 99 State 047593 paragraph 34 (copy attached) states that “rated employees should

ensure that gaps are identified... since employees may be disadvantaged due to the absence of evaluative material for periods of 120 days or more... PER/PE should be notified of gaps of more than 120 days for career members,” there must have been some reason why the Grievance Staff did not notify PER/PE as specified. What was it?

Follow-up Question: In dealing with [REDACTED], I became aware both that he had a problem with alcohol abuse which affected his work, and that in many situations he pursued a solution that had nothing to do with the issue I had presented to him. I noticed a similar tendency in your office’s responses to me, especially the fact that the Department only responded favorably to the one issue I mentioned that I had explicitly excluded from my grievance. Is there a problem of a similar nature in your office? Do you have such a problem? Does or did [REDACTED] have such an alcohol problem?

Question 8:

Background: In your response to the Discovery Request of December 16, 1999, **number 6** (USIS media coverage records), you declined to respond to the request because there was “no relation between these matters and the issues in [my] grievance.”

Question: If media coverage has “no relation” to the issues in my grievance, does that mean that the agency concurs with deleting all references to the media and public relations from the EER? Please confirm.

Question 9a:

Background: I quoted from the agency decision in my **number 7**, yet the agency’s response questions my veracity by qualifying my quotation. Since I also provide a specific reference to page 35 of the agency decision, one would think that my veracity could be verified.

Question: Why does the agency not believe that I am quoting its own decision, at a specific page, correctly? What is the problem?

Question 9b:

Background: The only affirmative response to my pair of discovery requests was **number 9**, a copy of an ALDAC cable, which repeats the text of a Department Notice, regarding stereotypical comments in EERs. I also attach for your information the 19 March, 1999 Department Notice: EER Preparation: Review Panels and direct your attention to Page 2 Para E.

Question: Since this paragraph also discusses stereotypes, and was actually the Department Notice whose prior-year edition I had recalled, why did you not find that one?

The Department, in its April 28, 1999 Motion to Dismiss grievant's Motion to Compel, as untimely filed, also declined to respond to the follow up discovery requests dated April 22, 1999, on the basis that they were repetitive to the ones responded to by letter dated March 19, 1999, and untimely.

The Board's ruling is as follows. Questions 1, 3, 5, 6, 7, 8, and 9 (a), need not be answered. They are follow-up questions relating to requests submitted on December 16 and 15, 1998, which we have denied.

Question number 2 refers to No. 1 of December 15, 1998, and need not be answered as we have instructed the Department to provide the requested information.

Regarding question number 4, grievant has not explained why he needs complete copies of the Consular Package statistics. This request is therefore denied. To the extent that the request relates to his desire to further document the workload vs. resources issue, as appears to be the case based on a reading of Question number. 3, the Board response for No. 2 of December 15, 1998 holds.

Regarding question 9(b). Grievant apparently has obtained a copy of the information requested through his own initiative. The Department's

reasons for not being able to find it are irrelevant and immaterial. The Board also notes that this request was withdrawn in the April 22, 1999, Motion to Compel.

Grievant is again reminded that interrogatories are a procedure to obtain information by means of direct questions, and are not appropriate if they become argumentative.

## **V. ORDER**

The Department is to provide the cable and guidance as instructed within 10 days of receipt of this Order. Grievant then has 30 days from receipt of the information to present a supplemental submission, if any. Thereafter, the Department will have 30 days to respond, and the grievant will finally have 15 days to rebut the Department's response. Unless good cause is shown, the rebuttal will be the final submission and the record will be closed.

For the Foreign Service Grievance Board:

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Margery F. Gootnick  
Presiding Member

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Gail P. Scott  
Member

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Caroline V. Meirs  
Member