

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant],
Grievant

Record of Proceeding

FSGB 2006-004R

And

September 3, 2008

Department of State,
Agency

**ORDER: MOTION TO
REOPEN/RECONSIDER - EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Roger C. Hartley

Board Members:

Garber A. Davidson

Gail M. Lecce

Special Assistant:

Linda B. Lee

Representative for the Grievant:

George Chuzi, Esq.

Representative for Department:

Joanne Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO REOPEN/RECONSIDER

I. ISSUE

[Grievant], an FS-01 Economics and Multifunctional Officer with the Department of State (Department, agency), filed a Motion to Reopen/Reconsider the grievance appeals she filed in 2005 and 2006 (FSGB No. 2005-049, FSGB No. 2005-060, and FSGB No. 2006-004). She claims that the Department improperly represented the findings of the promotion boards reconstituted pursuant to the Board's decisions in those cases, resulting in her not being promoted and thereafter designated for involuntary retirement. [Grievant] also claims that improprieties occurred with respect to the determinations of earlier promotion boards.

The Department states that the claims presented by grievant are new matters that should be filed with the Department for consideration and decision before they are presented to the Board. This order addresses grievant's Motion to Reopen/Reconsider the subject cases and the Department's request to remand the claims.

II. BACKGROUND

In 2005 and 2006, [Grievant] filed three grievance appeals with this Board alleging procedural violations in the review of her file by the promotion boards in three separate years. The Board consolidated the two grievances filed in 2005 (FSGB No. 2005-049 and FSGB No. 2005-060) into one case. In its decision issued on April 11, 2006, the Board directed the Department to submit grievant's file to reconstituted Senior Threshold Boards (STBs) for two of the years at issue in the consolidated case. The Department voluntarily agreed to submit grievant's file to reconstituted STBs for the

other year at issue in the third case, FSGB No. 2006-004, resulting in a total of six reconstituted panels, and the Board dismissed that case.

[Grievant] was ranked last by five of the panels and second to last by the sixth. Grievant questions these results and claims to have uncovered evidence of illegal tampering with the actual results of the panels. She requested a review of the matter by the Office of Special Counsel,¹ which is currently conducting an investigation into her allegations.

Later, on July 18, 2008, [Grievant] filed the subject Motion to Reopen the earlier consolidated case. On July 24, 2008, she asked that the motion be treated as a Motion for Reconsideration. She bases her motion on an implied mandate that the remedy directed by the Board be conducted in good faith and accurately.

[Grievant] requests relief in the form of an immediate one-year stay of her retirement, until the Office of Special Counsel has concluded its investigation. She further requests that the Board direct the State Department's Bureau of Diplomatic Security to conduct an investigation into her claim that "she has been promoted by one or more of the regular annual promotion boards that considered her from 2000-2007 but those results have been manipulated in such a way as to deny her promotion."

On July 22 the Department responded to grievant's Motion to Reopen. The Department argues that the claim questioning the validity of the results of the reconstituted promotion boards is a substantively new issue not previously considered by the Department. It therefore requests that the matter be remanded to the Department for investigation and consideration. The Department further notes that grievant's allegations

¹ The Office of Special Counsel, an autonomous entity, serves as an investigator and prosecutor of statutorily defined prohibited personnel practices. (5 U.S.C. 1206, 5 U.S.C. 1208.)

are being investigated by the Office of Special Counsel, and that the results of that investigation could affect the matters alleged in the Motion to Reopen. The Department states that request for interim relief before the Board is premature, but that it will grant interim relief to [Grievant] if the grievance has not been resolved before her retirement date of September 30, 2008.

On July 28 grievant filed a reply to the Department's response, in which she requested that her original Motion to Reopen be designated instead a Motion to Reconsider. In response to the Department's request for a remand, grievant argues that since she is alleging impropriety on the part of the Human Resources Bureau (HR), it would be inappropriate for the Board to remand the matter to HR for investigation and decision. She further argues that it is urgent that a stay of her retirement be implemented immediately, not at a later time as the Department suggests, since the lead time for submitting retirement papers is lengthy, and the current delays in resolving the interim relief request have left her in an extremely uncertain position.

On August 4 grievant served the Department with her first discovery request. On August 5, the Department requested that the Board toll the period for its response to the discovery request until it had ruled on the Department's request for remand. Grievant responded to that request on August 6.

III. DISCUSSION AND FINDINGS

Before the Board at this time is the Department's request that grievant's claims before the Board be remanded to it for investigation and decision.

The Board notes at the outset that, although her filings are unclear, grievant appears to be making two separate claims: (1) that there was manipulation of the results

of the six reconstituted promotion panels, which resulted in her not being promoted and subsequently designated for involuntary retirement; and (2) that there was manipulation and/or misconduct in reporting the results of the regular promotion panels that considered her file between 2000-2007, again with the result that she was not promoted, leading to her being identified for involuntary retirement.

Although the first claim is related to the remedies directed by the Board in FSGB Nos. 2005-049, 2005-060, and the Department's voluntary offer of remedies in 2006-004, the Board finds that the claim itself is a substantively new matter. In the earlier cases, this Board did not consider the actions taken by the reconstituted panels, nor the Department's involvement in reporting the results of those panels. The Foreign Affairs Manual (FAM) sets forth, in 3 FAM 4431, the requirement that a grievant present claims to the Department for resolution before filing a grievance involving such matters with the Foreign Service Grievance Board.

Regardless of the fact that grievant believes that HR may have been involved in the alleged misconduct, and therefore should not be responsible for investigating itself, it is incumbent upon grievant to allow the agency to develop a complete record in the case, in accordance with the regulations. Moreover, grievant has also requested review of her allegations by the Office of Special Counsel, which satisfies the need for an independent investigation.

With respect to the second claim, that the Department engaged in misconduct in reporting the results of the promotion boards between 2000 and 2007 that reviewed grievant's file, we once again find that it is a new matter that must first be developed and presented to the agency before the Board may accept jurisdiction.

The Board therefore lacks jurisdiction at this time to consider the matters presented in grievant's Motion to Reopen/Reconsider, including grievant's request for a stay of her impending involuntary retirement², since grievant has failed to exhaust the agency grievance procedure, as required by agency regulations.

IV. ORDER

The Grievant's Motion for Reopening/Reconsideration is denied.³ The case is dismissed without prejudice. The Department's request that the period for its response to discovery be tolled is therefore moot.

² The Board notes that 3 FAM 4431(b) (2) sets forth the standard that the agency must apply in considering grievant's request for interim relief.

³ Because the Board is dismissing grievant's claims pursuant to the provisions of 3 FAM 4431 and 3 FAM 4452, it has not reached the issue of whether grievant's request for an investigation by the Office of Special Counsel would preclude the Board's consideration of these claims under Section 1109(a)(1) of the Foreign Service Act.