

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between



Grievant

Record of Proceeding  
FSGB No. 2006-036

And

November 22, 2006

Department of Agriculture

**ORDER: JURISDICTION  
(TIMELINESS)**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Lois C. Hochhauser

Board Members:

James E. Blanford  
Thomas Jefferson

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Zlatana Badrich  
American Foreign Service Association

Representative for the Department:

Theresa Richbow  
USDA/FAS

Employee Exclusive Representative:

American Foreign Service Association

## **ORDER: JURISDICTION (TIMELINESS)**

### **I. THE GRIEVANCE**

This ORDER relates to the timeliness of an appeal, filed with the Foreign Service Grievance Board (Board) by [REDACTED] (grievant) on August 24, 2006, from a decision issued by the United States Department of Agriculture (Department, agency) on June 23, 2006.

In this grievance, [REDACTED], a Senior Foreign Service Officer (FE-OC) with the Foreign Agricultural Service (FAS), alleges that the agency committed material procedural error when it failed to include a September 8, 2004, Chief of Mission Statement by Ambassador [REDACTED] in the file reviewed by the 2004 Selection Board (SB). In addition, [REDACTED] objects to the agency's later decision to place the evaluation on the left side of his Official Performance Folder (OPF) rather than on the right side with other evaluations. For relief, he requests: that a reconstituted 2004 SB review be held with the evaluation in his file; that, should he be promoted, his promotion be made retroactive to the date of the 2004 promotions; that the evaluation be placed on the right side of his file; that the Board direct a proper remedy if it determines that placement of the evaluation on the left side was materially harmful; and any other relief deemed just and proper.

### **II. BACKGROUND**

In 2004, [REDACTED] was completing a three-year assignment as the Agricultural Counselor at the U.S. Embassy in [REDACTED]. On April 23, 2004, a telegram went out

from FAA<sup>1</sup> outlining due dates for 2004 evaluations. Included was a requirement that the agency's Human Resources Division (HR) receive completed performance appraisals for field personnel on or before July 10. According to [REDACTED], [REDACTED] would normally have written a supervisory evaluation covering [REDACTED] last months in [REDACTED] but [REDACTED] questioned whether an evaluation was really necessary. Grievant e-mailed [REDACTED] at the agency's HR to ask whether an evaluation was required and she responded, "[i]t's up to you."

Because [REDACTED] expected the ambassador's evaluation, he did not insist that [REDACTED] contribute. On September 10, 2004, grievant e-mailed [REDACTED], "I received the signed Ambassadorial evaluation for my final time in [REDACTED] yesterday. Shall I bring it over?" On September 13, [REDACTED] informed [REDACTED] "[y]ou can either send it over via courier (send to my attention at L Street, RM 5000) or you can take it to FAA. There is a box in FAA for the evaluations." That same day, grievant replied:

Thanks, [REDACTED] I gave it to FAA today.

[REDACTED] Because my packet went over already would it be possible for [REDACTED] to confirm that it has been added to my file?

Many many thanks. I know how crazy it must be for all of you these days. But just think, in less than two weeks, it will all be over!!

The SB met the week of September 20-24, 2004.

Grievant's assumption, following the message exchange, was that HR would inform him if the evaluation was not included in his file. However, when he checked in April 2005, he discovered the evaluation was not in his file. [REDACTED] asked [REDACTED] what

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<sup>1</sup> The Foreign Agricultural Affairs (FAA) program area of the Foreign Agriculture Service supports U.S. agricultural interests through its network of agricultural counselors, attachés, and trade officers stationed abroad.

<sup>2</sup> An FAA superior, not further specified in the ROP.

could be done about the situation and she told him that HR could do nothing; it was not possible to add information to a file after a board had reviewed it. She added that, because there was no requirement for ambassadorial evaluations for partial years, [REDACTED] file was technically complete when the 2004 SB reviewed it. HR agreed to place the evaluation in grievant's file for the 2005 SB, but on the left side with commendation letters rather than on the right side with evaluations. [REDACTED] told [REDACTED] that any request to include the ambassador's statement as an evaluation, or any request for a reconstituted SB, would have to be pursued through a grievance.

[REDACTED] filed an agency-level grievance on October 28, 2005. He asked for a reconstituted 2004 SB with the ambassadorial evaluation placed in his file. The agency denied [REDACTED] grievance on June 23, 2006, notifying him that he could appeal within 60 calendar days of receipt of the agency's response. [REDACTED] says he received the agency memorandum "on or about July 10, 2006." He appealed to this board on August 24.

In its June 23, 2006, response to [REDACTED] October 28, 2005, grievance, the agency argued that [REDACTED] filing was untimely and that he waived his right to appeal:

. . . The Foreign Affairs Manual (FAM) allows for you to file a grievance if the Agency fails to respond within 90 days. You have 60 days following the 90 day period to file the grievance with the Board (3 FAM 4451). You did not file a grievance during this time frame therefore the Agency contends this grievance is untimely.

In addition, the agency denied Shull's grievance on the merits:

The agency does not dispute that an Ambassadorial evaluation that is the subject of this grievance could have been included in your file and subject to the Selection Board's review . . . . However, due to the late submission attempt the ultimate burden clearly rested with you to assure that the file was complete with the necessary information.

The agency found that there had been no violation of Article 25 of the collective bargaining agreement or the FAM; that there was no requirement for the Chief of Mission to complete a statement for grievant; and that there was no reason to believe that Ambassador [REDACTED] evaluation would have had any effect on promotion opportunities.

In his August 24, 2006, appeal to this board, grievant claimed that, with respect to timeliness, the agency misconstrued the FAM regulation on grievances, the Board's Handbook, and grievance case law. He maintained that, "[a] grievant does not lose the right to file a grievance appeal with this Board if the grievant chooses to wait for a final Agency decision so long as the grievant subsequently files an appeal within 60 days of receiving that final decision." [REDACTED] points out that he received the agency decision on or about July 10, 2006, and that his August 23 appeal, with an effective filing date of August 24, was well within the 60 days allowed. Grievant argues further that he filed his agency-level grievance well within the two years specified by 3 FAM 4427. In his appeal, [REDACTED] went on to defend the merits of his case, asserting that once he provided the assessment to HR, the onus shifted to HR to ensure that it was placed in his file and that the absence of [REDACTED] statement in 2004 was a material omission under the Foreign Service Act and 3 FAM 4412(c)(5). In grievant's view, the ongoing positioning of the ambassador's statement on the left side of his file, combined with the absence of any supervisory assessment from FAS covering his final four to five months in [REDACTED] is a "material and prejudicial violation of the contract" and precludes future boards from giving the evaluation its proper weight.

In its September 6, 2006, acceptance letter, the Board gave the parties twenty days to submit briefs on the question of timely filing. The Board also asked the parties to

present arguments on whether the omissions constituted a “continuing violation” for limitation purposes. Grievant responded on September 26, reiterating the arguments voiced in his appeal. [REDACTED] also declared that the agency’s placing of [REDACTED] statement on the left side of his file caused continuing harm, sending a message to the 2005 and 2006 SBs that there was no supervisory assessment for the 2004 rating period.

The agency requested an extension of time for filing due to a change in personnel. Without objection, the extension was granted and the agency submitted its brief on October 19. The agency repeated the assertions in its June 23, 2006, decision that the grievance was untimely, that the burden of providing relevant information for the SB ultimately rests with the employee, and that the omission of the ambassadorial evaluation did not constitute a violation of either the collective bargaining agreement or the FAM. The agency did not comment on the question of whether the omissions constituted a continuing violation.

### **III. DISCUSSION AND FINDINGS**

In its June 23 decision letter to grievant, the agency advised him that he had a right to appeal the decision to the Board within 60 days of receipt of the letter. It is not clear what date grievant received the decision letter. The Board makes a determination that [REDACTED] received it by July 10, since he declares that he received it on or about that date, and the agency does not dispute his claim. Thus, the Board finds that the 60-day deadline would have been September 8. The Board received his appeal on August 24. Accordingly, we find that with respect to the 60-day deadline set forth in the agency-level decision, grievant’s appeal, filed on August 24, was timely filed.

Another provision of timeliness is set forth in 3 FAM 4427(a), Time Limits for Grievance Filing, which provides that, “[a] grievance under these regulations is forever barred unless it is presented to the grievant’s agency within two years of the occurrence(s) giving rise to it.” Grievant complains that the omission of an ambassadorial evaluation materially prejudiced his chances for promotion when his file was reviewed by the 2004 SB, meeting September 20-24, 2004. [REDACTED] filed his agency-level grievance on October 28, 2005, which is within the two-year time limit and thus timely.

Finally, the agency argues that grievant was required to file his grievance no later than 150 days after he filed his grievance with the agency since no decision had been reached. Grievant contends that he was not required to file a grievance with the Board until he received a final notice from the agency and, at that time, the 60-day filing requirement becomes operative.

This matter is governed by 3 FAM 4451:

A member whose grievance is not satisfactorily resolved under agency procedures (see 3 FAM 4430) shall be entitled to file a grievance with the Board no later than 60 days after receiving the agency decision. In the event that an agency has not provided its decision within 90 days of presentation, the grievant shall be entitled to file a grievance with the Board no later than 150 days after the date of presentation to the agency. The Board may extend or waive for good cause the time limits stated in this section.

The Board concludes that this grievance is timely filed. The agency’s interpretation of this regulation is without merit. There are two time frames. A grievant may file with the Board within 60 days of the date of the agency decision. Or, a grievant may file with the Board within 150 days of the date the agency grievance was filed if no decision letter has been issued. But if no decision letter is issued in the first 90 days and

a grievant fails to file a grievance in that 150-day period, the employee is not barred from filing a grievance on the matter, but must then wait until the final decision is issued. This analysis is included in the Foreign Service Grievance Board Handbook:

**Board Procedural Time Limits on Filing.** The appeal must be filed with the Board no later than 60 days after the member receives the agency decision. In the event the agency fails to provide a decision within 90 days of filing, the member may appeal to the Board no later than 150 days after the date of original presentation to the agency.

If the employee does not file within the stipulated 150 days, he or she still is entitled to file within 60 days of the agency decision, when issued.

By electing not to submit an appeal to the Board within the first 150 days, [REDACTED] gave up an opportunity to seek an earlier resolution of his case. As explained above, however, he did not forfeit his right to submit an appeal to this Board within 60 days of the agency's decision. *See* FSGB Case No. 1990-92.

Because both the agency's final decision and grievant's appeal address the merits of this case as well as the matter of timeliness, we do not find it necessary to remand the case to the agency for a decision on the merits. Effective as of the date of receipt of this Order, the time periods start for the normal processing timelines for discovery and supplemental submissions described in Attachment 2 to the Board's September 6, 2006, acknowledgment letter.

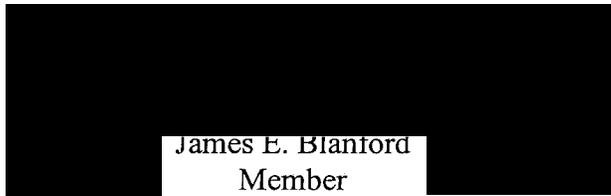
#### **IV. ORDER**

The grievance is held to be timely filed. The Grievance Time Guidelines previously provided begin as of the date of receipt of this Order.

For the Foreign Service Grievance Board:



Lois C. Hochhauser  
Presiding Member



James E. Blanford  
Member



Thomas Jefferson  
Member