

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

And

United States Agency for International
Development

Record of Proceeding

FSGB 2007-005

December 13, 2007

ORDER: MOTION TO DISMISS

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Harriet Davidson

Board Members:

Alfred O. Haynes

John H. Rouse

Special Assistant:

Linda B. Lee

Representative for the Grievant:

Pro Se

Representative for the Agency:

Sabrina Segal
Office of General Counsel, Ethics and
Administration

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO DISMISS

I. BACKGROUND

This grievance was initially appealed to the Board by [REDACTED] (grievant) on March 8, 2007 in the absence of a decision by her employer, the U.S. Agency for International Development (USAID, agency).¹

On May 16, 2007, the panel² held a Status Conference with the parties at which time they agreed to mediate this appeal and FSGB Case No. 2007-007. The Board held all proceedings in abeyance pending the outcome of the mediation. After the Board learned that the grievances had not been resolved through mediation, the panel held a second Status Conference on July 30, 2007 to clarify the issues and requested remedies, discuss pending motions, and address other matters. After the Status Conference, the parties resumed mediation. Since the Board was informed on November 13 that mediation ended unsuccessfully, the Board resumes the processing of the grievance appeal with this ruling on the agency's motion to dismiss.³

II. ISSUE AND POSITIONS OF THE PARTIES

This Order addresses the motion of USAID that the grievance be dismissed for failure to state a claim upon which relief may be granted.

Grievant's appeal requested that a statement be deleted from her 2004-2005 Annual Evaluation Form (AEF), because it was "inserted in direct contradiction to ADS

¹ Grievant retired on April 30, 2007.

² During the pendency of the grievance all three original panel members assigned to the grievance were replaced.

³ Grievant also submitted a number of discovery requests to the agency to which it responded, but not fully to grievant's satisfaction. Grievant's pending Motion to Compel will be addressed shortly.

(Automated Directives System⁴) guidance;” that her supervisor and rating officer be directed to “stop making false assertions about” her; that she receive evidence of the “skills deficit” referred to in the challenged AEF statement; and that she be awarded the bonus pay she would have received but for that statement.

USAID filed a “Statement in Opposition to Appeal” on March 22, 2007. In its statement, the agency requested that the grievance be dismissed on the ground that “Appellant does not make a claim upon which relief can be granted.” The agency asserted that in the grievance as filed “Appellant lists various remedies but makes no clear claim,” making it “impossible to address Appellant’s grievance in its current form.”

Grievant objected to the agency’s motion on March 22. She maintained that her claims were authorized by agency regulation stating that “the grievance procedure applies to any matter which is subject to the control of Agency management.” (ADS 490.5.2.) She asserted that the AEF statement she challenged violated agency rules and procedures in that it was placed in the final AEF but was not in the draft she had reviewed; she had never been informed that she was deficient in the skill areas mentioned; there was no substantiation of the criticism in the AEF; and the alleged deficit did not impact on performance, thus it should not have been mentioned. She also claimed she was denied the right to meet with her supervisor to review the Skills Checklist and address his concerns.

At the July 30 Status Conference, grievant stated that she was no longer requesting that her former supervisor stop making false statements about her or seeking

⁴ Every government agency is required to have a directives program. USAID’s Automated Directives System provides the structure for managing USAID’s internal regulations, including policy directives and required procedures.

evidence of the skill deficit cited, but was still pursuing the removal of the challenged AEF statement and award of bonus pay.

III. DISCUSSION

Section 1101(a)(1) of the Foreign Service Act of 1980⁵ defines a grievance as

any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service . . . of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including . . .

(E) alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial to the member.

In reviewing a motion to dismiss, the nonmoving party's factual allegations must be taken as true and all reasonable inferences must be drawn in favor of that party.⁶ In substance, grievant's current allegations claim that prejudicial statements were included in her 2004-2005 AEF, without required regulatory and procedural safeguards, to her detriment. As a result of this prejudicial AEF, she was denied bonus pay to which she would otherwise have been entitled. She requests deletion of the prejudicial material and an award of bonus pay. Certainly, if there was any fatal ambiguity in grievant's initial pleadings, as the agency asserted, any such failing has been cured. There can be no question that the allegations, as now framed, fall squarely within the legislated scope of Foreign Service grievances; and, if grievant meets her burden of proof requirement on the factual and legal issues raised, that relief would be merited. Grievant is entitled to the opportunity to meet that burden.

⁵ 22 USC §4131(a)(1).

⁶ See e.g., *Franklin Gallo v. Foreign Service Grievance Board*, 776 F.Supp. 1478 (D. Col.1991).

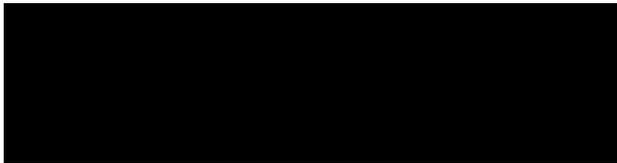
IV. ORDER

The motion of USAID to dismiss the grievance is denied.

For the Foreign Service Grievance Board:



Harriet Davidson
Presiding Member



Alfred O. Haynes
Member



John H. Rouse
Member