

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between



Grievant

And

Department of State

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Record of Proceedings

FSGB No. 2007-041

Date: December 21, 2007

**ORDER: MOTION TO COMPEL  
EXCISED**

For the Foreign Service Grievance Board:

Presiding Member:

Garvin Lee Oliver

Board Members:

Lois E. Hartman  
Alfred O. Haynes

Special Assistant:

Linda B. Lee

Representative for the Grievant:

Sharon Papp, AFSA

Representative for the Department:

Joanne M. Lishman  
Director, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## ORDER: MOTION TO COMPEL

### I. ISSUE

This Order addresses the motion of [REDACTED] (grievant) to compel the Department of State (Department, agency) to respond to requests for discovery.

### II. BACKGROUND

Grievant, a Foreign Service Office Management Specialist (OMS), FS-06, with the Department alleges in her appeal that the agency violated her Weingarten rights<sup>1</sup> under Title 5 U.S.C. Chapter 71 *et seq.*<sup>2</sup> and the Foreign Service Act<sup>3</sup> and 3 FAM 4322.3<sup>4</sup>

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<sup>1</sup> *NLRB v. Weingarten*, 420 U.S. 251 (1975), is the private sector case upon which the right to Union representation for Federal employees in certain investigatory circumstances is based.

<sup>2</sup> 5 U.S.C. Section 7114(a)(2)(B) provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

<sup>3</sup> 22 U.S.C. Section 4113(b)(1)(B) provides:

(1) An exclusive representative shall be given the opportunity to be represented at—

(B) any examination of an employee by a Department representative in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee, and

(ii) the employee requests such representation.

(2) The Department shall annually inform employees of their rights under paragraph (1)(B).

<sup>4</sup> 3 FAM 4322.3 Administrative Inquiry. The most relevant portions appear to be:

e. If an investigating official requests the employee to provide any personal information for inclusion in the report of administrative inquiry or other document containing the employee's name or other identifying factor (such as, but not limited to, his or her education, financial transactions, medical history, and criminal or employment history), the Privacy Act of 1974 (5 U.S.C. 552a(e)(3)(A)-(D)) generally requires that the employee be informed in writing of:

(1) The authority that authorizes the solicitation of the information;

(2) Whether disclosure of such information is mandatory or voluntary;

(3) The principal purpose or purposes for which the information is intended to be used;

(4) The routine uses which may be made of the information; and (next page)

29, 2006 meeting she was called to attend with Diplomatic Security (DS) Regional Security Officer (RSO) [REDACTED] and Regional Medical Officer Psychiatrist (RMO/P) [REDACTED]. Grievant claims that she was informed by RSO [REDACTED] and RMO/P [REDACTED] that she was under investigation and was to be medically evacuated from post. According to grievant, she was questioned by [REDACTED] and [REDACTED] but they refused to answer her questions, including the type of investigation she was under, whether her participation was voluntary, whether she had a right to counsel or an AFSA representative, and how the information they obtained would be used.

Grievant alleges that her medical clearance, security clearance, and suitability for employment were all under review. She claims that "suitability" issues could lead to disciplinary action such as a reprimand, suspension, or separation for cause under 3 FAM 4130 *et seq.* and that a loss of her security clearance would lead to her separation for cause, a disciplinary action under 3 FAM 4360. She claims, therefore, that she had a

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(5) The effects on him or her, if any, of not providing all or any part of the requested information.

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g. The investigating official should inform the employee of his or her right to have a representative present during all personal interviews conducted with him or her as part of an administrative inquiry and that he or she may authorize a representative to act on his or her behalf (see 3 FAM 4325). [3 FAM 4325.1 a. An employee who is a member of a collective bargaining unit for which a union has exclusive representation rights may request representation by the exclusive representative during any administrative inquiry which the employee reasonably believes may result in disciplinary action and in subsequent processing under 3 FAM 4300. In such cases, the exclusive representative will be given a reasonable opportunity to attend any interview with the employee. b. Subject to 3 FAM 4325.3, a bargaining unit employee may also be represented by an attorney or any other representative of his or her own choosing.]

h. If an employee who is to be personally interviewed is a member of a collective bargaining unit for which a union has exclusive representation rights, and the employee reasonably believes that the interview may result in disciplinary action against him or her, the investigating official shall give the employee the opportunity to be represented by the exclusive representative if the employee so requests. This right is known as the Weingarten right. When an employee invokes the Weingarten right, the investigating official will allow a reasonable period of time for a union representative to attend the interview.

reasonable basis to believe that she could be disciplined as a result of the November 29, 2006 and subsequent meetings.

### **III. DISCUSSION, FINDINGS, AND RULINGS**

We summarize below the positions of the parties for each issue raised in the motion to compel (MTC) followed by our analysis and findings.

#### **A. GRIEVANT'S DOCUMENT REQUEST**

Grievant requests a copy of her entire Diplomatic Security file housed in [REDACTED] or sent to Washington, D.C., including copies of all "Reports of Investigation," notes and records of interview from third parties. She specifically requests copies of any documents produced as the result of the investigation of her by the [REDACTED] RSO between November 2004 and April 2007, including copies of her personal e-mail correspondence, which became the basis of the investigation.

##### **1. GRIEVANT'S POSITION**

Grievant maintains that her Diplomatic Security file contains documents that will either prove or disprove that she was questioned by the RSO at the November 29, 2006 meeting and whether the investigation she was under should have afforded her the rights she claims. She also contends that her personal e-mails formed the crux of the investigation.

##### **2. AGENCY'S POSITION**

The Agency admits that it conducted an investigation of grievant's alleged pattern of disturbing behavior involving another employee. However, the agency claims that it did not interview [REDACTED] in connection with the matter, nor was she referred for disciplinary action. The Agency states that because the November 29, 2006 meeting

concerned a non-investigative and non-disciplinary matter, i.e., [REDACTED] recommendation that [REDACTED] undergo a psychiatric evaluation, and because the November 29, 2006 meeting was not an interview of [REDACTED] by either RSO [REDACTED] or [REDACTED], and [REDACTED] did not request union representation or other counsel, the Weingarten rights or a right to counsel under 3 FAM 4139.12<sup>5</sup> do not apply. Therefore, according to the Agency, [REDACTED] request for her Diplomatic Security file is outside the scope of her agency-level grievance and her appeal, and will shed no light on her allegations that she was entitled to assert and/or did assert Weingarten rights at the November 29, 2006 meeting. Nor will providing her own e-mails affect the nature of the November 29, 2006 meeting.

### **3. THE BOARD'S RULING**

The elements of the alleged violation of 5 U.S.C. Section 7114(a)(2)(B) and/or 22 USC Section 4113(b)(1)(B) to be determined by the Board are (1) whether there was “an examination” of the employee (the grievant), (2) by a Department representative, (3) whether the examination was “in connection with an investigation,” (4) whether the “employee reasonably believed that the examination may result in disciplinary action against the employee,” and (5) whether “the employee requested representation.” There

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<sup>5</sup> 3 FAM 4139.12 Employee Representative

The employee will be advised of the right to a representative of his or her own choosing at every stage, including initial questioning. The employee and representative(s) who are under the control, supervision, or responsibility of the foreign affairs agencies shall be granted reasonable periods of administrative leave to prepare, to be present, and to present the employee's case. The employee has a right to have his or her own representative present at any meeting when the employee is asked by authorized officials to provide information regarding the employee's own conduct, or information relevant to a question of the employee's suitability or security qualifications, or any other information pertaining to another person which the employee reasonably believes may result in disciplinary action against him or herself. Any representative must have an appropriate security clearance in order to have access to or use of classified information.

is no dispute that RSO [REDACTED] and [REDACTED] are Department representatives. The grievant claims she satisfies each of the other elements, and each of the others is disputed by the Department. The Board must also determine the alleged violation of Agency directive 3 FAM 4322.3, the applicability of which is also disputed by the Department. Thus, there are genuine issues of material fact in dispute.

We conclude that the information sought is relevant and material. The information requested, including the DS Reports of Investigation and the grievant's personal e-mails, may tend to prove or disprove, or lead to the discovery of admissible evidence, concerning the elements of the alleged violation of 22 U.S.C. Section 4113(b)(1)(B), set forth above, and whether there was a violation of 3 FAM 4322.3. See 22 CFR Section 903.9(b)(1); Federal Rules of Civil Procedure (FRCP) 26(b)(1); FSGB Case No. 2005-014 (Order dated November 3, 2005).

However, the period of disclosure requested, "anytime between November 2004 and April 2007," is not justified in the record, and we limit the production of the DS material requested to that covering the period from May 2006 through December 2006. Grievant's February 16, 2007 letter to Dr. Lawrence Brown, Medical Director, Department of State, and others, alleges that the RSO informed her on November 29, 2006, in part, that she had been "under investigation by DS for the last six months," which would be May 2006. Her medical clearance was restored in December 2006 and she was returned to post. Therefore, we find no present justification for the disclosure of reports outside the period May 2006 through December 2006.

## **B. GRIEVANT'S REQUEST FOR INTERROGATORIES**

Grievant requests that the Department be compelled to answer three interrogatories concerning a previous meeting on November 15, 2006, as follows:

1. Identify by name and official title everyone who attended a meeting on November 15, 2006 at which I was the topic of discussion.
2. Provide a detailed summary of what was discussed at the November 15, 2006 meeting.
3. Was the possibility of my curtailment from [REDACTED] discussed at the November 15, 2006 meeting?

### **1. GRIEVANT'S POSITION**

Grievant contends that answers to the interrogatories will show (1) that [REDACTED] curtailment committee met on November 15, 2006 to discuss whether or not her actions warranted involuntarily curtailment and (2) the committee found no just cause for involuntarily curtailing her from post. She maintains that, despite this recommendation by post's management, [REDACTED] RSO subverted this process by calling in the Regional Psychiatrist to have her removed from post by means of an involuntary Medical Evacuation, believing that this would remove her from post without the need for formal documentation.

### **2. AGENCY POSITION**

The Agency claims that the issues [REDACTED] sets forth in her Motion to Compel are not properly before the Board. However, in the interest of resolving this discovery dispute, the Department states that RSO [REDACTED] has advised the Grievance Staff that the November 15, 2006 meeting was not a meeting of any "curtailment committee;" that, to his knowledge, no such "committee" existed. He recalls briefing post management, including the Deputy Chief of Mission, on [REDACTED] behavior and

recalls consensus among those present that the issue should be approached from a medical perspective. As a result, [REDACTED] (who was not present at the November 15, 2006 meeting) was consulted and asked to come to the post. At post, [REDACTED] reviewed the information gathered by the RSO office and then consulted with the Office of Medical Services, Office of Mental Health Services (MED/MHS) in Washington. It was the recommendation of both MED/MHS and [REDACTED] that [REDACTED] undergo a psychiatric evaluation.

The Agency states that allowing discovery regarding the November 15, 2006 meeting would not advance the issues on appeal before the Board, which are limited to whether she was improperly denied her Weingarten rights and any rights she may have had under 3 FAM 4322.3 at the November 29, 2006 meeting.

### **3. THE BOARD'S RULING**

We conclude that the information sought is relevant and material and may reasonably lead to the discovery of admissible evidence regarding the elements of the alleged violation of Weingarten rights and whether there was a violation of 3 FAM 4322.3. It is admitted that the purpose of the November 29, 2006 meeting was discussed at the November 15, 2006 meeting. Thus, the information sought as to the attendees at the meeting and a summary of the discussion held may reasonably lead to the discovery of admissible evidence regarding whether the alleged "examination" of the grievant on November 29, 2006 was "in connection with an investigation," and whether the "employee reasonably believed that the examination may result in disciplinary action against the employee."

#### **IV. ORDER**

Grievant's motion to compel is granted, in part. The Department shall provide the Diplomatic Security File, covering the time period May 2006 through December 2006, and shall provide answers to Interrogatories 1, 2, and 3. The Department is directed to respond within 20 calendar days from the date of receipt of this Order.

For the Foreign Service Grievance Board:



Garvin Lee Oliver  
Presiding Member



Lois E. Hartman  
Member



Alfred O. Haynes  
Member