

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{grievant}
Grievant

Record of Proceeding

and

FSGB 2007-047

March 26, 2009

Department of Commerce
United States Foreign and Commercial
Service,
Department

ORDER: MOTION TO COMPEL

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Roger C. Hartley

Board Members:

James E. Blanford

John H. Rouse

Special Assistant:

Linda B. Lee

Representative for the Grievant:

Pro Se

Representative for Department:

Adam Chandler
Agency Representative
Office of General Counsel

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO COMPEL

I. BACKGROUND AND ISSUE

Grievant, {grievant}, filed this grievance appeal On November 13, 2007. He challenges the denial by the U.S. and Foreign Commercial Service of the Department of Commerce (USFCS, Department, agency) of his application for language incentive pay at his last post of assignment in {post}, before his 2004 retirement. He filed his grievance in 2007 after USFCS failed to reach a decision on his repeatedly renewed application for over three years. He alleges that the Department's written language incentive policy, under which his request was denied, is outdated and erratically applied, and deviates from actual agency practice.

Following several procedural matters and contested discovery by grievant, on January 15, 2009, he submitted his supplemental pleading. As permitted by Board procedures, on February 3, USFCS submitted its discovery requests to grievant. He responded in part on February 23, but objected to a number of the queries. USFCS filed a motion to compel responses to eight interrogatories and one document request on March 4, grievant filed a response on March 13, and the agency replied on March 20. This order addresses the agency motion to compel.

II. DISCUSSION

Interrogatories 2 and 3, and Document Request 6

These queries request information and documentation regarding the basis for and the dollar amount to date relating to grievant's remedial request for "[a]ttorney fees and expenses, if appropriate." USFCS asserts that it is entitled to this information in order to determine the extent of its potential liability. It finds no basis in law for grievant's

assertion that discovery is inappropriate because the claim is contingent on his prevailing on the merits, and it maintains that denying the information could deprive it “of a meaningful opportunity to challenge the amount of fees claimed.” Grievant contends that discovery is inappropriate as entitlement and amounts are not ripe for consideration and will depend on whether he prevails.

Discussion. The agency motion concerning these requests is denied. An attorney fee award will only come into question should grievant prevail on the merits of his grievance. Both the basis for such a claim and the amount involved could change substantially during the course of the grievance. To merit such an award, grievant will have to prevail on the substance of his claim, and to prove that the appropriate attorney-client relationship exists, that he is entitled to the specific amounts claimed, and that award is in the interests of justice. Should the issue arise, USFCS will have ample opportunity to be fully apprised of the nature, basis and amount of any claim, to review the claim and to make its views known. We can anticipate no negative consequences for the agency from delaying development of this conditional issue.

Interrogatory 4

This query asks grievant to specify the particular remedies he is requesting in his remedial request to the Board for “[a]ll other appropriate relief deemed just and proper.” USFCS contends that no discovery rule prohibits this request for clarification which is needed to permit it to prepare its position and determine the extent of potential liability. Grievant maintains that the information requested is “unripe” for a response, and that the request is immaterial and overly broad.

Discussion. The remedial request to the Board for “all other appropriate relief” has become a standard element of grievance appeals, presumably to empower the Board, if the grievant prevails, to take corrective actions not otherwise specifically requested. The Board has broad remedial authority not dependent on such blanket appeals. Ordinarily such blanket appeals do not encompass remedies contemplated but not specified elsewhere, and ordinarily a last minute appeal for additional relief not timely included in the grievance would be viewed with some skepticism by the Board. However, as there is no reason why the agency may not inquire whether grievant has in mind remedies not yet spelled out, the Board will direct that this query be answered.

Interrogatories 12 and 17 ask whether grievant is claiming that a named State Department officer has authority over the agency language policy or that the agency is required to align its language policy with that of the Department of State. USFCS contends that it is entitled to “understand grievant’s arguments” so that it can respond to them. Grievant maintains that the factual information he has provided adequately addresses these requests and that the requests are burdensome, immaterial and not productive, in that they seek “contentious or debatable propositions.”

Discussion. These interrogatories must be answered. While it is true that discovery primarily is to elicit factual information in possession of the other party, contention interrogatories are appropriate to identify important aspects of the opposing party’s position when those aspects are not manifest from the existing pleading. Here, it is material whether grievant is asserting that a named State Department office has authority over the agency’s language policy and whether the agency is required to align

its language policy with that of the Department of State. As the current pleadings do not clarify these matters, interrogatories 12 and 17 must be answered.”

Interrogatories 18 and 19. The request to compel responses to these queries has been withdrawn by USFCS.

Interrogatory 20 asks grievant to identify all persons with whom he has discussed his language incentive pay claim since 2002 and for the substance of those discussions. USFCS contends that shielding from it potential witnesses not protected by privilege and the substance of material discussions with them would unfairly impair its ability to present its case. In response, grievant has identified his AFSA attorney, claiming privilege, and one USFCS employee. Grievant states “that he cannot identify anyone further with whom he discussed the issue . . . that would be relevant to this case or to the Department” and notes “that all information on official conversations and e-mails has been duly provided to the Department and Board in the course of these proceedings.”

Discussion. The Board understands grievant’s response to mean that he has identified on the record all persons on whose statements or information he is relying in the grievance. The agency is entitled to know the identities of all persons whose evidence will form a part of grievant’s case. Thus the grievant will be limited to the evidence presented by individuals already identified to the agency. With this understanding, the agency motion on this interrogatory is denied.

III. DECISION

Grievant is directed to respond to Interrogatories 4, 12, and 17 no later than April 14, 2009. In all other respects the Motion to Compel is denied as discussed in this Order.