

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{ Grievant }
Grievant

Record of Proceeding

And

FSGB 2007-047
September 19, 2008

Department of Commerce
United States Foreign and Commercial
Service

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. INTRODUCTION

{Grievant} (grievant) filed a grievance appeal on November 13, 2007 challenging the denial by the U.S. and Foreign Commercial Service (USFCS) of the Department of Commerce of his application for language incentive pay at his last post of assignment, {post 1}. He alleged that the denial was based on an outdated policy with false premises that was not being uniformly applied. Grievant submitted a discovery request to the Department on November 29 seeking answers to interrogatories, documents and admissions. Following a Board order upholding the timeliness of the appeal, USFCS responded in part to the discovery request, but objected to a large number of the queries. Grievant filed a motion to compel agency answers on July 11, the Department responded on July 28, and {Grievant} replied on August 7, 2008. This Order addresses the Motion to Compel.

II. BACKGROUND

From June {year} to June {year} grievant served with USFCS in {post 1}. During that time he had a tested language rating of S-2/R-2 in {language 1}, a rating qualifying him for language incentive pay at an appropriate language designated post. In June 2004, after discovering that incentive pay was available, grievant applied for such pay for the period of his past assignment in {post 1}, but his request was denied on the grounds that only the language {language 1} was designated in the USFCS language incentive policy as an incentive language for the post.

Grievant appealed the denial in July 2004, asserting that with the break-up of {country} in the 1990s {language 1} was no longer an official language and pointing out

that the Department of State list of official languages treated “as a single language” for incentive pay purposes “{languages}.” He argued that his expertise in {language 1} was “virtually identical” to {language} and should qualify him for {post 1} incentive pay. USFCS replied that it would revisit the issue and get back to him.

Grievant retired from USFCS in July 2004. For the next three years he pursued his claim intermittently, and was repeatedly assured that his request was still under review. Finally, he grieved the denial, but on November 13, 2007 USFCS denied his grievance on the grounds that {language 1}, in which he had established proficiency, was not an incentive language recognized in the USFCS language incentive policy. Unlike the Department of State, which grouped together {language}, {language 1}, {language 1} and {language} as a single language for incentive pay purposes, USFCS had designated only {language 1}.

In his grievance appeal, {Grievant} asserts that the USFCS listing of {language 1}, dating from the 1990s, is outdated; that {language 1} no longer exists as an official language, with no official training in {language 1} offered, eliminating it in practice as an incentive language; and that USFCS officers are being trained in {language} or {language 1}, not {language 1}, and are receiving language incentive pay when qualified. He maintains that the USFCS denial of pay for him “hides” behind the outdated written policy, which is erratically applied, and deviates from actual agency practice.

III. THE DISCOVERY REQUEST AND RESPONSE

Grievant’s discovery request to USFCS included six interrogatories directed to Denise McGann, Chief of Human Resources Operations and Services, who had been {Grievant’s} most frequent contact during his prolonged quest for language pay. The

queries asked McGann to describe her role and recommendations with respect to his application, and the knowledge, actions and communications of all other employees involved in considering or processing his request. Also included were 13 requests for all documents relating to the issues raised in the appeal that were received or prepared by McGann or eight other employees whom grievant had previously contacted or identified as possibly involved, and two requests for documents regarding post designation and language incentive payment with respect to {language 1}, {language}, or {language 1}. Included also were five requests for admissions regarding incentive payment and post designation with respect to {language 1}, {language}, and {language 1}.

In response, USFCS objected to all of the interrogatories on two grounds: (1) that they request information that is irrelevant and immaterial, and (2) that the information sought is protected from release by the deliberative process privilege. The agency provided some documents in response to the document requests (which are not included in the grievance record) but interposed a repeated objection to most of the requests, “to the extent that it requests predecisional information protected from release by the deliberative process privilege.” The agency objected to two of the document requests and to all of the requests for admissions on individual grounds that are discussed below.

Grievant’s Motion to Compel challenges the agency objections to all of the interrogatories, to document requests 3-12 and 15 and to requests for admission 2, 3, and 4.

IV. DISCUSSION

Since the USFCS assertions of irrelevancy and privilege apply to a number of the discovery requests, they will be discussed before reviewing requests individually.

Relevance

USFCS objects to each of grievant's interrogatories on the grounds that "it requested information that would not lead to discovery of admissible evidence." It maintains that the "sole issue" in the grievance is whether its denial of incentive pay to {Grievant} is "in accordance with its policies," and that information regarding the role of individual staff members, their positions and communications in connection with the decision, "would not shed light on what the actual policy and practices are regarding language incentive pay," and thus is irrelevant.

Grievant states that relevance is a broad standard encompassing any information "likely to prove a fact that affects the outcome of the claim." He maintains that the "real issue" in the case is whether USFCS "practice substantially deviates from its written policy." Information regarding the role, actions, and communications of McGann and other involved staff members related to this process "clearly would go toward proving" grievant's allegations.

Board regulations provide that a grievant is entitled to information in possession of the agency that is not privileged and is relevant and material to the grievance (22 CFR 903.6, 903.9). "Relevant and material information is that which tends to prove or disprove a fact that may affect the disposition of a grievance." (Board publication, "Policies and Procedures Regarding Discovery.") When addressing discovery disputes, the Board's role in terms of relevance is to determine whether the information requested

is relevant or likely to lead to the discovery of relevant information. Like the courts, relevance for discovery purposes in Foreign Service grievances is a much broader concept than the issue of relevance in terms of actual admissibility of proffered evidence at a hearing. See FSGB Case No. 2005-040, (Order of February 3, 2006). Grievant's interrogatories and document requests inquire into the actions, communications, and practices taken in connection with denial of his incentive pay application or the treatment of other officers, seemingly similarly situated. The Board is of the view that each of grievant's renewed discovery requests, as approved herein, could well lead to disclosure of information material to grievant's claim of inconsistent and erratic agency action, and is therefore relevant and material as defined in Board practice and rulings. We so hold.

Privilege

USFCS objects to grievant's interrogatories Nos. 1-3 and 5 and 6 on the grounds that each "requests information protected from release by the deliberative process privilege." Interrogatory No. 1 asks that McGann describe her role regarding grievant's language pay request. No. 2 asks that she describe her "recommendation (and its basis) to USFCS" regarding the request; and No. 3 asks that she describe "how your recommendation . . . was received and acted upon by USFCS." Interrogatories Nos. 5 and 6 ask McGann to describe her communications with, and the substantive input on the subject from, staff members identified in the document requests and to identify all others with whom the language pay request was discussed and describe those communications and the individuals' substantive input.

Citing FSGB Case No. 2006-037 (May 1, 2007), the agency states that to be protected by the privilege it must show that the information is "both (1) pre-decisional

(prepared to assist a decision maker in making a decision) and (2) deliberative (bears on the exercise of agency's judgment).” USFCS asserts that the information requested regarding staff recommendations and “input given to agency decision makers” and the handling of it is “clearly pre-decisional and bears upon the exercise of the agency’s judgment.”

USFCS also declined to provide information in response to Interrogatory 4 and document requests 5-12 and 15 “to the extent that [each query] requested predecisional information protected from release by the deliberative process privilege.” As to these responses it did not develop its argument further or identify the specific information or documents that it contends are covered by the privilege.

In opposition to the agency assertion of privilege, grievant, citing a number of federal court decisions, maintains:

- The agency has the burden of establishing that the material requested is both predecisional and deliberative and must disclose factual information not “inextricably intertwined” with the protected material.

- The agency must at the least specify the decision to which the material correlates, establish that the material was prepared to assist the deciding official in making the decision, and verify that the material preceded the decision.

- A conclusory assertion of privilege will not suffice to carry the agency’s burden of establishing the right to withhold records or information.

- In all of its objections asserting the privilege, USFCS has failed to show that the named staff member was not the final decision maker, or the role of the employee in making the decision, or how this type of decision is reached; that the information

withheld was originated to facilitate a specific agency decision; and whether any of the information withheld is factual in nature.

Grievant concludes that, failing such required agency specifications, the deliberative process privilege does not apply, and USFCS should be compelled to answer his requests.

Board procedures permit discovery only of “nonprivileged information.” (“Policy and Procedures Regarding Discovery,” cited above). The Board has emphasized, however, that the initial burden of showing that an exclusionary privilege applies rests on the agency. FSGB Case No. 2000-044 (October 23, 2000). The Board has followed judicial rulings defining the deliberative process privilege as encompassing only information “reflecting advisory opinions, recommendations and deliberations that are part of a process by which [agency] decisions and policies are formulated,” and has held that “[a] formal invocation of the deliberative process privilege must include a detailed specification of the information for which the privilege is claimed, with an explanation of why it properly falls within the scope of the privilege.” FSGB Case No. 2006-037 (May 1, 2007), declining to sustain an agency claim of privilege on “a mere conclusory statement that the information is protected by the privilege.” The deliberative process privilege does not apply to routine discussions about application of existing decisions and already formulated policies.

There can be no doubt that the broad, general, and encompassing assertions of privilege put forth by USFCS do not approach the degree of specificity required to warrant protection from disclosure. The agency characterizes grievant’s interrogatories in broad terms such as seeking information “concerning the recommendation made by an

Agency staffer on the final decision on grievant's claim," "concerning input given to Agency decision makers," and "concerning input, opinions and recommendations made by Agency employees on the final decision." It does not, however, disclose the decision making process or the roles in it of the staff members queried or of their communications, and it makes no effort to disaggregate and identify factual, nondeliberative information related to the decision process that would not be protected. Agency objections to grievant's document requests are even more ill-defined and unsatisfactory - simply declining disclosure "to the extent that [the query] requested predecisional information protected from release by the . . . privilege," with no identification whatsoever of the nature, content, purpose or extent of the information being withheld, and no effort at disaggregation and release of nonprivileged information.

Such summary and inclusive assertions of privilege clearly fail to meet Board standards of specificity or to carry the agency burden to establish that the privilege applies. As USFCS has failed to establish that the information sought is privileged, the Board would be warranted in directing it to release all documents, communications and other information sought. Such a blanket order, however, would certainly lead to release of some deliberative information which should properly be protected and which would probably have been excluded by the Board if correctly identified. The Board has decided to permit the agency to seek to assert the deliberative process privilege in a procedurally correct manner in accordance with Board and judicial precedents, with required specificity regarding the decision making process, the roles of queried staff members and the particular communications and information sought to be protected.¹ If it wishes to

¹ To be more specific regarding the requirements to be met would amount to an advisory opinion, contrary to Board practice. One approach followed by courts has been to require a "privilege log" of information

reassert the privilege, USFCS is granted 15 days to present such a submission to the Board, and grievant is granted 15 days from his receipt of that submission to reply, following which the Board will revisit the question.

Individual Requests

Document Request No. 3 seeks all documents that “identify {post 2} as a {language 1} designated language-speaking post . . . and . . . {post 1} as a {language} designated language-speaking post.” Absent such documents, it requests “all documents (including from FSI) that identify the language-speaking designations for both posts.”

USFCS states that it is unable to answer the request as it does not designate posts as “language-speaking.” Grievant contends that the agency is being “deliberately obtuse by refusing to answer perfectly clear discovery requests on the basis of minor semantics.” For clarity he has revised the request as follows and asks that USFCS be directed to respond to the revised request.

Any and all documents that identify that the SCO position in {post 2}, is or was language-designated from 2000 until present. Any and all documents that identify that the SCO position in {post 1} is or was language-designated from 2000 until present. If any such information is lacking, please produce any and all documents that identify the language designation for both positions from 2000 until present.

claimed to be privileged, including a brief description or summary of the contents of each document without divulging the privileged information, as follows

1. The date the document was prepared or conversation occurred;
2. The person or persons who prepared the document or engaged in the conversation, with title;
3. The person to whom the document or conversation was directed, with title;
4. The purpose in preparing the document or having the conversation;
5. The privilege or privileges asserted with respect to the document or conversation;
6. How each element of the asserted privilege is met as to that document or conversation;
7. The persons to whom the information was disclosed if this is not included in item # 2 and the titles of such persons.

See generally Bennett v. Fieser, 1994 WL 542089 at *3 (D. Kan., Feb. 25, 1994)

The Board finds that the meaning and thrust of the initial discovery request, while not precisely worded, was unmistakably clear. The refusal of USFCS to respond on narrow, technical grounds appears confrontational, unreasonable, and inconsistent with agency discovery response obligations. USFCS is directed to respond to the request as reformulated above.

Document Request No. 4 requests “all documents (including those from FSI) identifying any officers (currently and within the last 5 years) that are receiving language incentive pay for {language 1}, {language} or {language 1}.”

USFCS produced some documents respecting language-incentive pay in {post 1} but objected to reference to any other post as not being at issue, and at providing information in the possession of FSI (the Foreign Service Institute), a State Department entity. Grievant contends that his request only encompasses {post 1} and {post 2}, both of which are material to his claim of improper practice, since {language 1}, {language} and {language 1} are involved.

The Board agrees with grievant. USFCS is directed to respond with respect to {post 2} as well as {post 1}. It need not, of course, seek documents in the possession of FSI, but it should produce any relevant documents in USFCS possession, whether or not originated by FSI.

Requests for Admission Nos. 2, 3, and 4 are related. They ask the agency to admit that no FCS post in the region is “designated as {language 1} speaking,” that “{post 2} is designated as a {language 1} speaking post,” and that “{post 1} is designated as a {language} speaking post.”

USFCS objects to any reference to posts other than {post 1} as not at issue and states that no posts are designated as “language-speaking.” Grievant renews his assertion that {post 2} is relevant to his claims, and for clarity has rephrased the three requests, as follows:

1. Admit that the SCO position in {post 2} is not language designated as {language 1}.

Admit that the SCO position in {post 1} is not language designated as {language 1}.

2. Admit that the SCO position in {post 2} is language designated as {language 1}.

3. Admit that the SCO position in {post 1} is language designated as {language}.

The Board finds that, for purposes of discovery, the references to {post 2} are relevant to grievant’s claims regarding agency language incentive practices and that USFCS failure to comprehend and respond to the requests as initially framed was not reasonable. USFCS is directed to respond to the three requests for admission as rephrased above.

V. DECISION

1. The Board defers decisions on grievant’s Motion to Compel responses to Interrogatories Nos. 1-6 and Document Requests Nos. 5-12 and 15. USFCS has 15 days from the date of this Order to resubmit its position that information requested is protected from release by the deliberative process privilege. Grievant will have 15 days from receipt of the agency submission to reply, following which the Board will review these

requests anew. To the extent that USFCS should decide not to renew its claim of privilege, it is directed to respond fully to those requests not included in the renewed claim within 15 days of the date of this Order.

2. USFCS is directed to respond to Document Requests Nos. 3 and 4 and Requests for Admission Nos. 2-4 in accordance with the Board's rulings above. The responses are to be submitted to grievant within 15 days of the date of this Order.