BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

And

Department of State

Record of Proceeding
FSGB No. 2009-023

Date: October 19, 2009

ORDER: JURISDICTION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Harriet Davidson
Board Members:	Gail M. Lecce Nancy M. Serpa
Special Assistant:	Joseph Pastic
Representative for the Grievant:	Sharon Papp American Foreign Service Association
Representative for the Department:	Joanne M. Lishman Director Grievance Staff
Employee Exclusive Representative:	American Foreign Service Association

ORDER: JURISDICTION

I. BACKGROUND

On June 24, 2009, grievant filed a grievance appeal, claiming improper use by the Department (Department, agency) of the results of a polygraph examination he had taken in conjunction with a detail from the Department to the Central Intelligence Agency (CIA). On July 13, grievant submitted his first discovery request to the Department. The Department requested an extension of time to reply, from August 3 to August 28, which the Board granted.

On August 12, the Department requested that the Board make a preliminary determination on the jurisdictional issues it had raised in the Agency level decision and stated its intention to file a brief in support of its request on August 28 in lieu of its reply to grievant's discovery request. On August 20 the Board advised the parties that it would grant the Department's request to delay its response to discovery pending a review of the jurisdictional issues. The Department filed a memorandum on August 28 in support of its position that the Board lacked jurisdiction in the case. Grievant filed a response on September 7. On September 17, the Department submitted a reply to grievant's Statement Regarding Jurisdiction.

II. ISSUES

Within his appeal, grievant makes several specific claims: 1) that the CIA provided the results of the polygraph to a Diplomatic Security (DS) agent in the Department, in violation of Department regulations and CIA policy; 2) that the Department requested and/or received the polygraph results from the CIA, in violation of its own regulations; 3) that the Department improperly used the polygraph results in the

course of security update investigations; and 4) that the Department improperly provided information drawn from the polygraph to the Director General (DG), which resulted in the DG withdrawing grievant's nomination to be a chief of mission.

The Department contends that the Board lacks jurisdiction in the case, based on a number of rationales. It argues that neither the Department nor the Board have authority to entertain claims against the CIA. It further argues that grievant is claiming violations of the Privacy Act and the Freedom of Information Act, which the Board also lacks authority to entertain. To the extent that grievant is claiming violation of Department regulations at 12 FAM 250, the Department finds those claims to be inextricably merged with the claims against the CIA and with the Privacy Act violations, providing a basis for dismissing those claims in their entirety.

In the alternative, the Department contends that grievant has materially altered his grievance in the appeal to the Board. The Department argues that grievant is no longer alleging that the improper use of the polygraph results is a matter of violation of his privacy, but rather that the improprieties led to his not being appointed a chief of mission (COM), which in turn resulted in a two year loss of salary and allowances for which he now seeks reimbursement. The Department contends that these new claims are either not grievable or should be remanded to the Department for initial resolution.

III. DISCUSSION AND FINDINGS

In his original grievance to the Department, grievant, proceeding *pro se*, states that his grievance is based upon violations of the Privacy Act and 12 FAM 250. However, in the development of his claims within that submission, grievant relies almost entirely on the specific provisions of 12 FAM 250. He does not cite any specific

violations of the Privacy Act. Rather, grievant refers to the Privacy Act as providing one of the underlying statutory bases for the Department's own regulation of polygraph examinations, set forth in 12 FAM 250. Similarly, grievant's references to the Freedom of Information Act are provided as context for the Department's own policies and regulations regarding polygraphs. In his September 7 response to the Department's request that the Board dismiss the case for lack of jurisdiction, grievant further clarifies that he is not basing his claims on violations of the Privacy Act or Freedom of Information Act, but rather solely on the violations of 12 FAM 250.

The Board finds that the claims presented by grievant with respect to violations of 12 FAM 250 stand on their own and are not inextricably entwined with claims, never clearly made by grievant in the original grievance, regarding violations of the Privacy Act or Freedom of Information Act ("FOIA"). Grievant is challenging the Department's actions in acquiring the polygraph information and its subsequent use of that information, as regulated by 12 FAM 250. The claim that the alleged violation of 12 FAM 250 is not appealable to this Board because those claims might also be plead as a violation of the Privacy Act or the FOIA is rejected. The Board need not decide whether a grievance based upon assertions that the Department violated the Privacy Act and/or the FOIA is appealable. The grievance in this case is grounded in claimed violations of the FAM, that are alleged to have harmed the grievant. The grievance is thus properly appealable to the Board.

The Department's assertion that the CIA is not a party before the Board is correct. The grievance complains, however, about the effect on the grievant's employment that resulted from the actions of the Department. The CIA is not a necessary party to this

appeal and this Board's lack of jurisdiction over the CIA provides no basis to dismiss this appeal.

The Department's alternative contention that grievant has materially altered his grievance to include new challenges regarding the withdrawal of his nomination as a chief of mission, and that his claim should therefore be remanded to the Department for initial resolution is also rejected. We find that these are sufficiently related to the claimed violations of 12 FAM 250 and the appropriate remedy for any proven violations to be considered part of the original claim. The Board has generally not considered clarification or expansion of remedies to be an expansion of a grievance as defined by 3 FAM 4452 and has allowed such at the appeal level. Nor do we find in this case that permitting grievant to expand or clarify his request for remedies in this situation results in any prejudice to the Department.

The Department also contends that grievant's appointment as a COM is not a grievable matter and is, therefore, not properly before the Board. The Department makes two distinct arguments to support this contention. First, it argues that grievant voluntarily withdrew his name from consideration, and that, as a voluntary action, the issue is not grievable. The grievant disputes the Department's assertion that he voluntarily asked that his nomination be withdrawn. Given this disputed material fact, dismissal of this claim would be inappropriate.

The Department argues second that a Presidential appointment as a COM is not a right or benefit to which grievant was entitled; that such an appointment is beyond the control of the Secretary of State; and that, therefore, any claims relating to such an appointment can have no remedy. The Department asserts, therefore, that grievant's

claims regarding the withdrawal of his nomination are outside the parameters of a grievance as defined by 22 U.S.C. 4131.

Grievant responds that he is neither challenging the failure to be nominated *per se* nor claiming that he was entitled to an appointment as a COM. Rather he is challenging the use of the polygraph information in the process that led to this action and seeks not appointment as a COM as relief, but monetary compensatory relief for this claimed FAM violation. We decline to dismiss this claim for relief and reserve for an appropriate point in the process whether, based upon any proven violation of the FAM, such relief is appropriate.

IV. CONCLUSION

The Board finds that it has jurisdiction over the claims presented by the grievant. The timeline in the case is reinstituted. The Department should respond to grievant's first request for discovery not later than two weeks after receiving this Order.

For the Foreign Service Grievance Board:

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Harriet Davidson
Presiding Member

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Gail M. Lecce
Member

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Nancy M. Serpa
Member