

In the Matter Between

██████████

Grievant

And

Department of State

Record of Proceeding  
FSGB No. 2009-023

Date: March 17, 2010

**ORDER: MOTION TO COMPEL**

**EXCISED**

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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:

*Pro se*, assisted by Sharon Papp,  
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman  
Director  
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

## **ORDER: MOTION TO COMPEL**

### **I. BACKGROUND**

On June 24, 2009, [REDACTED] (grievant), a retired Senior Foreign Service Officer, appealed to this Board the State Department's (Department) denial of his grievance with respect to the use of the results of a polygraph exam he took in 2003 in conjunction with a detail to the Central Intelligence Agency (CIA). Grievant claims the improper handling and use of the results of that exam violated the Department's own regulations (12 FAM 250) and resulted in his having been denied a Presidential Appointment as a Chief of Mission (Ambassador).

On July 13, 2009, grievant submitted his first discovery request. After delays occasioned in part by the Department's request for a preliminary determination regarding jurisdictional issues and a stay of the pending discovery, the Department filed its reply to the discovery request on November 10, 2009. Grievant submitted a Motion to Compel Discovery (MTC) on November 20, 2009, to which the Department responded on December 9, 2009. Seeking clarification of some of the discovery requests and the responses, the Board convened a status conference on January 11, 2010. At the status conference, the Department agreed to provide additional information, which it submitted on February 3, 2010.

On February 14, the Board asked grievant which, if any, document and interrogatory requests remained unsatisfied in his view. Grievant replied on February 16 that he did not believe he had received satisfactory responses to Interrogatories 1, 3, 5g, 6a and e, and 7 c, d, f and h. This order addresses only those requests that grievant is pursuing.

## II. DISCUSSION AND RULINGS

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 Sections 903.6 and 903.9. The Board is guided in the discovery process by its “Policies and Procedures Regarding Discovery.” Specifically, the term “relevance” is defined in that document and in Board precedent such as FSGB Case No. 2008-019 (August 27, 2009).

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*” (August 12, 1997 revision.) This includes both claims and defenses. When addressing discovery disputes, the Board’s role 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).

### INTERROGATORY REQUESTS

Interrogatory Request (IR) #1: Has the Department ever obtained a Department employee’s polygraph examination results from the CIA for a personnel security background investigation based on the employee’s SF-86 signed release? If so, please describe the circumstances under which this would occur.

The Department objected to answering this interrogatory on the grounds that it was overbroad, immaterial, and irrelevant.

Ruling on IR #1: The Board finds that the information sought is not relevant and material to the grievance, and the Department need not respond to this question.

IR #3 for Diplomatic Security Case Officer for the Grievant’s first 2006 (routine update) background investigation: Did you request the Grievant’s security file, including the Grievant’s polygraph results, from the Central Intelligence Agency as part of this background investigation? Why, or why not?

The Department objected to this IR as immaterial and irrelevant insofar as it concerns matters not at issue in this case.

Ruling on IR #3: The Board finds that the material the Department provided in its February 3, 2010 response to the Board has sufficiently answered this interrogatory, and the Department need not provide any further response.

IR #5g for Diplomatic Security Investigator for 2008 interview for second background investigation (Robert Richardson): You indicated that the polygraph was issued to supplement an investigation. Since you reviewed the Grievant's file according to your statement to him, what prior investigative steps had been taken?

The Department responded that Mr. Richardson did not, to the best of his recollection, review the grievant's file.

Ruling on IR #5g: The Board considers that this question has been answered.

IR # 6a: for Diplomatic Security Case Officer for the second background investigation: You did not conduct an employee interview for his background security check prior to receiving his polygraph results. Why not?

The Department answered this question by saying there is no particular order in which an investigation must be conducted.

Ruling on IR #6a: The Department has sufficiently answered the question and need not respond further.

IR #6e for Diplomatic Security Case Officer for the second background investigation: Have you ever requested an employee's polygraph results from the CIA before? If so, under what circumstances?

The Department found this interrogatory overbroad, irrelevant, and immaterial.

Ruling on IR #6e: Under the more ample concept of relevance applied at the discovery stage, the Board finds that the information requested is sufficiently relevant to

grievant's claims or likely to lead to the discovery of information relevant to such claims to compel discovery. The information requested may help to clarify the Department's practice in applying the regulations governing the use of polygraphs that are issue in this case. We do not find the request to impose such a burden on the Department as to outweigh the potential usefulness of the information requested. The Department is directed to respond.

IR #7c for Diplomatic Security: Describe the prior investigative steps taken before the Grievant's polygraph results were requested and received from the Central Intelligence Agency.

The Department responded that its discovery responses have addressed the context and authorities by which information on the grievant was requested from the CIA, what information was received, and how it was used.

Ruling on IR #7c: The Board believes the Department has sufficiently answered this interrogatory and need not respond further.

IR # 7d for Diplomatic Security: What "investigative leads" or other matters did you wish to pursue by use of the Grievant's polygraph examination results?

The Department responded, after clarification, that it had addressed the authority for its use of the CIA's summary of polygraph examination results as an investigative lead.

Ruling on IR #7d: The Department has sufficiently answered the question and need not respond further.

IR #7f for Diplomatic Security: Why didn't DS conduct an employee interview as part of this background security investigation before requesting and acting upon the results of his polygraph examination?

The Department responded that there is no particular prescribed order of events in an investigation and that it did conduct an employee interview on December 12, 2007.

Ruling on IR #7f: The Department has sufficiently answered this question and need not respond further.

IR # 7h for Diplomatic Security: Does DS routinely request and receive polygraph examination results on all Department employees who have taken polygraph examinations at the CIA as part of their routine background security investigations?

The Department objected to this interrogatory as irrelevant and immaterial in all respects.

Ruling on IR # 7h: Under the more ample concept of relevance applied at the discovery stage, the Board finds that the information requested is sufficiently relevant to grievant's claims or likely to lead to the discovery of information relevant to such claims to compel discovery. The information requested may help to clarify the Department's practice in applying the regulations governing the use of polygraphs that are issue in this case. We do not find the request to impose such a burden on the Department as to outweigh the potential usefulness of the information requested. The Department should distinguish the circumstances under which it does routinely request polygraph information from the CIA and those in which it does not. The Department is directed to respond.

### **III. ORDER**

Grievant's Motion to Compel as modified by his February 16, 2010 e-mail communication to the Board is partially denied and partially granted, as detailed above. The Department is directed to respond to grievant's Interrogatories 6e and 7h not later than 20 days after receipt of this order.

For the Foreign Service Grievance Board:



Harriet Davidson  
Presiding Member



Gail M. Lecce  
Member



Nancy M. Serpa  
Member