BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted] Grievant	Record of Proceedings FSGB No. 2009-027A
And	November 17, 2010
U.S. Department of State	**ORDER**

For the Foreign Service Grievance Board:

Presiding Member:	Arline Pacht
Board Members:	Jeanne L. Schulz Nancy M. Serpa
Senior Advisor	Margaret Sula

Representative for the Grievant:	*Pro se*
Representative for the Department:	Joanne Lishman HR/G
Employee Exclusive Representative:	American Foreign Service Association

ORDER

I. THE ISSUE

On July 17, 2009, grievant [redacted] an FS-4 Foreign Service Officer Career Candidate with the U.S. Department of State (the Department, the agency), appealed the Department's denial of her agency-level grievance to this Board. She contends that the five-day suspension proposed by the deciding official is not reasonable, is inconsistent with the precept of "like penalty for like offense," and that the DS investigation on which her discipline was based is flawed.

II. BACKGROUND

[redacted] filed her initial discovery request on May 19, 2010 to which the Department responded on June 30, 2010. Thereafter, [redacted] filed a Motion to Compel (MTC) on July 8, 2010. In its July 21, 2010 response to that motion the agency sustained its denial of many of her requests, and grievant replied to this response by memo dated July 28, 2010. This order addresses grievant's outstanding requests for production of documents, interrogatories, and requests for admission.

III. GRIEVANT'S MOTION, DISCUSSION AND FINDINGS

A. DOCUMENT REQUESTS

Request 2: The March 4, 2009 letter of discipline states that the Fraud Prevention Manager "discovered that you ran 18 name checks on May 30, 2006." The Fraud Prevention Manager and the Assistant Regional Security officer "compared the names to those in the [redacted] band '[redacted]' and discovered they matched." From among those 18 names, produce the screen shot of the NIV refusal/issuance notes (remarks) screen of the person who had previously been denied a visa because he had a wife in the US (in his interview prior to May

2006) and the screen shot of the NIV notes/remarks screen of the back-up singer who had previously stated that he worked in a bank (in his interview prior to May 2006). Please provide these, if possible, in the version of the NIV software that was in use at the time (May 2006) since there have been many changes to the NIV system and NIV processing since.

Grievant contends these "screen shots" are relevant and will show how her case differs from those of officers disciplined for inappropriately accessing Privacy Act-protected databases. The Department argues these screen shots are irrelevant, immaterial, and unlikely to lead to the discovery of admissible evidence. Moreover, it contends that the information sought is the same information that grievant admitted to having obtained from the Consular database and provided to an unauthorized third party. The Department avers that "your admitted actions violated Consular Affairs regulations and you were disciplined for those violations."

Discussion and Finding: We are not persuaded that the "screen shots" requested by grievant are irrelevant, immaterial, and unlikely to lead to the discovery of admissible evidence as the Department contends.

With this and other requested information, the Board believes grievant is attempting to distinguish the data she inappropriately viewed and reported to others from data other charged consular officers viewed, to support her argument that the discipline she received is too severe in view of the precept of "like punishment for like offenses." The Board finds that this request is sufficiently relevant to require disclosure of the information in question.

Moreover, the record does not reveal that grievant printed or retained "screen shots" of the data she inappropriately viewed in [redacted] as the Department contends. Thus, her request for screenshots in a software version in use at the time of the incident is justified.

Accordingly, the Department is directed to produce these documents, or, if the 2006

documents are unavailable, a reasonably similar example of the requested information.

Request 3: Grievant requests production of all documents relating to her complaint to the State Department Office of the Inspector General (OIG) regarding the manner in which the Regional Security Officer, and Diplomatic Security (DS) Agents in Washington, D.C. conducted the investigation against her, including any documents prepared by OIG Special Agent [redacted], as well as any other document prepared by DS that addresses her complaint.

In addition to arguing that this request is irrelevant and immaterial, the Department claims it did not rely on nor have access to any OIG complaint or file. Instead, the Department suggests that grievant address this request to the OIG. In her MTC grievant explained that OIG Special Agent [redacted] told her that in his report to DS about her complaint, he referred to DS' bias and unprofessional conduct, and stated that the Report of Investigation (ROI) contained false information. Grievant argues that since the Discipline Decision Letter she received was based on DS' ROI, any OIG investigation about that ROI is relevant.

Discussion and Finding: If an OIG investigation was conducted that generated any documents or reports, as grievant contends, they could prove relevant to this case and/or lead to the discovery of relevant evidence. The fact that the OIG findings may not have issued until after the discipline that is challenged in this case does not render it immaterial for discovery purposes where the grievant is challenging the accuracy of the information reported to, and apparently relied upon, by the Deciding Official in imposing the discipline in this case and in selecting the penalty, and has alleged multiple harmful errors in the manner in which the DS investigation was conducted. An OIG report could provide relevant information, especially if it reached a conclusion as to whether the ROI, upon which the deciding official based her final decision, contains false or inaccurate information. The request for documents other than any

final report issued by the OIG, however, is denied at this time with leave to request further discovery should the OIG report reveal that additional material may be relevant.

Thus, the Department is directed to produce any OIG final report that is responsive to this request.

Request 4: Grievant requests production of redacted proposal letters, discipline letters, case comparison worksheets, and Douglas Factor Checklists for all like cases involving misuse of official positions to access a consular database occurring in the past ten years.

The Department objects to this request as overly broad and overly burdensome, irrelevant, immaterial, and not likely to lead to discovery of admissible evidence. It also submits that HR/ER bases its review of cases during the past five years, adding that there were no "like" cases in this period. Grievant responds that the Foreign Service Grievance Board does not accept this five year limit.

Discussion and Findings: The claimed "HR/ER practice" of limiting its review of like cases to the past five years does not render similar cases beyond the five year period irrelevant (although it may affect weight) and cannot preclude appropriate discovery of cases beyond the five year period. This is particularly so in this case where grievant is alleging that the penalty recommended was not reasonable and no like cases were found within the five year limit. The Department is directed to produce this data for any like cases in the past ten years.

Request 5: Grievant requests production of redacted proposal letters, discipline letters, case comparison worksheets and Douglas Factor Checklists for all cases involving misuse of the PIERS database occurring in the past three years.

The Department objects to this request as irrelevant, immaterial, overly broad, and burdensome based on its contention that the instant grievance does not involve misuse of the

PIERS database. It also points out that employees involved in the PIERS cases did not access those databases at the request of an unauthorized person, as is the case in the instant grievance. However, the agency acknowledges that disciplinary actions relating to misuse of the PIERS database have ranged from admonishments to a recommendation for separation from the Service. Grievant argues that since PIERS is a consular database and she is charged with improperly accessing a consular database, her request is relevant and material.

Discussion and Findings: The Board is not persuaded that the Department's assertion that this request is irrelevant, immaterial, overly broad, and overly burdensome is valid. The Department is directed to produce the requested documents.

Request 6: The grievant requests redacted proposal letters, discipline letters, case comparison worksheets, and Douglas Factor Checklists in all like cases involving poor judgment for the past ten years.

The Department objects to this request as irrelevant, immaterial, overly broad, overly burdensome and unlikely to lead to the discovery of admissible evidence. Grievant contends that her request is relevant, since the proposing and deciding officials had an obligation to examine like cases prior to making their decisions in this case.

Discussion and Findings: The Board agrees with the Department's assertion that this request is overly burdensome, given that "poor judgment" is a charge that can be associated with a wide range of discipline cases. But if there are cases involving the charge of "poor judgment," and if a subset of those cases are cases about inappropriately accessing government databases, that subset could prove relevant. Therefore the Department is directed to produce the requested documents, redacted where necessary to protect privacy, for all cases in the last ten years where a charge of poor judgment for accessing government information was involved.

B. INTERROGATORIES

The grievant seeks responses to the following interrogatories:

Request 1: Ask DS to identify each answer grievant provided to DS during her interview at Post and in Washington, DC that support its allegation, and [redacted] conclusion, that she was "evasive and at times deceptive" about her answers to several questions.

The Department responds that the answer to this interrogatory is contained in Attachment A to the ROI, DS internal memorandum. Moreover, [redacted] was asked to provide a written statement to address her relationship with [redacted] which she declined to answer. Grievant contends that the Department's position is non-responsive.

Discussion and Finding: The Board finds that the ROI in this case, and its Attachment A, do not provide information responsive to this specific request, as the Department avers. The interrogatory seeks the specific bases for [redacted] conclusion that the Grievant was evasive and at times deceptive. The Department is directed to respond to this request.

Request 2: Which version of the NIV software system and INK software system was used in 2006 in [redacted] and which version of the NIV software system is currently used in the majority of NIV-processing posts?

The Department objects to this interrogatory as irrelevant, immaterial, and unlikely to lead to the discovery of admissible evidence.

Discussion and Finding: To the extent that this request repeats the information sought in Document Request 2, to which the Department was directed to respond, the request is denied as moot. To the extent that it seeks information about the version of software used, it is not sufficiently relevant or likely to lead to the discovery of relevant information and is denied.

Request 5: Confirm that the majority, if not all, of the employees listed in the Foreign Service List of Offenses and Discipline imposed during 2008 and 2009 who received a letter of admonishment for PIERS violations were serving overseas.

The Department objects to this interrogatory as irrelevant, immaterial, overly burdensome and unlikely to lead to the discovery of admissible evidence. Grievant states in her MTC that this information is relevant to her defense, particularly because the Department previously changed its answer as to the kind of employees who have been charged with PIERS violations.

Discussion and Finding: When the Department produces information responsive to discovery requests 4, 5, and 6, those responses will contain all the information sought by this Interrogatory. The grievant can make this calculation on her own after receipt of those responses. Therefore, the motion to compel this request is denied.

Request 11: State all of the mitigating factors [redacted] found were applicable in grievant's case.

In responding, the Department proposed that grievant refer to the Douglas Factors Checklist and the discipline decisions letter. However, since the Department indicated that [redacted] found both mitigating and non-mitigating factors, grievant submits that she needs to know how to distinguish between or among them.

Discussion and Finding: The Board finds that the March 4, 2009 decision letter from [redacted], and the Douglas Factor Checklist provided to the grievant, adequately identified the mitigating and aggravating factors deemed applicable by the Deciding Official. Therefore the Motion to Compel a response to this Interrogatory is denied.

Request 15: Identify by name and title the "personnel" mentioned in the April 29, 2010 Agency Decision on AGS 2009-028/FSGB 2009-027 referred to on page 5, paragraph 3 ("DS

interviews of other personnel").

Discussion and Finding: The Board accepts the Department's response that the only person interviewed was FSN [redacted]. Therefore, this request is denied.

Request 16: Ask former DS Special Agent [redacted] to answer the following questions under oath:

a. Did you have [redacted]'s memo in your physical possession during the interview of [redacted] on March 20, 2007, and did you use that as the basis for questioning her?

b. Did you include [redacted]'s memo in the ROI without clarifying/correcting portions of the memo based on your March 20 interview with [redacted]?

c. During the interview of [redacted], with Sharon Papp and [redacted] present, on March 20, 2007, [redacted] and Ms. Papp both recall you starting the interview with a very long multi-part statement, which, to the best of [redacted]'s recollection, included a statement that she gave out sensitive-but-unclassified information to "[redacted]," to which you required [redacted] to answer whether the statement was true, "yes or no," to which [redacted] responded "no" and tried to explain that parts of the statement were not true. Did you then, at any time, say, "So you want to do this the hard way?" or any words to that immediate effect?

d. Did your frustration, irritation, or other emotion, color how you conducted the remainder of the interview or color the final Report of Investigation?

e. During the same interview on March 20, 2007, you asked [redacted] about [redacted]' marital status. According to her direct recollection, the extent of that part of the conversation was:

Agent [redacted]: what is your understanding of the marital status of [redacted].

[redacted]?

[redacted]: that he is married

Agent [redacted]: Not divorced?

[redacted]: No, but with a few periods of separation.

Refer to AFSA Attorney Sharon Papp's hand-written notes taken simultaneously during that interview of March 20, 2007, and attached to [redacted]'s September 2007 Rebuttal. On the first page of those notes, refer to where Papp wrote: "He's married – not divorced – few periods of separation." Her notes corroborate [redacted]'s recollection.

The ensuing Report of Investigation (ROI; date reported 4/01/2007) showing you as the reporting agent (RA) page 2 states,

> 03/2007 – Interview of [redacted], Consular Officer
>
> SUBJECT was interviewed in the Office of Professional Responsibility.
>
> [redacted] and [redacted] [redacted] were present…
>
> SUBJECT stated that she knew [redacted] was married, having never separated and still living with his wife.

Is it possible that you were mistaken when you put in the ROI referred to in question #2, "SUBJECT stated that SHE knew [redacted] was married, having never separated and still living with his wife"?

The Department objects to the entire discovery request posed to Agent [redacted] as irrelevant and immaterial, and unlikely to lead to the discovery of admissible evidence.

Discussion and Finding: Given that grievant's recollection of the interview contrasts sharply with Agent [redacted]'s report, that [redacted]'s report formed part of the ROI viewed by the deciding official, and the facts and factors cited in the Decision Letter, the Department is

directed to seek answers from DS Agent [redacted] to the grievant's five questions and forward those answers to her. The Board notes that the responses may be relevant and/or reasonably lead to the discovery of relevant evidence. The Board further notes that it does not routinely direct that answers to Interrogatories be provided under oath, and declines to order that the answers in this case be provided under oath.

C. ADMISSIONS REQUESTS

Request 5: Admit that the PIERS software system for managing and processing American Citizens' Services consular work contains such records as passport applications, reports of birth abroad, repatriation cases that sometimes include notes about U.S. citizens' mental condition (such as having schizophrenia or other mental illness), and welfare/whereabouts cases that may also include physical or mental health information pertaining to U.S. citizens.

The Department responded that this request is irrelevant, immaterial, and unlikely to lead to the discovery of admissible evidence. Grievant maintains that this admission bears on her contention that she was disciplined more harshly than FSOs who improperly accessed the PIERS database which contains Privacy Act-protected data.

Discussion and Finding: The Board finds that this admission is relevant, material, or likely to lead to the discovery of admissible evidence with respect to the issue of the reasonableness of the discipline proposed. The Department is directed to either admit or deny this request.

Request 6: Admit that passport records in PIERS contain scans of actual, filled-in passport application forms completed by U.S. citizens.

Discussion and Finding: For the reasons grievant outlined in Admissions Request 5, we

conclude that her request is relevant and direct the Department to admit or deny.

Request 7: Admit that passport applications such as the DS-11 contain Privacy Act-protected information including, *inter alia*, Social Security numbers and dates and place of birth, previous names used, address and telephone number(s); height, eye color, hair color, occupation, and employer; marital status; spouse's name, spouse's place of birth, date married, date widowed or divorced, date of birth, parents' information including names, dates of birth, places of birth and parents' U.S. citizenship or lack of U.S. citizenship.

Discussion and Finding: The Department objected to this admission as irrelevant and immaterial. The Board finds that this admission is relevant, material, or likely to lead to the discovery of admissible evidence with respect to the issue of the reasonableness of the discipline proposed. We direct the Department to admit or deny this request.

For the Foreign Service Grievance Board:

Arline Pacht
Presiding Member

Nancy M. Serpa
Member

Jeanne L. Schulz
Member