

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]

Record of Proceedings

Grievant

FSGB No. 2009-027B

And

March 28, 2011

[Department]

ORDER: MOTION TO COMPEL

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:

Melinda Chandler

HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO COMPEL

I. THE ISSUE

On July 17, [Year], grievant [Grievant] filed an appeal with this Board of the Department of State's (Department, agency) five-day suspension for her unauthorized access of a consular database. FSGB Case No. 2009-027A. Grievant filed a second, related appeal on May 5, [Year], seeking to amend the Reviewing Officer's statement in her Employee Evaluation Report (EER) covering the period in which the actions leading to discipline took place, arguing that it was, in part, inaccurate and falsely prejudicial. FSGB Case No. 2009-027B (appeal of the EER).

On June 22, [Year], grievant filed her first discovery request in the EER grievance appeal. The Department responded on July 21, [Year], denying portions of the request. Grievant then filed a Motion to Compel (MTC) on August 12, [Year]. The Department responded to that Motion by memo dated August 23, [Year]. This order addresses grievant's August 12 MTC.¹

II. DISCUSSION AND FINDINGS

The only discovery request at issue in the MTC is Interrogatory 5, which states as follows:

Please explain the basis for the statements from the April 30, [Year] Agency decision letter that 'At the time of the [FSN] meeting,² the DS investigation encompassed far more than accessing the Consular database. You were initially under investigation for potential visa fraud... The meeting was pre-approved by DS and Embassy management as part of the ongoing investigation into the possibility of visa fraud activities on your part.' Please provide documentation to support HR/G's allegation that at the time of the December 12, 2006 meeting, I was already under investigation, or admit that these assertions are incorrect,

¹Due to a series of administrative errors, the Board was unaware that it had not responded to the August 12 MTC before that fact was brought to our attention in February, [Year], a mistake for which the Board apologizes.

²For the purpose of this Order, we use the terms "FSN meeting," "FSN dinner" and "December 12 dinner" interchangeably; all refer to only one meeting over dinner between grievant, FSN [Name 2], and [Name 1].

given that the ROI states that the investigation began on January 24, 2007. Also, state by name and title the ‘Embassy management’ who pre-approved the meeting, and state whether this person was in my supervisory reporting chain.

In its response dated July 21, [Year], the Department addressed the three separate parts of this interrogatory, labeling them parts A, B, and C.

With respect to the request that the Department explain the basis for the statement in its decision that at the time of the December meeting grievant was already under investigation for visa fraud, labeled by the Department part A, the Department replied:

As of December [Year], you were a ‘person of interest’ to DS fraud investigators. The increase in your misuse of the name check database was detected and reported to DS. The intent of your activities was initially unknown to DS investigators and the potential for visa fraud on your part was a distinct possibility. You made a direct approach to the chief local investigator of the Consular Section’s Fraud Prevention Unit to coordinate the meeting between that investigator and the local musician in question, at the musician’s request. Your request for the meeting was reported to DS fraud investigators and approved by DS in an effort to determine the possibility of visa fraud involvement on your part.

With respect to grievant’s request for the documentation supporting the Department’s allegations, labeled by the Department part B, the Department replied that it was “irrelevant, immaterial and unlikely to lead to the discovery of admissible evidence related to the issue grieved – the EER comments of the reviewing officer.”

With respect to grievant’s request that the Department give the names and titles of “Embassy management” who pre-approved the meeting (part C), the Department stated:

‘Embassy management’ in the decision letter refers to the Regional Security Office and the investigators working therein under the supervision of the Regional Security Officer (RSO). The RSO is part of Embassy management. The persons were not in your supervisory chain.

In her MTC, grievant challenges only the Department's response to part B of Interrogatory 5, which is more accurately described as a request for documents or for an admission. Among other things, she contends that the Department could not include new allegations in its grievance decision, and then argue that its own statements in the decision were not relevant to the grievance that it was resolving.

The Department replied to grievant's MTC on August 23. While continuing to maintain that part B of Interrogatory 5 was irrelevant and immaterial, and unlikely to lead to the discovery of admissible evidence related to the issue grieved, that is, the EER comments of the reviewing officer, it nevertheless provided the following response:

The ROI contains a statement from Mr. [Name 2], the FSN supervisor of the Fraud Prevention Unit, which references the August 18, [Year] introduction by Ms. [Grievant] of Mr. [Name 1] to Mr. [Name 2] and the December 12, [Year] dinner. Mr. [Name 2] stated: '[Grievant] had approached me at work a few days before the dinner and said that [Name 1] wanted to talk about some 'issues.' I immediately reported this to ARSO [REDACTED] and he gave me permission to attend. The agency understands how the contested language is misleading and apologizes for any confusion resulting from it. Ms. [Grievant] is correct that at the time of the December 12, [Year] dinner she was not under investigation. It would be more accurate to say that her contacts with Mr. [Name 1] and Mr. [Name 2] had been brought to the attention of post.

In an email to the Department dated August 23, grievant objected to the reference to the August 18, [Year] date, asserting that the Department made "another misleading statement." Although grievant copied the Board on this email, it was not presented to the Board as a challenge to the Department's response to her MTC. The only issue before the Board, therefore, is whether in its August 23 reply the Department was responsive to what has been termed part B of Interrogatory 5.

The Board finds that the Department was fully responsive to the discovery request by identifying the [Name 2] statement in the ROI as the documentation that supported the challenged statements in its decision letter. At the same time, it has given at least a partial admission that grievant was not under “investigation” prior the December 12 dinner. Although questions may still remain about the meaning of this clarification, or admission, in particular with respect to the timing of the “attention” given to grievant’s actions, those questions are not relevant to the Board’s determination of the issue at hand. For the purposes of resolving the current MTC, the Board finds that the Department’s identification of the [Name 2] statement is sufficient to satisfy grievant’s outstanding discovery request. No further response is required.

III. DECISION

The Motion to Compel is denied.