

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{Grievant}
Grievants

Record of Proceedings
FSGB No. 2010-015

And

November 15, 2010

Department of State

**ORDER: MOTION TO COMPEL
DISCOVERY
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

James E. Blanford
Lois E. Hartman

Senior Advisor

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO COMPEL DISCOVERY

I. ISSUE

This order addresses a motion filed by the grievants, {grievants}, to compel the Department of State (Department, agency) to respond to discovery requests.

II. BACKGROUND

Grievants completed their assignments in Embassy {post 1} and departed post in 2006. Included in their household effects (HHE) shipment were parquet flooring and decorative doors and frames. When the HHE shipment arrived in the U.S., the Department withheld delivery of the flooring, doors and frames. It claimed that these items were construction material, not HHE, and therefore were not eligible to be shipped at government expense. Grievants were informed they were to pay \$24,566.32 for the delivery of the “ineligible” HHE. Grievants filed an administrative appeal with the Deputy Administrative Secretary (DAS) for Global Financial Services, James Millette. He denied their appeal, but reduced the amount grievants’ owed to \$18,751.98.

Grievants filed a grievance with the Department on December 2, 2009. In its decision the agency denied the grievance on the preliminary ground that it lacked jurisdiction, since grievants had filed an administrative appeal within the agency; however, it also denied the grievance on its merits. Grievants filed an appeal with this Board on May 7, 2010.

On June 9, 2010, grievants filed a First Request for Discovery to which the Department responded on June 29, 2010. Grievants then filed the instant motion to compel discovery to which the Department responded with additional information. The Board was unclear, as were the parties, whether the motion to compel remained outstanding for a decision or whether the grievants would amend their motion given that

they had received additional discovery. The Board contacted the parties and stated that it wished to be advised whether grievants were satisfied with the additional discovery information and, if not, what specific aspects of their motion to compel remained for a decision. On October 12, 2010, grievants filed a Reply to the Department's Response to the Motion to Compel, indicating their continued dissatisfaction with certain discovery responses from the Department. In addition, the Board received a letter dated October 13, 2010, in which the Department notified grievants that the debt had again been recalculated and further reduced by Global Financial Services from \$18,751.98 to \$15,012.69.

III. POSITIONS OF THE PARTIES AND THE BOARD'S RULINGS

According to the Board's guidelines, the grievants are entitled to obtain, through discovery, information from the agency that is not privileged and that is relevant and material to the issues presented in the grievance. Relevant and material information is that which tends to prove or disprove a fact that is of consequence and which may affect the disposition of the grievance (FSGB Case No. 1998 – 087).

1. REQUESTS FOR DOCUMENTATION¹

Document Request No. 2: Grievants requested that the Department provide invoices for the trucking portion of their HHE shipment.

Department's Position: There are no invoices because transportation vendors submit electronic invoices directly into Power Track (an internet web-based billing and payment system). The Department calculated the actual trucking costs by taking the "billed total amount" divided by the total weight on documents THO – 215 and THO –

¹ The Board notes that grievants do not address their Document Request No. 6 or their Interrogatory No. 6. Therefore we assume that grievants are satisfied with the Department's responses.

219. The Department then applied this cost per hundred weight to the amount of wood that each of the grievants shipped. The Department also asked ABF (the trucking company) to provide additional substantiation of these charges from its internal record keeping system (copies of which were given to grievants).

Grievants' Position: Grievants point out that the documents provided by the Department are bills of lading and contain no cost information. They reference the Department's response to Document Request No. 8 which states: "Bills of Lading are contracts, not invoices. (invoices are payment claims made for services...)." (Emphasis in original.) Grievants state that they are not satisfied with the Department's response. The additional information provided by the Department from ABF indicates that volume was a factor in the calculation of cost in addition to weight. There is no indication as to how the amount invoiced [to] the Department was actually calculated.

The Board's Ruling: The Board finds this document request to be reasonable in that it seeks information relevant to determining the actual amount billed to the Department for transporting by truck the parquet flooring, doors and frames. The grievants are entitled to discover precisely how the Department has calculated the costs of truck transportation of what it has determined to be "ineligible" HHE and how it determined the amount to bill the grievants. The Department must provide copies of any documents it has in its possession that show how the calculation was done, if there are any documents that are different from those that have already been provided.

Document Request No. 8: Provide a copy of the contract with Crowley Liner. If no contract exists and the GBL is considered a "contract" explain how the GBL²

² "Government Bill of Lading"

“contract” was competed and provide a copy of the file containing bids by other ocean liners for these shipping services.

Department’s Position: There is no separate contract with Crowley Liner. The GBLs are the contracts and have already been provided to grievants. Regarding the request for an explanation as to how the GBL was competed and a copy of the file containing bids from other ocean liners, the Department responds that the request is irrelevant, immaterial, overly broad, overly burdensome and unlikely to lead to the discovery of admissible evidence.

Grievants’ Position: Since the cost charged by Crowley Liner was substantially higher than market rates (based upon estimates obtained in {post 1} by grievants from other export companies), grievants request the Board to compel discovery of the Crowley file. This request is material to the grievance because it is material to the question: how did Crowley Liner calculate the cost of shipping the “ineligible” HHE and is therefore relevant to the reasonableness of the amount the Department is attempting to collect from grievants.

The Board’s Ruling: The Board finds this request to be reasonable and relevant to a determination of the fair amount grievants should be charged, if anything. The Department is ordered to provide the requested documents.

Document Request No. 14: Provide the Report of Investigation (ROI) with all attachments prepared by the Office of the Inspector General (OIG) in which grievants were the subject.

Department’s Position: This request for information is different from that which was requested in grievants’ original discovery request and the Department objects to it.

The OIG provided in the ROI all documents that the OIG determined were necessary to support the results of its investigation. The OIG informed the Grievance Staff that documents in the investigative file are protected by the attorney-client and attorney work product privileges, are law enforcement sensitive and therefore are exempt from release under the Freedom of Information Act and/or the Privacy Act, or are third agency documents. The Department also objects to providing information/documents regarding evidence obtained from the United States Department of Agriculture (USDA) as these issues are not relevant to the instant grievance. Without waving its objections, the Department did provide answers to grievants' questions regarding various interview statements.

Grievants' Position: They do not believe that the ROI transmitted to them included copies of all of the interviews conducted as part of the investigation. The grievants are aware of at least two individuals who were reportedly interviewed by Agent Becton as part of the investigation. Grievants request that the OIG provide the complete investigative file to include all evidence obtained by Becton from the USDA and all other evidence in support of the statements in the ROI (as detailed in their August 4, 2010 Motion to Compel). Grievants further argue that Becton is a State Department employee; so the Department should be able to contact him regarding the ROI.

The Board's Ruling: We agree with the Department that this request is not relevant to the instant grievance. The issue in this grievance is limited to whether the Department can properly exclude the wood items from grievants' HHE and, if so, what is the proper calculation of the amount that the agency can bill grievants for the ineligible HHE. The request for Document No. 14 is denied.

2. INTERROGATORIES

Interrogatory No. 2: Please explain how a “consolidation of the two shipments on the same truck” reduced the rate per hundred pounds from \$103.00 to \$45.30 and \$47.62 for {Grievants}³ respectively – and why, if the shipments were indeed consolidated, the rates per hundred pounds are different.

Department’s Position: Even though grievants’ shipments were consolidated on one truck to save money, they were still considered separate shipments. The following are the calculations of the different rates and how they applied to each shipment:

{G-1}

$$\$4,854 \div 10,719 = \$45.29 \text{ (sources: THO 218 and 219)}$$

$$\$45.29 \times 4,255 = \$1,913.50^4$$

{G-2}

$$\$6266.43 \div 13160 = \$47.62$$

$$\$47.62 \times 6,097 = \$2903.39$$

Grievants’ Position: They are not satisfied with the Department’s response for the reasons previously stated. The calculations provided are those of the Department, not ABF. Please see grievants position regarding Document Request No. 2.

The Board’s Ruling: We agree with the grievants that the Department’s responses regarding the shipping rate calculations are confusing and not responsive.⁵ As

³ A.k.a. {G-2}.

⁴ Although the Department’s response to the motion to compel includes this calculation, it appears that it is arithmetically in error. $\$45.29 \times 4,255 = \1927.09 , not $\$1913.50$. Moreover, if one does not round the numbers, but uses the calculations as stated by the Department, one gets a different number for each grievant. For example, {G-1} $(4854 \div 10719) \times 4255 = 1926.84$. {G-2} $(6266.43 \div 13160) \times 6097 = 2903.22$. In addition to these concerns, it appears that in its original response to grievants’ interrogatory no. 2, the Department calculated the total trucking charge as $\$4817.32$. It does not appear, however, that the numbers add up to this amount, regardless of which numbers are used for each grievant.

we ruled with regard to Document Request No. 2, the Department must provide a detailed explanation of how the rates and totals claimed to be due from grievants were calculated, with copies of invoices or other documentation from the carriers that support the calculations.

Interrogatory No. 5: In Lee Karras' e-mail of March 18, 2010 to Shawn Griffin (THO – 010), Mr. Karras sets forth a trucking rate of \$28.56 per hundred pounds, inclusive of a fuel surcharge. The cost of transporting 10K lbs from Miami to Washington (D.C.) in June 2006 would have been \$2856.04, according to Mr. Karras. Why, then, does the revised bill from Mr. Millette calculate the charge per hundred pounds of {G-1}'s HHE at \$45.30 and {G-2}'s HHE at \$47.62?

Department's Position: The revised bill from Mr. Millette relied on charges reflected in THO -214 and THO – 218.

Grievants' Position: The Department has not offered an explanation as to why Mr. Millette relied on THO – 214 and THO – 218. The cost of trucking from Miami has been substantially revised over time by Mr. Millette. Grievants reiterate their request that the FSGB compel the Department to provide an actual fee schedule from the trucking company. This request is material to the grievance because it is material to the amount the Department is attempting to collect from the {Grievants}.

The Board's Ruling: The Board agrees with grievants that the Department has not provided adequate information regarding the fees/rates and the calculations of the

⁵ As an example, in using the figures provided by the Department, we calculate that the rate for {G-1} should be \$45.28; not \$45.29. And, using the Department's figures, \$45.29 x 4255 lbs equals \$1927.09, not \$1913.50.

amount owed. As previously ruled, the Department must provide detailed information on the fees/rates and calculations.

3. ADMISSIONS

Admission No. 8: Admit that the {Grievant}s' HHE was not shipped from {post 1} until October 2006.

Department's Position: The Department objects to this request as irrelevant, immaterial, overly burdensome and unlikely to lead to the discovery of admissible evidence. Without waiving its objections, the Department responds that it has been unable to verify the date when grievants' shipment left {post 1}.

Grievants' Position: This information is readily available in Travel and Transportation's records and in Embassy {post 1}'s records. The shipment date is relevant to this grievance because it demonstrates that the {Grievants} were not in country at the time of shipment. The {Grievants}' shipments were delayed because the crates had to be opened and the contents shifted from one container to another. If post or the new GSO (General Services Officer) had any questions about the contents of the shipments, it had ample opportunity to raise the issue internally or with transportation officials in Washington, D.C., during the intervening months between when the HHE was packed (July/August) and when it was shipped (October).

The Board's Ruling: We agree with grievants that this information is relevant to grievants' arguments that they had already left the country before the flooring, doors and frames left {post 1}. It also appears that this information is readily available to the agency. The Department is ordered to respond to this request.

Admission No. 16: Admit that {name 2} and {name 3} were not placed under investigation by the Office of the Inspector General.

Department's Position: The Department does not have information to either admit or deny this request. The Department maintains its objection. Ms. Chandler did not ask Becton whether {name 3} and {name 2} were placed under investigation by the OIG.

Grievants' Position: The Department can readily obtain this information from the OIG and should be compelled to do so. This information is material to the issues raised in their grievance relating to disparate treatment.

The Board's Ruling: We deny this request as it is not relevant or material to the issues in this grievance.

Admission No. 17: Admit that Luis Espada-Platet shipped wooden doors in his HHE shipment from {post 1} to Puerto Rico in January 2006.

Department's Position: The Department does not have the information to either admit or deny this request. Travel and Transportation confirmed to the Grievance Staff that they never had the requested records. Embassy {post 1} informed the Grievance Staff that documentation relating to this shipment has been destroyed pursuant to a two-year document retention schedule.

Grievants' Position: Grievants are not satisfied with the Department's response and request that the Board order the requested discovery. Grievants believe that the State Dispatch agent in Miami follows the Department policy regarding retention of records and that the requested information is available.

The Board's Ruling: The Board denies this request as it is not relevant to the issues in this grievance.

IV. ORDER

The Department is ordered to respond to Document Requests No. 2, and No. 8; Interrogatories No. 2 and No. 5 and Admission No. 8 within thirty calendar days of the receipt of this Order.