

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between



Grievant

and

Department of State

Record of Proceedings  
FSGB Case No. 2011-020

September 13, 2011

**ORDER: MOTION TO  
COMPEL**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Garber A. Davidson  
Alfred O. Haynes

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Melinda P. Chandler  
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service  
Assoc.

## **ORDER: MOTION TO COMPEL**

### **I. ISSUE**

This order addresses a motion to compel filed by the grievant, [REDACTED], to require the Department of State to respond to certain requests for documents.

### **II. BACKGROUND**

Grievant was an Assistant RSO in [REDACTED] at the time of the incidents leading to his proposed discipline. He, his former girlfriend, and several colleagues were drinking at several bars while watching a soccer match. During the course of these sessions, it was determined that grievant was carrying his weapon while drinking at the bars. The Department imposed a ten-day suspension for violation of the Department's and the Embassy's firearm policies: 12 FAM Exhibit 023 (the Department's Firearm Policy); Section 2.6B(5) and Section VI(C) (Mission Firearm Policy). Grievant does not dispute the finding that he violated the regulations, but argues that the penalty is more severe than others have received for similar or worse offenses.

On June 10, 2011, grievant filed his first discovery request, asking the Department for nine (9) documents. In its June 30 response, the Department provided grievant with five (5) of the nine (9) documents.

On July 8, grievant filed his motion, asking this Board to compel the Department to produce the four (4) documents (documents requests 5, 6, 7 and 8) that it had refused to provide earlier.

The Department's response to the motion was filed on July 28, 2011.

### **III. DISCUSSION AND FINDINGS**

The following are the Board's findings with regard to each of the four requests

presented by the grievant:

REQUEST NO. 5: Grievant seeks the Department's letter proposing discipline, the decision letter, case comparison worksheet, and Douglas factor worksheet in a possibly similar case designated as 0382 for 2009. Grievant notes that he is not seeking any information protected by the Privacy Act in this or any other request for information.

The Department objects to the request on the grounds that the information is neither relevant nor calculated to lead to discovery of admissible evidence. In essence, the Department argues that the instant case involves the "twin circumstances of being armed with a firearm and consuming alcohol shortly before or while so armed". In the Department's view, grievant is not entitled to the requested documents because they do not relate to disciplinary actions that have been taken under "like and similar" circumstances, relying on 3 FAM 4374. In case 0382, the conduct at issue involved a failure to store a firearm and ammunition in accord with regulations, and did not involve alcohol consumption. In its view, the grievant is overreaching by seeking documents that involves violations of firearm regulations in any case.

Grievant disputes the Department's analysis, and asserts that it misconstrues the regulations. In his view, the Department's analysis severely limits the concept of "relevancy" for purposes of discovery in which the Board has applied a broader standard broad than the actual admissibility standard of proffered evidence.

Grievant argues that:

All the Board requires of evidence sought in discovery to be "relevant" is that it "*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). (Emphasis added). The Board has held that this standard applies to evidence supporting defenses, just as it applies to evidence supporting claims, and so it applies to discovery I seek in attempting to mitigate my discipline.<sup>1</sup>

Grievant states that he only knows of this case and others cited in his motion because the Department provided him with the decisions. He could not reasonably be expected to know which of the cases provided by the Department contain facts similar to his grievance.

**THE BOARD’S RULING:** The Board finds this document request to be reasonable in that grievant seeks information that is relevant to determining whether the discipline proposed in this grievance is consistent with the precept of like penalties for similar offenses with mitigating or aggravating circumstances taken into consideration (3 FAM 4374). The instant grievance and case 0382 involve violations of firearm regulations. Grievant has conceded that he violated the regulations. He is objecting to the proposed penalty, and is seeking information to determine if the proposed penalty is consistent with discipline imposed for similar offenses. Even though case 0382 appears not to involve allegations of a firearm violation and alcohol abuse, we believe that the information sought may tend to prove or disprove a fact that may affect the disposition of this grievance. The information sought in Request No. 5 shall be provided to grievant.

REQUEST NO. 6: Grievant seeks information in this request similar to Request No. 5. However, in the case cited in this request, Case 12651 for 2010, the allegations include intoxication, acting in a threatening manner while holding a knife, and refusing police commands to drop the knife. Grievant makes many of the same arguments about the need for these requested documents as he did in Request No. 5.

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<sup>1</sup> Grievant’s Answer to the Department’s Response to Motion to Compel First Discovery Request dated August 8, 2008 (page 3).

The Department responds with the arguments cited above in opposition to Request No. 5. In addition, it notes that the case referred to by grievant does not involve a violation of the Department's firearms policy. More importantly, it states that no final decision has been reached in the case. Thus its value, if any, as a comparator case is limited.

**THE BOARD'S RULING:** The Board denies the request for documents. While this possible comparator case involves the allegation of alcohol abuse, it does not involve the violation of the Department's firearm policy. In the context of this grievance, we believe that the violation of the firearms regulations is a crucial factor. Further, since there has been no final decision by the Department, we will not consider this case in our decisional process.

REQUEST NO. 7: In this request, grievant seeks documents similar to those requested in Request No. 5 involving case number 12571 for 2010. His reasons for seeking these documents are identical to Requests Numbered 5 and 6.

The Department asserts that the requested information is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. In addition, the Department notes that the case does not involve the consumption of alcohol shortly before becoming armed with a firearm or while armed with a firearm. In its response to the first discovery request, the Department states that "because the matter resulted in a letter of admonishment there are no responsive documents".

In the motion to compel, grievant modifies his request to seek the letter of admonishment since it would constitute both the proposal and decision letter and should be provided.

In its reply to the motion, the Department states that a letter of admonishment does not propose or impose discipline. It merely admonishes an individual for certain behavior and is not made a part of the Official Personnel File.

**THE BOARD'S RULING:** We deny grievant's request for this information. Grievant's case involves the consumption of alcohol while armed with a firearm. The case about which he is seeking information involves alcohol consumption, but does not involve an allegation of the firearm regulations. We do not find that the requested information is relevant to the grievance at issue.

REQUEST NO. 8: In this request grievant seeks documents concerning the discipline of an individual in case number 0320 for 2008. His request is based on the arguments cited above.

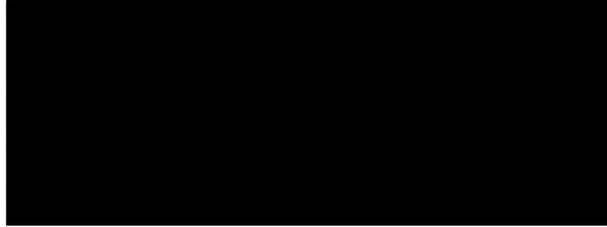
The Department relies on its prior arguments concerning relevancy. The Department states that case 0320 involved poor judgment and weapons violations, but alcohol was not a factor. Accordingly, in the Department's view, the circumstances are not "like and similar" to the grievant's case. It is not clear what discipline, if any, was imposed in this case. The grievant disputes the Department's reasoning as he did in Request No. 5.

**THE BOARD'S RULING:** We grant the request for these documents. Our decision is based on our ruling in Request No. 5. The Department admits that case 0320 involves poor judgment and a weapons violation. The grievance here involves a violation of the firearm regulations and consumption of alcohol. As such, alcohol consumption may be considered "poor judgment" in such situations. The requested information shall be provided to grievant.

#### **IV. ORDER**

The Department is ordered to respond to Document Requests 5 and 6 within ten (10) calendar days of the receipt of this Order. Document Requests 6 and 7 are denied.

For the Foreign Service Grievance Board:



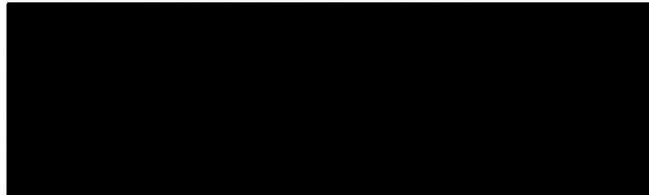
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John M. Vittone  
Presiding Member



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Garber A. Davidson  
Member



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Alfred O. Haynes  
Member