

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Record of Proceedings
FSGB Case No. 2011-024

February 18, 2014

United States Agency for International
Development

**ORDER: Agency Motion for
Reconsideration and AFSA
Intervention**

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

James E. Blanford
Jeanne L. Schulz

Special Assistant:

Lisa K. Bucher

Representative for the Grievant:

Daniel S. Crowley
Hannon Law Group, LLP

Representative for the Agency:

Marc Sacks, GC/EA, USAID

Employee Exclusive Representative:

American Foreign Service Association

**ORDER: AGENCY MOTION FOR RECONSIDERATION
AFSA INTERVENTION BRIEF**

I. THE ISSUE

This order addresses a brief filed by the intervenor, the American Foreign Service Association (AFSA), commenting on the last discovery order issued by the Foreign Service Grievance Board (Board) and a request by the U.S. Agency for International Development (USAID) for reconsideration of that same order.

II. BACKGROUND

██████████, (grievant) joined USAID in 1995. She was promoted to FS-01 in 2003 and began to receive Senior Management Group (SMG) assignments in 2004. On January 5, 2011, she filed the current grievance, (FSGB Case No. 2011-024, “██████████”), in which she claimed that USAID consistently failed to provide her a reasonable opportunity to demonstrate her potential for advancement and made adverse personnel decisions based on false allegations that were not properly investigated and without affording her due process. The agency denied the grievance on April 5 and this appeal was filed on June 3, 2011.¹

During the course of discovery between the parties, the Board issued an order on October 24, 2013 (Order: MTC#4) granting a Fourth Motion to Compel Discovery filed by grievant. By email dated November 8, 2013, AFSA requested permission to intervene in this case in order to file a brief in response to the Order: MTC#4. On November 15, 2013, USAID filed the instant motion for reconsideration of our Order: MTC#4. AFSA’s request to intervene was granted by

¹ Approximately one year later, on July 19, 2012, grievant filed a second grievance with the agency, alleging that the agency discriminated against her by denying her promotion and assignments because of her race and retaliated against her for filing the first grievance. The agency denied this related grievance on October 20, 2012, after which grievant appealed on December 19, 2012 (FSGB Case No. 2012-073, “██████████”).

order dated December 9, 2013 and AFSA filed a brief in response to the Order: MTC#4 on December 16, 2013. Grievant opposed the motion for reconsideration and the agency filed a reply. On January 15, 2014, both the agency and the grievant filed a response to the brief filed by AFSA.

III. POSITIONS OF THE PARTIES

USAID:

The agency states that the Order: MTC#4 “requires USAID to disclose the identity of individuals who submitted “complaints” about Grievant from 2004-2009.” It argues that neither the SMG panels that made assignment decisions nor the Performance Boards that made promotion decisions were ever privy to complainants’ identities. Accordingly, the agency contends:

the Board’s ruling ordering disclosure of ‘complainants’ was clear error because their identity [sic] is *completely irrelevant* to any potentially legally valid claims asserted by Grievant about the Agency’s assignment/promotion process.

(Emphasis in original). The agency raises the concern that our last discovery order requires it “to produce *the names* of individuals who made alleged ‘complaints’ regarding Grievant, as well as raw 360° feedback. . . .” (Emphasis in original). The agency also argues that the SMG panels and Performance Boards were only aware of complaints about grievant through 360° feedback summaries, which were disclosed to grievant in discovery, but which do not include any identifying information about the source(s) of the feedback.

USAID complains that the Board has employed a definition of the term “complaint” that is overbroad and should be revised and redefined. The agency states:

. . . apparently, the definition of “complaint” used by the Board and the parties has broadened improperly to include “negative” 360° feedback or

other *ad hoc*, informal protests or criticisms. . . .[T]here can be no doubt that such assessments, including responses provided as part of a 360° feedback process, *do not* constitute “complaints.”

(Emphasis in original).

USAID attaches to its motion an affidavit from a member of its Office of Human Resources (OHR) in which the declarant states that the agency’s SMG assignment process, which depends on “unvarnished” 360° feedback, will be fatally compromised based on the last discovery ruling of the Board. The agency goes on to argue that it should not have to disclose the identity of individuals who provide 360° assessments about their supervisors because this would have a “manifestly unjust impact” on the reporting employees’ careers and place them at risk for retaliation.

The agency claims that this grievance is improper under the Foreign Service Act because it pertains to multiple assignments, none of which are grievable under 22 U.S.C. § 4131(b)(1). USAID also argues that this grievance is not proper because it alleges that the agency must investigate 360° feedback on employees before making assignment decisions. The agency responds that no investigation is done and none is required.

USAID contends that this Board:

has already concluded that Grievant has a legal basis for challenging her assignment and promotion decisions (despite the fact that Grievant has never presented the Board, and the Board has never identified, a legal justification for such a challenge).

* * *

We again plead with the Board to take a step back and consider whether such justification exists. If the Board believes that it does, we ask the Board to specifically identify the legal basis for Grievant’s claim so that the Agency has the opportunity to dispute it.

The agency lastly claims that the Board’s challenged discovery order will result in “manifest injustice by fatally compromising the effectiveness of the Agency’s SMG assignment

process. . . .” The agency notes the concerns raised by AFSA in its request to intervene and states that it concurs with AFSA’s conclusion about the impact of our last discovery order on FSN employees, but adds that the order will impact the willingness of all USAID employees to provide candid feedback on supervisors and others who are considered for performance reviews.

The agency offers as a compromise the voluntary disclosure of several items: (1) an unredacted version of a May 27, 2009 “Action Memorandum” from grievant’s subordinates requesting relief from her alleged abuse; (2) unredacted emails concerning incidents that allegedly triggered the Action Memorandum; and (3) unredacted emails reflecting the agency responses to the Memorandum.

AFSA:

AFSA asked to intervene in this case, protesting our order requiring the agency to disclose the names of complainants. AFSA stated:

It is unclear to AFSA whether that directive encompassed the names of foreign service national (FSN) employees. Some FSN employees are direct-hire employees of the agency. Most FSNs are essentially at-will contractors at the USAID mission. Either way they are particularly vulnerable to pressure and fear for their employment, particularly in Third World countries where employment by an entity of the U.S. mission is very highly prized and uniquely valuable. Losing such employment is a disaster to an FSN. Should FSNs generally become aware that they can become embroiled in litigations by direct-hire American employees against the agency, their willingness to be open and frank with American employees and mission leaders will surely be compromised. AFSA conten[d]s that FSNs should be protected from coerced involvement in litigations [sic] of the type represented by this case. Should the Order be interpreted to include or exclude FSN employees?

In its intervenor’s brief, AFSA repeats the above concerns on behalf of FSN employees. It argues that FSN employees “are the glue that keep[s] embassies and missions operating smoothly” and they should be reassured that the confidentiality of their disclosures about

American employees will not be undermined. AFSA further states that “FSN employees are the ‘ears on the ground’If this trust and confidence is broken, posts are the poorer for it.”

Grievant:

Grievant argues that there is no legal basis for this Board to reconsider its last discovery order because USAID does not argue an intervening change in the law or newly discovered evidence. With respect to the issues of clear error and manifest injustice, grievant argues that this Board ordered disclosure of information, notwithstanding the agency’s arguments about the sensitivity of the names and identifying information about the sources of complaints. She maintains that since the parties have litigated these issues of confidentiality in three motions to compel and one motion to reconsider, there is no basis for the agency to reargue them here.

In addition, grievant claims that with respect to her request for information pertaining to complaints filed or made against her, the agency provided some information, but redacted many of the details that were requested. She states that the parties have previously argued the relevance of the requested information and the Board made a decision that the information was relevant to her claims. Grievant argues that the SMG panels did receive complaints about her in the form of 360° feedback summaries. She also claims that this information is subject to disclosure in discovery if it is either relevant or likely to lead to the discovery of relevant information. Thus, she argues, relevance is a “much broader concept” than the issue of admissibility. She claims that she seeks discovery of evidence that the agency failed to provide her a reasonable opportunity to advance and made decisions to remove her from positions based on uninvestigated rumors and complaints. She argues that the Board properly permitted her to “trace the history and substance of. . .complaints from the source through the SMG panel[s].” Grievant also argues that since the agency states that it “anticipates potentially putting on live

testimony during the hearing in this case to support the information provided in the 360 feedback summaries,” she is entitled to learn in advance of the hearing as much as she can about the substance of this evidence.

Grievant states that the affidavits from USAID personnel about the effect of our last discovery order do not demonstrate manifest injustice and do not offer newly discovered evidence. She asserts that the information contained in the affidavits was available to the agency from the start; therefore, she challenges this Board’s consideration of it in this motion for reconsideration.

Grievant argues that to the extent that the agency raises confidentiality issues, it failed to request a protective order and since there is no privilege or any other legal authority for protecting the information, it remains subject to discovery. In addition, she claims that the agency’s confidentiality concerns are at best speculative, inasmuch as it argues on the basis of what it anticipates and what it believes will result from enforcement of the discovery requests.

Grievant asserts that she presents grievable claims because she challenges the pattern of her assignments as well as decisions by her agency to make personnel decisions based in part on uninvestigated complaints and rumors. She asks the Board to enforce its last discovery order and to decline USAID’s request to establish a post hoc definition for the term “complaint” that both parties and the Board have used repeatedly to date. To be clear, she states: “The parties and the Board have understood from the beginning that [REDACTED] intended the word to be used in its ordinary sense, which Merriam-Webster’s Dictionary defines as ‘expression of grief, pain, or dissatisfaction.’” She lastly objects to the agency’s proposed compromise as “unacceptable.”

IV. DECISION

On its Motion for Reconsideration, USAID bears the burden of persuasion. Pursuant to 22 CFR § 910.1: “The Board may reconsider any decision upon the presentation of newly discovered or previously unavailable material evidence.” This principle has been expanded to complement statutory and regulatory standards that are recognized in the courts. Under this expanded standard, the Board may reconsider any decision it has made based upon: (1) an intervening change in controlling law, (2) the availability of newly discovered evidence, or (3) a need to correct clear error or to prevent manifest injustice.” FSGB Case No. 2009-004 (September 10, 2009); FSGB Case No. 2002-055 (November 10, 2003). In this case, the agency relies only on a need to correct what it argues are clear errors and a need to prevent manifest injustice.

USAID argues that SMG panels in making assignment decisions and Performance Boards that rated and ranked grievant for promotion did not receive information about the identity of any complainants who offered negative information about grievant. Therefore, the agency argues, the identities and details of complaints made against grievant and the names of complainants are irrelevant and non-discoverable. The agency argues that the Board’s order was “clear error” because no Senior Threshold Performance Board (that recommends employees for promotion) or any Senior Management Group (SMG) panel (that decides assignments) had access to any complaints about grievant and no information about the identities of any complainants. The issue for this Board is not whether SMG panels and Performance Boards considered the identities of complainants. The issue is instead grievant’s ability to investigate, through discovery, whether there is any evidence of false complaints made against her to anyone in a position to promote her, assign her, or influence a promotion or assignment. If, for example,

a false complaint was made and considered by an assignment or promotion panel even without disclosure of the complainant's identity, then grievant is entitled to know the source of the complaint in order to mount a defense or to prove that the complaint was false. Likewise, she is entitled to try to demonstrate that a complainant was either biased against her or otherwise motivated to put her in a negative light.

Board policies provide that parties may seek to discover non-privileged information that is relevant and material to the issues presented in a grievance or that may lead to discovery of relevant evidence. Relevant and material information is that which tends to prove or disprove a fact that may affect the disposition of a grievance. FSGB Case No. 2008-019 (November 25, 2008).

USAID misreads our last discovery order, asserting that it requires the agency to disclose the sources of 360° feedback which “could lead to manifest injustice by fatally compromising the effectiveness of the Agency’s SMG assignment process.” The agency misapprehends the import of our order. We specifically stated in Order: MTC #4 that we were addressing only interrogatory #5 and document request #8. These discovery requests sought information about complaints made against grievant, not sources of 360° feedback. The issue of 360° feedback was the subject of document request #4 which was not addressed in our last order.

Interrogatory #5 asked the agency to:

Please identify and describe *all complaints, formal or informal*, USAID received regarding [REDACTED] treatment of subordinate staff from January 1, 2004 to present. This includes, but is not limited to, complaints received or made by the following individuals: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(Emphasis added). Likewise, document request #8 asked for:

All documents related to complaints identified in response to interrogatory five.

These two requests are distinct from document request #4 which asked:

Please provide a copy of [REDACTED] applications for Senior Management Group (“SMG”) positions. This includes, in addition to the underlying application and acceptance or denial letter: (i) all documents added into the SMG application or evaluation file; (ii) all formal and informal notes; (iii) all “360 degree” assessment comments; (iv) all junior or senior employee evaluations or outside recommendations; (v) all Employee Bidding Forms; (vi) all written justifications for non-selection; and (vii) all information included in the SMG books compiled for the SMG committee, AAs, DAAs and/or the Administrator. If any document is removed, redacted, or withheld, please identify the document with completeness and state the legal justification for the withholding.²

In an order, dated March 5, 2013 (MTC#3), we ruled:

To the extent that it has not yet done so, we direct the agency to provide the information and documents that it agreed to provide, listed as items (2) - (5) above. In addition, to the extent that a 360° summary states conclusory information, such as, “[Grievant] is recommended for structured analytical tasks but not as a supervisor [due to] Poor feedback as a manager and supervisor,” we order that USAID provide any documentary *summaries* of this feedback without disclosing the source of the feedback. *We deny grievant's request for individual 360° feedback documents* to the extent that the agency can establish that confidentiality was promised to the sources.

(Emphasis added). Thus, in the order resolving the third motion to compel, we did not order the agency to disclose sources of 360° feedback. Nothing in the order resolving the fourth motion to compel changed that.

² In response to this request, the agency agreed to produce the following:

- (1) Grievant's bids since 2007;
- (2) The level of experience of other candidates;
- (3) The name and background of the individual selected;
- (4) A list of SMG panel members; and
- (5) A list of SMG documents regarding [REDACTED]

The language that the agency cites as the cause of its concern appears on page 10 of our last order and reads:

. . .we amend our previous orders (issued March 5, 2013 and August 6, 2013) to the extent that either order permitted the agency to withhold the names of individual sources and hereby require the agency to disclose the names of the complainants as well as recipients of any complaints, unless the agency interposes a specific privilege with supporting arguments for the applicability of the privilege, or the agency offers evidence that it made a specific promise of confidentiality to an individual complainant before receiving a particular complaint. In the absence of privilege or a specific promise of confidentiality, the agency shall disclose all details, including names of complainants, pertaining to complaints filed during the period 2004-2009.

This language does not define 360° sources as “complainants.” Our use of the term “sources” above was intended only to refer to sources of complaints, not sources of feedback and we intended to distinguish complaints from feedback. Pursuant to the Order: MTC#4, the former must be disclosed in detail, while the latter have not been ordered to be disclosed. The last discovery order does not, and was not intended to require disclosure of 360° feedback sources. Instead, it amends two previous discovery orders (MTC#3 and MTC#2) and requires that the agency disclose identifying information about sources of “complaints,” as requested in interrogatory #5 and document request #8 consistent with the accompanying instructions.³

³ The instructions require the agency to provide details about each complaint, including:

(for oral complaints) -

- the means of communication (e.g., telephone, personal conversation, or otherwise)
- where the communication took place
- the date or approximate date of the communication
- the identity of each person who was party to, overheard, or may have overheard the communication,
- the substance of what was said
- who said it
- to whom it was said
- and if the communication (even in part) is recorded, described or referred to in any document (then follow the definition of “identify” for documents)

(for written complaints) -

- the title or nature of the document
- the date of the document

The Board concludes that the term “complaint” does not need a redefinition, an explanation, or a clarification. The term does not include negative 360° feedback as the agency worries. Moreover, we are satisfied that the agency understood the common sense definition of the term when it responded to interrogatory #5 as follows:

The Agency is aware of multiple complaints made about [REDACTED] in treatment of subordinates while she was the [REDACTED] in [REDACTED] and while she was the [REDACTED] for [REDACTED].

We require the agency to provide to grievant detailed information about these “multiple complaints” as it used the term.

We note that despite its request for reconsideration, the agency states:

USAID is not seeking reconsideration of the Board’s order to the extent that it requires the Agency to produce all information specific to Grievant, including any ‘complaints’ about Grievant, considered by the relevant SMG panels and the Senior Threshold Performance Boards. . . .And we do not dispute the order to the extent it requires the Agency to identify any investigations of any ‘complaints’ included in that information.

Thus, it appears that the agency is not confused about the definition of the term “complaint,” but instead seeks to have this Board restrict its disclosure requirement to only those complaints that were considered by the SMG panels and Performance Boards. This effort has been previously denied.

USAID avers that this Board has determined that the agency was required to investigate negative 360° feedback comments. We have not made such a determination. Rather, we have determined simply that grievant is entitled to discover what the complaints against her were, whether they were investigated, and whether the complaints and/or the results of any

-
- a summary of its contents,
 - the author or preparer and signatories
 - the present location/custodian of the document
 - the identities of the addressees and other recipients
 - how the document was prepared (handwritten, by typewriter, by word processor) and
 - the disposition of the document (if not in agency control)/last known custodian.

investigations were made known to those who made promotion and assignment decisions. To the extent that the agency reports that SMG panels and Performance Boards were not advised of the identities of 360° feedback sources, it misses the point of the request. 360° feedback is not implicated by our last discovery order.

The agency argues correctly that grievant cannot legally challenge “an individual assignment, other than [one] alleged to be contrary to law or regulation.” 22 USC § 4131(b)(1). It claims, however, that “the Board has apparently concluded that Grievant has a legal basis for challenging her assignment and promotion decisions. . . .” This is not accurate. We denied the agency’s initial motion to dismiss (*see*, Order dated September 29, 2011) not because we decided that grievant may legally grieve individual assignments. Instead, we recognized that an employee may legally challenge “an unproductive pattern of assignments that precludes any realistic potential for promotion.” FSGB Case No. 1996-007 (February 3, 1997); FSGB Case No. 1995-063 (January 6, 1996); FSGB Case No. 1995-018 (April 26, 1996); FSGB Case No. 1994-018 (July 19, 1994); FSGB Case No. 1992-078 (February 22, 1994); FSGB Case No. 1991-048 (February 21, 1992); *Gaiduk v. U.S.*, 1990 U.S. Dist. LEXIS 5673 (August 12, 1987). We did not decide in advance that grievant will be successful in her attempt to prove a “pattern of assignments” claim, but instead, we concluded that she may investigate through discovery whether she has such a valid claim. The issue at this stage in the proceedings is her right to discover relevant evidence in support of her claim or information likely to lead to the discovery of relevant evidence. To the extent that she asks for detailed information about complaints that were made against her by subordinates between 2004 and 2009, she is entitled to investigate any such complaints.

USAID claims that our order will “fatally compromis[e] the effectiveness of the Agency’s SMG assignment process, which depends, in part, upon Agency employees providing unvarnished 360° feedback.” We disagree and suggest that the agency misapprehends the intent of our last order as explained above. Similarly both USAID and AFSA raise concerns that:

Should. . .FSNs generally become aware that they can become embroiled in litigations by direct-hire American employees against the agency, their willingness to be open and frank with American employees and mission leaders will surely be compromised.

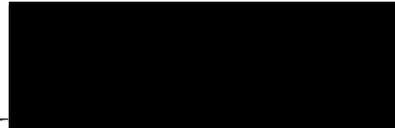
To the extent that either USAID or AFSA is concerned that our order requiring disclosure of complainants’ identities may affect the willingness of FSNs in the future to be open and frank, there does not appear to be any authority for either entity to raise concerns on behalf of FSNs in this forum.⁴ Moreover, as stated above, if the concern is that Foreign Service officers and/or FSNs will be unwilling to provide 360° feedback, our order does not require disclosure of feedback sources. If the concern is that there may be a chilling effect on general complaints in the future (whether FSNs or employees), then we hold that complainant’s names are not confidential or otherwise protected by privilege, unless there was a specific promise made by the agency. We conclude that neither clear error nor manifest injustice has been shown.

IV. ORDER

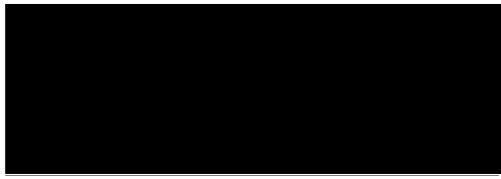
The motion for reconsideration filed by USAID is denied. AFSA’s request that the Board modify its last motion to compel to protect disclosure of the identities of FSNs who may have complained about grievant is denied.

⁴ See, FSGB Case No. 2006-002 (June 2, 2006), in which the Board held that it lacked jurisdiction to hear a grievance brought by a non-U.S. citizen FSN.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



James E. Blanford
Member



Jeanne L. Schulz
Member