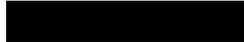


BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

Record of Proceedings

FSGB Case No. 2011-024

and

February 12, 2016

The United States Agency for International
Development

**ORDER: Grievant's Motions for Sanctions #4
and #5**



EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

William J. Hudson
Jeanne L. Schulz

Special Assistant:

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

Daniel S. Crowley
J. Michael Hannon
Hannon Law Group, LLP

Representative for the Agency:

Frank Walsh, GC/EA, USAID

Employee Exclusive Representative:

American Foreign Service Association

I. THE ISSUE

This order resolves two motions for sanctions filed by the grievant, [REDACTED], alleging that counsel for the United States Agency for International Development (USAID, the agency) interfered with her efforts to secure responses to interrogatories from agency employees that this Board permitted in lieu of depositions. The Board concludes that the motions for sanctions should be granted in part.

II. BACKGROUND

[REDACTED], grievant, joined USAID in 1995. She was promoted to the rank of FS-01 in 2003 and began receiving Senior Management Group (SMG) assignments in 2004. After she was removed from a management position in 2009 and was assigned to over complement, she filed the instant grievance on January 5, 2011, claiming a “pattern of assignments” violation that allegedly prevented her from advancing at the agency. She also claimed that USAID made certain assignment decisions based on uninvestigated false complaints made by subordinates against her, in violation of assignment procedures. The agency denied the grievance on April 5 and this appeal was filed on June 3, 2011.

The grievance appeal remains in protracted discovery litigation with both the grievant and the agency filing numerous pleadings, including motions to compel further discovery, objections to discovery requests, motions for sanctions, and motions for reconsideration of orders previously issued. At a status hearing held with the parties on June 5, 2014, the Board resolved all outstanding discovery disputes between grievant and USAID. Grievant then requested permission to depose over 100 agency employees. The Board considered the request and permitted grievant to submit additional discovery requests to a reduced number of employee

witnesses, by way of written interrogatories and requests for production of documents in lieu of depositions.

In response to concerns raised by grievant's attorney at the status hearing that the agency's attorney might interfere with grievant's discovery instructions to the employees and/or with their responses, the presiding member of the Board stated that the interrogatories would be submitted to the employees just as they were drafted and that agency counsel would not edit or change them in any way. The Board further stated that Mr. Sacks would not edit or change any of the responses either. Counsel for grievant also sought to ensure that agency counsel would take no action to influence the responses from agency employees. He requested that the Board issue instructions to the witnesses or limit what instructions agency counsel could give them. The Board responded that this was unnecessary because the instructions to the employees would be those that were included in the discovery requests.

Grievant then submitted to agency counsel her proposed discovery requests to the employees. USAID then noted numerous objections to most of the questions and to all requests for documents. On October 31, 2014, the Board issued an order resolving most of the disputed issues. The Board order gave a number of clear instructions to the parties in how discovery should progress, including:

[W]itnesses shall sign and date their responses and certify their accuracy by including the following declaration: "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge."

Id. at pp. 5-6. The Board modified one of grievant's discovery instructions to read:

Instruction 13. If any interrogatory or request for production is not answered fully because you are claiming a privilege, or that it is work product, or for any other reason, state 1) the basis for your refusal to answer and/or 2) the basis for your refusal to produce responsive documents. *State precisely what privilege or privileges you are raising or what your objection is.*

Id. at p. 12 (Emphasis added). The Board also expressly approved, after modifications, three interrogatories that asked the following questions:¹

2. If you talked with an attorney regarding these requests, please identify the attorney and state whether the attorney represents you in connection with these requests.
3. Identify all other persons with whom you spoke about these requests, other than your attorney, and tell us the details of each conversation.
7. What instruction have you received regarding these requests and from whom?

With regard to one witness (Wright), the Board sustained an agency objection to a question that asked Mr. Wright whether he had ever spoken with former agency counsel (Mr. Sacks) and, if so, what he (Mr. Wright) told Mr. Sacks. *Id.* at p. 21. The Board concluded: “Although Mr. Sacks does not have an attorney/client relationship with these witnesses, the objection to this interrogatory is sustained.”

USAID thereafter filed two motions for reconsideration, in part because the Board did not address certain of the agency’s objections and in part because the agency claimed that communications between agency counsel and the employee witnesses were protected by the attorney-client privilege. The Board first denied the motion, concluding that agency counsel is the attorney for the agency and that he “concedes that he has no attorney-client relationship with the employees of the agency.” Order dated February 10, 2015 at p. 5. The Board again reconsidered the issue of whether agency counsel had an attorney-client relationship with agency employees and concluded:

In the instant case, no USAID employee has had the opportunity to assert, in response to a particular discovery request, that s/he objects to the request on grounds that it violates an alleged attorney-client privilege with

¹ Some of the same interrogatories were submitted to different employees with different numbers.

agency counsel. Nor has any employee offered an affidavit providing the necessary information for this Board to make a determination whether to recognize an attorney-client privilege between the employee and agency counsel. Instead, agency counsel seeks to assert a blanket attorney-client privilege between himself and all agency employees before they receive the discovery. We conclude that the issue whether there is an attorney-client privilege between Mr. Sacks and any USAID employee who is scheduled to receive grievant's discovery requests is not ripe for a determination in this instance inasmuch as there is no indication that any employee who is a holder of the privilege has authorized Mr. Sacks to assert it on the employee's behalf and in the absence of evidence on which a determination may be made, pursuant to the factors set out in *Gangi [v. U.S. Postal Service, 97 MSPR 165 (2004)]*.

See, Order, dated April 6, 2015, at pp. 9-10.

The interrogatories were submitted to the employees and responses were received by grievant who next filed two motions to compel (Nos. 5 and 6), first arguing that the employees failed to respond at all;² and later arguing that the employees' responses were inadequate. The Board dismissed the 5th Motion to Compel upon information that the responses were timely filed. In response to the 6th Motion to Compel, the Board ordered certain employees to supplement their responses. With regard to agency counsel's repeated claim that he enjoyed an attorney-client privilege with certain employees, the Board held again:

... The Board reads Interrogatory 2 to require the witnesses to provide information detailing all conversations they had within anyone other than their own attorney. Thus, this would include conversations with any USAID counsel, unless the witness asserts that agency counsel represents the witness. Only the witness can assert that agency counsel represents him or her and, in order for the Board to determine the existence of an attorney-client privilege, the witness would have to provide an affidavit or other information concerning the establishment of an attorney-client relationship, as well as the nature and circumstances of the communications that the witness claims are privileged. To the extent that witnesses assert that USAID counsel does not represent them, then they must answer Interrogatory #2 with details of their communications with him. The motion to compel further responses is granted with respect to the following witnesses (16 named witnesses).

² Counsel apparently miscalculated when the responses were due, believing they were due earlier than they were.

See, Order dated August 11, 2015 (Motion to Compel Order), at pp 5-6. In addition, the Board stated:

[N]otwithstanding the agency's argument that this request [Interrogatory 6 regarding what instructions the witnesses received regarding the interrogatories] impinges upon both the attorney-client and work-product privileges, the Board concludes that agency lawyers' instructions to employees whom they do not represent regarding how they should respond to discovery requests are not, without more, covered by the attorney-client privilege. *Gangi v. U.S. Postal Service* We find that the agency has not offered an affidavit or other evidence to establish the necessary factors identified in *Gangi, supra*, for determining the existence of an attorney-client privilege.

* * *

The agency offers no information that disclosure of the instructions given by its attorneys to its employees would reveal a privileged communication from employees to the attorneys that would enable the lawyers to represent the agency client. ... The Board finds that the agency did not prove its entitlement to this privilege.

* * *

The Board also concludes that there is no evidence, whatever, offered to support the agency's claim of work product privilege.

After receiving additional discovery disclosures, pursuant to the Motion to Compel Order, grievant filed the instant two motions for sanctions, dated October 26, 2015 and November 16, 2015. In these motions, grievant complains that former agency counsel, Mark Sacks, willfully violated numerous Board orders regarding how discovery was to proceed and regarding the attorney-client privilege. USAID, now represented by successor counsel, Frank Walsh, filed an opposition to both motions for sanctions.

III. POSITIONS OF THE PARTIES

A. GRIEVANT

1. Motion for Sanctions #4

Grievant contends that former agency counsel, Marc Sacks, gave inappropriate instructions to the employees about her interrogatories; advised certain witnesses how they

should respond to certain interrogatories; told witnesses that their communications with him were protected by an attorney-client privilege; edited witness responses to the interrogatories; retained original responses; substituted revised responses that the witnesses submitted to him in response to his suggestions; and suggested that witnesses withhold certain documents from disclosure. As an example, grievant cites an email communication that was disclosed pursuant to the Motion to Compel Order. Mr. Sacks wrote to Michael Satin (one of the employee witnesses): “You may state that you’ve received instructions from me, but our communications are covered by the attorney-client privilege ... and you should not describe the content.” In other examples, grievant contends that Mr. Sacks edited Ms. Riley’s responses substantively when he added the language, “[a]s is the case for all candidates,” before her description of how grievant’s bids were handled during the SMG process. With respect to Mr. Satin’s responses, grievant states that Mr. Sacks likewise made substantive edits when he removed Mr. Satin’s detailed explanation of his conversation with Mr. Sacks as “non-responsive.” In the end, grievant argues that her concern “is larger than the actual substance of any particular edit” and that the Board “cannot trust the agency” when it claims that everything has been disclosed.

Counsel for grievant also revisits complaints about late disclosed e-discovery and about the declaration from the Chief Information Security Officer that was submitted in response to a recent Board order, dated September 30, 2015. Grievant claims that “there are additional witnesses who are likely to have information about why [REDACTED] bids [on various assignments] were denied.” She also asserts that “[A]ll of the evidence in this case is tainted by the agency’s conduct. Neither the Board nor [REDACTED] can have any faith that the discovery produced by the agency or the agency’s employees is accurate or complete. ... She has been denied a fair opportunity to develop evidence to support her grievance.” Grievant also contends

that the agency failed to inform her before certain witnesses retired or left employment with USAID, rendering them unavailable to her for compulsory process. Grievant also contends that the agency has intentionally delayed the discovery process which has caused witnesses' memories to deteriorate.

In reply to the agency's opposition, grievant argues that Mr. Sacks acted in bad faith when he instructed the employees that he had an attorney-client relationship with them, but failed to advise either grievant or the Board that he did so. Thus, rather than respond to the Board's statement that it would decide the attorney-client privilege issue only if the witnesses asserted the privilege and only if they provided affidavits from which the issue could be analyzed, grievant contends that Mr. Sacks simply ignored the order and advised the employees that the privilege existed between himself and them.

For relief, grievant seeks:

- (1) Permission to direct and oversee a search of the agency's electronic records;
- (2) An order prohibiting the agency from introducing evidence from any of the employees to whom she directed discovery requests;
- (3) An order prohibiting the agency from introducing evidence related to information available to SMG Panel members, or any claim that concerns about grievant's management skills were the basis for denying her bids or promotions;
- (4) An order requiring the agency to produce all correspondence (including electronic transmission of all kinds) by agency lawyers related to this case, including correspondence with employees ... as well as correspondence among its lawyers;
- (5) An order reopening discovery entirely, permitting grievant to issue new discovery, untainted by interference from agency lawyers;
- (6) That grievant be permitted to conduct depositions of agency employees;
- (7) That the Board reconsider every discovery objection that it sustained, including those orders that pertained to whether Mr. Sacks conducted himself appropriately during discovery; and

(8) That the agency be ordered to pay the fees incurred by grievant during the entirety of this grievance.

2. Motion for Sanctions #5

In her related motion for sanctions #5, grievant argues that several witnesses failed to comply with this Board's August 11, 2015 Motion to Compel order. Grievant claims that the following witnesses did not comply with the Board order that required additional responses because Mr. Sacks intentionally gave them instructions that countermanded our order:

- Peter Hubbard (failed to provide the email instructions he received from Mr. Sacks and from Mr. Walsh)
- Susan Riley (failed to provide her original draft response to interrogatory 9 seeking her explanation of the 360° process. The agency produced an email from Ms. Riley stating that Mr. Walsh's notes accurately described her recollection of the process. Ms. Riley also did not provide any information describing her communications with Mr. Walsh responsive to the interrogatory requesting that all communications with agency counsel be disclosed.)
- Rochelle Sales (failed to produce additional documents that had been provided to USAID, despite an email stating "more would follow.")
- James Wright (failed to describe his conversation with agency attorney, Karen d'Aboville and failed to describe the instructions he received regarding the discovery requests. Most of what this witness produced were emails from Attorney d'Aboville to agency counsel, Frank Walsh. In addition, an email from Ms. D'Aboville indicated that Mr. Sacks had edited Mr. Wright's responses. The originals have not been produced. An email from Mr. Wright that was produced included the language "quoted text hidden.")
- Karen Towers (failed to describe conversations with Mr. Sacks and instructions received from him.)
- Torina Way (failed to describe all conversations with Mr. Sacks, instructions received from him, and failed to produce all documents that had been previously provided to agency lawyers.)
- Yvette Malcioln (failed to produce documents reviewed in answering the interrogatories and documents provided to Mr. Sacks.)
- All employees (failed to provide information about any additional instructions received from agency counsel despite the Board order requiring such disclosures.)

– USAID

- (submitted its responses on behalf of agency employees, paraphrasing their responses, rather than complying with the orders of this Board to have the employees submit responses directly to grievant’s counsel signed under the penalty of perjury.)
- With regard to Crystal Garrett who was no longer able to identify documents responsive to the requests, but had submitted documents to USAID, agency counsel failed to confirm that all of the documents produced by Ms. Garrett had been disclosed to grievant.)

In reply to the agency’s opposition to this motion for sanctions, grievant argues that the agency only provided fuller responses to outstanding requests after the motions for sanctions were filed. Grievant argues that under local District of Columbia Rules of Civil Procedure, a response to a discovery motion that is offered after a motion to compel is filed is sufficient to warrant an award of fees. She further cites the Federal Rules of Civil Procedure 37(b)(2)(C) and the local equivalent rule as mandating an award of fees against a party that disobeys an order granting a motion to compel, “unless the failure [to comply with the court order] was substantially justified or other circumstances make an award of expenses unjust.” Grievant concedes that these rules “are not directly applicable to this proceeding,” but argues that had USAID performed as it did in federal court, the court would have been required to impose sanctions. With regard to each specific discovery request, grievant challenges the agency’s responses and states:

- Peter Hubbard – grievant concedes that she now has the requested documents, but for purposes of the motion for sanctions, argues that the documents that were produced finally on November 20 had been ordered to be produced by the Board in the August 11, 2015 order and were forwarded to current agency counsel on September 29, 2015. Despite a supplemental disclosure by the agency on October 27, these documents were withheld until November 20. In addition, grievant argues that Mr. Hubbard still has not disclosed all communications with agency counsel about discovery. An email dated November 20, 2015 from the agency indicates that Mr. Hubbard met with Mr. Sacks regarding discovery, but

there was no description of the conversation, nor was there a description of the communication from Mr. Walsh that prompted Mr. Hubbard to produce twenty more emails on November 20, 2015.

- Susan Riley – grievant argues that Ms. Riley does not explain how HR reconciled conflicting 360° feedback about her and who were the individuals who reviewed or created the 360° summaries.
- Rochelle Sales – grievant seeks those documents that Ms. Sales has. She stated, “Here is what I have so far, I am still working on it, but keep getting interrupted.” Grievant seeks a statement from Ms. Sales regarding whether she has completed her search and what, if any, additional documents she was able to find.
- James Wright – grievant argues that Mr. Wright acknowledged in a conversation with Ms. D’Aboville that he had provided 360° oral feedback as requested by the Mission Director. She contends that this should have been produced because it is not protected by the Board’s order that permitted the agency to withhold information about individual written 360° feedback. Grievant also complains that agency counsel improperly instructed Mr. Wright to confirm that he did not receive any instructions from anyone other than two lawyers, “so that we can definitively refute any allegations from opposing counsel.” Grievant argues that what the agency produced was a revised draft, but not yet the original from Mr. Wright.
- Torina Way – grievant points out that in her original response, Ms. Way stated that she had given her documents to the agency. Despite the Board order requiring her to produce them to grievant, the agency merely resubmitted her original response.
- Yvette Malcioln – Ms. Malcioln wrote that she submitted documents to Mr. Sacks and had no others. The documents submitted to Mr. Sacks were never produced by the agency. Instead, the agency references her original discovery requests, but did not provide the responses.

Lastly, grievant argues that her motions for sanctions were not untimely filed, as the agency argues. The agency’s reference to a 15-day deadline pertains to a motion to compel, not a motion for sanctions.

B. USAID

1. Opposition to Motion for Sanctions #4

USAID claims that notwithstanding the actions of former agency counsel, Marc Sacks, grievant has not suffered any harm that would warrant the imposition of sanctions. USAID cites

the fact that the Board previously held, in the order dated September 30, 2015, that no sanctions were warranted when the agency produced certain documents late in the discovery process because the information contained in them had previously been disclosed. The agency also claims that in the fourth motion for sanctions, grievant only recites old claims that were all resolved in the September order. Later, in the opposition, however, the agency addresses new claims raised by grievant.

USAID argues that the Board never ruled that there was no attorney-client privilege between agency lawyers and employees. Rather, the Board determined that the agency had not submitted sufficient information from which to decide the question. Accordingly, the agency contends, it was not bad faith for Mr. Sacks to instruct the employees consistent with his belief that there was an attorney-client privilege between himself and the employees. Current counsel, Frank Walsh, further states that all communications between Mr. Sacks and the employees have been produced and the only documents withheld from disclosure are those among agency lawyers that are work-product.

USAID also argues that Mr. Sacks did not distort the responses of Mr. Satin or Ms. Riley. Instead, he instructed employees to provide fuller answers in some instances than were originally offered by the employees. The agency submitted a spread sheet showing the differences between what the employee originally wrote and what Mr. Sacks recommended by way of edits. USAID argues that, in any event, because grievant now has all of the information – what the employees originally wrote and the “minor” edits proposed by Mr. Sacks – there is no reason for the Board to impose sanctions.

The agency contends that the requested remedies would “needlessly prolong” this litigation that should “focus on her ‘pattern of assignments’ claim.”

2. Opposition to Motion for Sanctions #5

In this opposition, the agency addresses each claim pertaining to each employee as follows:

- Peter Hubbard – the agency argues that grievant’s complaint with regard to this witness is moot, inasmuch as the requested documents have been produced, notwithstanding the agency’s view that they are “non-responsive and irrelevant.”
- Susan Riley – the agency argues that it was appropriate for former counsel to take notes of a conversation with Ms. Riley, send the notes to her for confirmation of accuracy and completeness, and then forward counsel’s notes in lieu of a direct response from the witness. The agency argues that grievant’s demand for a sworn interrogatory response “should be denied as irrelevant, burdensome, and a needless waste of time and resources when grievant already has an answer with a written affirmation.” The agency further offers to stipulate that it will not object to grievant using counsel’s notes as Ms. Riley’s statement in future briefing.
- Rochelle Sales – the agency argues that grievant has no evidence that Ms. Sales has any additional documents and contends that it has produced all documents submitted by Ms. Sales; therefore, this issue is moot.
- Jim Wright – the agency argues that the fact that one of its lawyers (D’Aboville) responded in lieu of the witness does not warrant sanctions. In addition, the agency, submitted an affirmative statement from Mr. Wright stating that he did not have any additional communications with other agency lawyers. In addition, counsel for USAID states that to the extent that one email contained a redaction of a communication between attorneys and another was truncated by the USAID email system, the unredacted and complete versions of these emails have been produced. Finally, the agency argues that former counsel instructed Mr. Wright to edit his original response to affirmatively state that he had no responsive documents.
- Karen Towers – the agency contends that Ms. Towers has provided a written description of her conversations with and instructions from Mr. Sacks.
- Torina Way – the agency argues that Ms. Way has in fact produced all documents that were previously provided to USAID and whereas a portion of an email from her was cut off by the email system, the entirety of the email has since been produced. Thus, the issues with regard to this witness are moot.
- Yvette Malcioln – USAID states that it produced documents received from Ms. Malcioln. Thus, this issue is moot.

- All employees – USAID claims that it has produced “extensive emails including Frank Walsh’s instructions to witnesses” The agency objects to grievant’s demands for all instructions provided by agency counsel to the witnesses as discovery continues. Counsel for USAID calls this “discovery on discovery.”
- USAID – the agency disputes grievant’s claims that counsel is interfering with her efforts to obtain discovery. USAID explained that it “posed the Board’s instructions to witnesses via email, received their responses via email, and then produced the entire email chain to Grievant in document productions.” Counsel argued that it was unnecessary to submit a 25-page order to each witness in order to get relevant responses. Instead, the portion of the order applicable to each witness was transmitted verbatim to the witness and those instructions, along with the witnesses’ responses, were produced to grievant.

IV. DISCUSSION AND FINDINGS

The FSGB Policies and Procedures (P&P) do not expressly provide for a motion for sanctions to be filed by parties to a grievance appeal. At the same time, our procedures do not prohibit such a motion and generally allow for any motion to be filed “in writing, stating the grounds supporting it and the relief sought.” (See P&P at p. 12). Grievant bears the burden of proving that her motions are meritorious.

We first note that although the Board has authority to regulate how discovery shall proceed, we are aware of no authority in the Foreign Service Act, the Code of Federal Regulations, or the Board’s Policies and Procedures that authorizes this Board to impose sanctions of any kind for discovery violations. Nor has grievant cited any directly applicable authority for the imposition of sanctions.

Federal Rule of Civil Procedure (FRCP) 37(b)(2)(C) provides:

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent – or a witness designated under Rule 30(b) (6) or 31(a) (4) – fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

We agree with grievant that this rule does not directly apply to proceedings before this Board. Nonetheless, we have before us her fourth and fifth requests for sanctions against USAID based on the agency's alleged failure to obey numerous orders of this Board, including an order granting in part a motion to compel further discovery. We conclude that although FRCP rule 37 is not controlling on the issues presented, it is instructive and informative.

We discuss grievant's two motions for sanctions together. First, we note that we could not have been clearer at a status hearing on June 5, 2014, how the Board expected counsel for both the grievant and USAID to conduct themselves during this phase of discovery. The Board stated that after all objections were resolved, we expected the discovery requests to be delivered by agency counsel to the named employees with no modifications and no substantive instructions from agency counsel, because the relevant instructions were those provided by grievant as part of the discovery requests. Moreover, we stated that we expected agency counsel to deliver the responses to grievant's counsel without any edits or changes. When grievant's union

representative questioned whether agency counsel (Marc Sacks) might edit the discovery requests. The following colloquy took place:

Mr. Broome (AFSA representative):³ Question. Once Mr. Hannon [grievant's lawyer] frames an individual's interrogatories, it goes to Mr. Sacks. And if he doesn't – if Mr. Sacks doesn't object, is it going out to the employee in the same language that Mr. Hannon poses?

Ms. Winfield (Panel Chair): Absolutely.

Mr. Broome: Or will it be massaged?

Ms. Winfield: Oh, no.

Mr. Broome: Same question when the answer comes back.

Ms. Winfield: Absolutely not. Mr. Sacks is not going to do anything to Mr. Hannon's interrogatories. He's not going to change the language.

Mr. Broome: And to the responses, will he not massage them either?

Ms. Winfield: No. Of course not. Because then that's not the answer from the employee. It's Mr. Sacks, you know massaging. But that's not an issue. ... Right?

Mr. Sacks: No, that's not an issue.

Tr. 6/5/14 Status Hearing, at p. 134.

With regard to instructions that the employees would receive, grievant asked the Board to draft instructions to the employees or limit what instructions agency counsel could give them.

The Board declined the request, stating:

Ms. Winfield: It would not be my plan to give instructions to witnesses such as you request. So to the extent that you're requesting something from the Board, your request is denied.

Mr. Hannon: Then what will be sent to them by Mr. Sacks?

Ms. Winfield: I have no idea. Mr. Sacks will make that decision. ...

³ AFSA is the American Foreign Service Association.

Mr. Hannon: May we see it ahead of time?

Ms. Winfield: I don't see why. Why would you do it?

Mr. Hannon: Because I want to know what communications Mr. Sacks has with these witnesses in connection with their responsibility to answer these interrogatories. ...

Ms. Winfield: ... I don't know what your experience is with Mr. Sacks or with this Agency or with Foreign Service agencies in general, but I have not seen it done in the past. I don't see the need for it. *Mr. Sacks is going to be professional, as you [Mr. Hannon] are going to be professional. He's going to forward these interrogatories – if [he has] no objections to them – to the witnesses. **The interrogatories will give them instructions.***

Mr. Hannon: Well, then, may I see what he sends to them?

Ms. Winfield: ... I don't see a reason for such an order, so the request is denied. *I have no expectation – none – that Mr. Sacks is going to say anything inappropriate or do anything untoward that would have an impact on the witnesses' answers to your [grievant's] questions.*

(Emphases added). *Id.* at pp. 187-188. Because we expected no instructions from Mr. Sacks, the Board considered each of the agency's objections to grievant's discovery requests and carefully decided the specific language and substance of each of grievant's instructions. (See order, dated October 31, 2014).

The Board also explained the procedure for securing responses. In response to grievant's lawyer's question, "Do we have to file these through [agency] counsel?" the panel chair stated: "You're going to file them through agency counsel and counsel is going to make certain that he gets responses from each of the employees." *Id.* at pp. 109-110. Despite Mr. Hannon's protests about submitting his requests through Mr. Sacks, the Board stated, "If you send [the interrogatories] through counsel, we're going to get responses when responses are due. Right?" Mr. Sacks responded: "That would be our intent. Absolutely." *Id.* at p. 111-112. The Board went on to state:

... The concern is the procedure and the procedure is going to be that when you file these interrogatories ... you're going to send them through Mr. Sacks because we, the Board, want answers from these witnesses and we want him to get them. The only way I can make certain that we get answers from witnesses who don't have to answer is if they go through him and he is then tasked by the Board.

Id. at pp. 114-115. In addition, the Board responded to a concern raised by USAID counsel that grievant might ask overbroad questions in her interrogatories. We stated: "He's not going to do that anymore than you're going to change their answers." *Id.* at p. 182. In a subsequent order resolving all of the agency's objections to grievant's interrogatories, the Board stated:

Grievant shall therefore modify the interrogatories consistent with this order, but she shall make no other changes or add any additional questions. The interrogatories shall be served on the witnesses, through agency counsel, by no later than November 14, 2014. *Agency counsel shall immediately forward the interrogatories to the witnesses. Responses to the interrogatories shall be filed with both grievant's counsel and agency counsel, by not later than November 28, 2014.*

See, Order, dated October 31, 2014 at p. 31. The Board later reaffirmed its order that agency counsel's "obligation ... is to submit the interrogatories to the employees and to transmit their responses exactly as written." See, Order, dated February 10, 2015 at 6.

This Board also decided on numerous occasions that, despite USAID counsel's repeated assertions that there was an attorney-client privilege that applied to his communications with agency employees, there was, in fact, no attorney-client privilege that could be recognized because neither the agency nor the employees had submitted any information from which the Board could determine that a privilege applied. See orders, dated October 31, 2014, February 10, 2015, April 6, 2015 and August 11, 2015. In the absence of such proffered evidence, no privilege could be recognized by the Board. It is axiomatic that the assertion of the privilege does not itself confer the privilege. See FRCP 26(b)(5):

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

See also, *United States v Tratner*, 511 F2d 248 (7th Cir. 1975) (Claimant of privilege, rather than proponent of evidence, bears burden of proof on privilege questions.). Instead, the assertion of the privilege does no more than present a legal issue to be decided by the Board. *Gangi v. United States Postal Serv.*, 97 M.S.P.R. 165, 2004 MSPB LEXIS 1832 (Sept. 1, 2004).

Accordingly, we hold that counsel for USAID, Marc Sacks, had no legitimate basis on which to instruct agency employees that their communications with him were protected under an attorney-client privilege. We make no decision about whether Mr. Sacks was motivated by bad faith when he erroneously advised employees that their communications with him were privileged, except to say that there was literally no basis whatsoever for him to believe that he had a privilege that only the Board could recognize and that we repeatedly stated he had not proved.

Despite the clear pronouncements by the Board of its expectations about how discovery from employees would be conducted, Mr. Sacks violated Board instructions in a number of ways. Mr. Sacks gave background information about the grievance that suggested that agency lawyers were positioned to protect the witnesses' interests and defend them from the burden and nuisance of grievant's requests and the Board's orders. The first of these violations occurred within one week of the status hearing, after the Board stated that it expected Mr. Sacks to act professionally and not say anything "inappropriate or do anything untoward that would have an impact on the witnesses' answers to [the] questions." On June 12, 2014, Mr. Sacks wrote to Mr. Satin:

The Foreign Service Grievance Board has ordered that you are required to respond to written questions regarding a grievance brought by employee [REDACTED]. Information about your obligation follows.

Michael [Satin]:

... You probably recall that we communicated about the grievance [REDACTED] has brought against the Agency a few months back – you wrote me a detailed written response on March 23, which I appreciated. *While I'm sure you hoped that would be the last of your participation, I now have to come back to you again.*

As part of her grievance, [REDACTED] attorneys have now requested, and the Board allowed (over the Agency's objection), that [REDACTED] attorneys be permitted to submit written questions about her case to certain Agency employees, including you. As the Agency attorney defending the grievance, I'm here to explain the process to you, answer any questions you may have, and ensure that the Agency complies with the Board's order by submitting your written answers to [REDACTED] attorneys' questions. My goal is to make the process as clear and easy for you as possible.

* * *

*I recognize that your reaction will most likely be that you don't want to be involved. Unfortunately, since the Agency is under a Board order – that is not an option. I'm hoping that you'll assist me by being responsive and willing to provide the answers required by the Board. **The good news is that submission of the answers should end your involvement – the Board has said that it will not allow [REDACTED] attorneys to take oral depositions and will not allow [REDACTED] to have a hearing and call live witnesses.***

(Emphases added). He also wrote: “The FSGB has denied our objections and has ruled that you must respond to the following [questions.]” Mr. Frank Walsh also wrote to some of the witnesses, apologizing for the “inconvenience that this litigation has caused.”

A few weeks after hearing the Board state that the only instructions to employees would be contained in the discovery requests, Mr. Sacks gave employees instructions not only about

how to respond to the interrogatories in general, but to each question, in particular. In an email to Michael Satin, dated April 16, 2015, Mr. Sacks wrote:⁴

... [T]he [FSGB] has finally ruled on the content of the interrogatories and I write to tell you that you now have an obligation to respond to the attached document.

I'm available to talk to you about your response anytime convenient for you, but let me first walk you through the document briefly.

The document begins with Definitions and Instructions that you should review – though there is no need to respond to them. I understand that there is significant “legalese” in the definitions and instruction – I’m available to explain or clarify as needed.

Then you will find the Interrogatories. For each interrogatory, you must provide a truthful written answer based on your personal knowledge. To answer the interrogatories, you may, though you are not required to, seek out documents to aid in your response (see more on documents below). You are not obligated to speak to anyone else about the interrogatories – they seek only your personal knowledge – though you may do so if you choose. If, today, you don’t remember the answer to an interrogatory – you may so state. You are not required to make efforts, other than truthfully stating your current personal knowledge, to obtain an answer.

(Emphases added). Mr. Sacks then explained each interrogatory and what, in his view, the request called for. With regard to the document requests, Mr. Sacks instructed the witnesses that they had no obligation to “seek out documents that are not already in your possession or control, though you may do so if you choose.” In addition, Mr. Sacks instructed the witnesses that they must provide all responsive documents to him before providing them to grievant’s attorney. This was in direct contravention of our stated expectation that the instructions were to be those that were approved and included as part of the discovery requests and that the witnesses would submit their responses directly to both grievant’s counsel and agency counsel simultaneously. Even if Mr. Sacks received the responses, the clear expectation was that he would forward them without reviewing or modifying them.

⁴ It appears from the record that several witnesses, in addition to Mr. Satin, received similar emails from Mr. Sacks.

When grievant's attorney emailed several employees seeking an opportunity to speak with them about the case, Mr. Sacks went beyond giving instructions when he told Susan Riley: "... You have no obligation to respond to the communication. If you choose, you can delete and have no further worry about it. If you want to discuss further, just let me know. Thanks."

Mr. Sacks also gave his opinion about the merits of the grievance to Regional Legal Officers (RLOs) who were themselves advising some of the witnesses how to respond to the interrogatories. He stated:

Dear RLO Colleagues:

For those of you who don't know me, I work in GC/EA ... that handles employee grievances brought against the agency. I am currently defending the agency before the [FSGB] in a grievance brought by [REDACTED] [REDACTED], who was formerly an RLA and then served as DMD in [REDACTED] and [REDACTED] ... claims that [recites the claims]. *Based on all the information I have seen, the case has zero merit.*

[Explains the Board authorization of interrogatories]. ... *I fought as hard as possible to limit the number of employees who could be questioned, but the Board, of course, had the final say in what the Agency is required to do.* [Explains the interrogatory process]. I will forward ... any interrogatories I have no objections to. For ones that I have objections to (which I expect to be most), I will forward the following week as soon as the Board has resolved the objections.

(Emphasis added).

The most egregious violation of Board orders occurred when Mr. Sacks and other agency lawyers, including Mr. Walsh, edited witness responses, even though the Board stated that it expected that absolutely no changes would be made to witness responses. Mr. Sacks wrote to Michael Satin on April 21, 2015:

Consider deletion of "since I was first approached in early 2014. I did however receive an email from one of the USAID/Nigeria personnel informing me and the other office directors who served in Nigeria at the time that [REDACTED] was the [REDACTED], that he had received the same message from the USAID General counsel. Please find

a copy of this email message with my response, attached to this document.”

Consider deletion of: “I have only ever had the two email communications that I am providing with this response document related to this case. I do not have now, nor have I ever had any related documents supporting any aspect of this case.”

John Power, an attorney with USAID, wrote to Susan Riley on April 29, 2015:

... I took a shot at putting your answers in what I think is a format that Marc [Sacks] will like with the declaration at the end. I corrected some typos and deleted one or two sentences that were not responsive to the question (like your involvement with the QDDR) and made one or two answers more responsive. Take a look at the attached and make sure you are comfortable with any changes that I introduced.

Ms. Riley also wrote to Mr. Sacks on April 29, 2015: “I’ve revised my answers per your guidance. ... Let me know if these answers are ok.” In one instance, after the Board ordered Ms. Riley to provide additional information about the 360° summary process, instead of submitting her response, current agency counsel, Mr. Walsh, held a conversation with Ms. Riley about her response, took notes of that conversation, and submitted his notes rather than a written response from Ms. Riley. Moreover, the responsive information was not signed “under the penalty of perjury” as instructed by the Board.

Mr. Sacks falsely advised witnesses that they had an attorney-client relationship with him, and told them that their communications with him were therefore privileged. He wrote:

First I need you to consider changes to account for the attorney-client privilege, which applies when, as here, Agency counsel is communicating with an Agency employee regarding ongoing litigation. While the FACT that we have communicated is not privileged, the content of our communications is privileged. So, for example, while my email to you attaching the interrogatories was entirely appropriate, it is not a document that we need to provide in litigation since it is privileged.

Lastly, he suggested to witnesses that some of the documents and information that the witnesses offered to disclose need not be disclosed. All the while, Mr. Sacks did not indicate to grievant or

this Board that he had injected himself in the discovery process, “massaging” many of the responses. It appears that the only reason why grievant discovered what Mr. Sacks said and did vis-à-vis these discovery requests was that Mr. Sacks was replaced on this case by different counsel, Mr. Walsh, who honored this Board’s last order requiring additional disclosure of information concerning communications between the employees and Mr. Sacks.

Notwithstanding our finding that agency lawyers violated a number of our rulings, we have concluded that we will not impose sanctions as requested, provided that USAID shall immediately, without exception, comply with the orders as stated below. The Board finds that the issue is to secure full and complete responses to witness interrogatories, rather than to sanction misconduct by lawyers. The Board finds further that despite grievant’s arguments to the contrary, and given the amount of discovery that has been provided by USAID to date, there is no reason to conclude that there are “additional witnesses” likely to have any additional information; the evidence in this case is not “tainted;” and grievant has unquestionably received a fair opportunity to develop evidence to support her grievance. Despite the fact that agency counsel did not alert grievant when employee witnesses were facing retirement or otherwise were leaving USAID employment, we find that the agency is not required to provide this notice and is not responsible for the fact that witnesses have left the agency, making them unavailable for compulsory process in this grievance. To the extent that grievant claims that the agency’s dilatory tactics have caused witnesses to forget important information, we find that to the contrary, grievant is herself responsible for waiting three years (from June 2011 when the appeal was filed until the June 5, 2014 status hearing) before requesting this opportunity to secure discovery from employee witnesses. Lastly, the Board finds that the agency has provided all e-

discovery that is required and will not reconsider ordering any further information from the Chief Information Security Officer.

V. CONCLUSIONS

The motion for sanctions is denied, provided that the agency shall comply with the following orders of this Board.

1. USAID shall immediately and without exception provide the following notice to all employees who are named in #3 below:

The Foreign Service Grievance Board has ordered that certain witnesses must provide additional responses to questions posed by [REDACTED] DIRECTLY TO HER ATTORNEYS:

**J. Michael Hannon and Daniel S. Crowley,
Hannon Law Group, LLP,
333 8th Street, N.E.,
Washington, D.C. 20002.**

The last two orders of this Board are enclosed in relevant part for your review. In addition, enclosed are the instructions and definitions that you should consider when responding to these questions.

- **The Foreign Service Grievance Board has determined that [REDACTED] [REDACTED] is entitled to receive information directly from certain employees without any input from USAID lawyers.**
- **The Foreign Service Grievance Board has determined that no attorney-client privilege has been established between any of the USAID employees and any agency lawyer. Therefore, if you discuss your responses with any attorney for USAID, you must disclose the precise details of all such conversations.**
- **Your responses shall NOT be submitted to agency lawyers before they are sent directly to grievant's attorneys; however, copies of your responses may be sent simultaneously to USAID counsel, Mr. Frank Walsh.**
- **Your responses should be accurate, complete and supported by whatever documentation you have or have access to.**
- **All responses shall be in writing, drafted by the employee, and shall be certified as accurate by including the following**

declaration: “I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.” The employee shall sign this declaration before submitting responses.

- **If there is an established violation of this order, the Board will consider permitting [REDACTED] to take oral depositions of any witness who does not comply.**
2. Along with the above notice, USAID shall provide to all of the employees named in #3 below, a copy of the following documents:
 - A copy of the cover page and the discussion and conclusion sections of this order and the Motion to Compel order, dated August 11, 2015.
 - A copy of grievant’s original instructions and definitions that were part of the interrogatories.
 3. The Board directs that the following employees shall provide additional information as ordered below, by no later than March 31, 2016.
 - **Peter Hubbard** – describe all conversations and meetings between yourself and all agency lawyers about [REDACTED] discovery requests and provide all written communications, including emails and draft documents, between yourself and any agency lawyer about these discovery requests. If you provided written responses to these discovery requests to any agency lawyer that were subsequently revised, you must produce all drafts of these communications.
 - **Susan Riley** – provide your own complete account and explanation of the 360° feedback process employed by USAID; specifically explain how HR reconciled individual 360° positive and negative feedback and how these responses were reflected in the 360° summaries.
 - **Rochelle Sales** – provide all documents that are responsive to grievant’s interrogatory #3 (“Describe the efforts you made to obtain the documents that are requested by [REDACTED] in this document.” You responded: “Here is what I have so far, I am still working on it, but keep getting interrupted.” Complete the production of these documents, including those that you said you provided to an agency attorney. If the documents are no longer available, “identify” them, as that term is defined in the definitions and instructions provided in the interrogatories.
 - **James Wright** – describe all conversations and meetings between yourself and all agency lawyers about these discovery requests and provide all written communications, including emails and draft documents, between yourself and Marc Sacks and between yourself and Ms. D’Aboville about these discovery requests.⁵

⁵ Grievant’s request for an order requiring Mr. Wright to provide information about 360° oral feedback he gave to a Mission Director is denied. This is similar to the Board’s previous orders that individual 360° feedback need not be disclosed.

- **Torina Way** – In your last response to the interrogatories, you stated that you had given documents to the agency. Please produce all documents that were provided to the agency. If the documents are no longer available, “identify” them as that term is defined in the definitions and instructions provided in the interrogatories.
 - **Yvette Malcioln** - In your last response to [REDACTED] interrogatories, you stated that you had given documents to agency counsel. Please produce all documents that were provided to this lawyer. If the documents are no longer available, “identify” them, as that term is defined in the definitions and instructions provided in the interrogatories.
4. Agency counsel may NOT offer any explanation of this order, or offer his view(s) of this case, or of the decisions of this Board to any of the witnesses. All instructions are contained in the discovery requests.
 5. Agency counsel may NOT in any manner offer advice, instructions, or assistance to the witnesses who are responding to outstanding discovery requests.
 6. Counsel may not review the responses before they are submitted to grievant’s attorney.
 7. Counsel for USAID may not edit, propose changes, suggest deletions, additions, or any other modifications of any witness responses before they are sent to grievant’s attorney.
 8. The Board further finds that if grievant is unable to secure full and complete responses directly from the witnesses without interference from any USAID lawyer, the Board will reconsider grievant’s request to depose witnesses, along with other requested relief.

The Board denies each of the following requested forms of relief, with prejudice, with one exception as stated below in section f.

- a. An opportunity to direct and/or oversee a search of the agency’s electronic records;
- b. An order prohibiting the agency from introducing evidence from any of the employees to whom she directed discovery requests;
- c. An order prohibiting the agency from introducing evidence related to information available to SMG panel members, or any claim that concerns about grievant’s management skills were the basis for denying her bids or promotion;
- d. An order requiring the agency to produce any additional discovery, including correspondence among agency lawyers or between agency lawyers and employees;
- e. An order reopening discovery entirely;
- f. An order permitting grievant to conduct depositions of agency employees; however, if grievant establishes good cause to believe that the agency has violated any of the orders stated herein, the Board will reconsider the request to depose those witnesses.
- g. Reconsideration by the Board of every discovery objection that was sustained; and

- h. An order for the payment of attorney's fees incurred by grievant during the entirety of this grievance.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



William J. Hudson
Member



Jeanne L. Schulz
Member