

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Record of Proceedings
FSGB Case No. 2011-024

November 7, 2014

The United States Agency for International
Development

ORDER: Motion for Reconsideration

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
J. Michael Hannon
Hannon Law Group, LLP

Representative for the Agency:

Marc Sacks, GC/EA, USAID

Employee Exclusive Representative:

American Foreign Service Association

I. THE ISSUE

This Order addresses a motion filed by [REDACTED] (grievant), an FS-01 Foreign Service employee of the United States Agency for International Development (USAID, agency). In her motion, grievant asks this Board to reconsider rulings that were made at a status hearing held on June 5, 2014.

II. BACKGROUND

Grievant filed the instant grievance on January 5, 2011, asserting that beginning in 2004, USAID made “adverse personnel decisions based on false, uninvestigated allegations” about her and failed to afford her reasonable opportunities “to demonstrate her potential for advancement.” When USAID denied the grievance, [REDACTED] appealed to the Foreign Service Grievance Board (FSGB, the Board) on June 3, 2011.

The parties have been actively engaged in discovery for more than three years. Grievant has filed four motions to compel discovery responses and a motion for sanctions. Because of how protracted discovery had been to date, the Board scheduled and held a status hearing with the parties on June 5, 2014 to attempt to resolve all outstanding discovery issues. We reviewed grievant’s claims and concluded that the agency had made significant efforts to investigate and disclose all requested discovery, in particular, information about informal complaints that were made against grievant by her subordinates.

At the status hearing, we ordered USAID to disclose to grievant, with limited personal information redacted, all documents that the Board had recently reviewed *in camera*. These documents revealed additional details about complaints made against grievant. In addition, we asked agency counsel to confer with his predecessor and advise the Board whether “e-discovery” had been completed. On the basis of later representations by agency counsel that all means to

provide additional details about informal complaints had been exhausted and all other discovery disclosed, the Board ruled that the outstanding motion for sanctions should be denied and the agency should not be obligated to produce any further discovery responses. The Board also ruled that there would not be a hearing in this case and denied grievant's request to depose more than 100 agency employees. The Board lastly ruled that any additional discovery sought by grievant from agency employees would have to be procured by means of written interrogatories.

On June 30, 2014, grievant filed the instant motion for reconsideration of several rulings by the Board during the status hearing. USAID filed an opposition on July 15, 2014 and grievant notified the Board that she did not intend to file a reply.

III. POSITIONS OF THE PARTIES

A. Grievant

1. Informal Complaints

Grievant argues that the Board erred in ruling that USAID was not obligated to provide any further discovery on the issue of informal complaints. She notes that the FSGB initially ordered USAID to provide detailed information about informal complaints that were allegedly made about her by subordinates. She contends that although the agency claimed that it communicated with all current and former agency employees about their knowledge of, and information about complaints, the response was woefully inadequate, given the specificity of the approved discovery requests. According to grievant, the agency responded to her recent motion for sanctions by interviewing two employees, while at the same time identifying 29 employees who "may have knowledge" of complaints made about her. Grievant complains that none of these 29 employees were interviewed by USAID about that knowledge. Likewise, grievant argues that the agency has produced dozens of pages of complaints by employees about her, but

without providing the detailed information requested in the discovery requests. Indeed, grievant contends that in some instances, USAID did not even identify the person who made a complaint, or the person to whom the complaints were communicated. Grievant concludes that there was no legitimate basis on which the Board could decide that the agency had conducted a comprehensive or diligent search to respond to the requested discovery. She renewed her motion for sanctions on the basis that the agency had not yet produced unredacted copies of documents that the Board ordered disclosed.

2. E-discovery

Grievant argues that the Board clearly erred in denying her request for further e-discovery and deciding that there was no more information to be learned. According to grievant, the Board's rulings on this issue have been confusing. She argues that the Board first suggested that in order to complete e-discovery, USAID might check every email in its files between 2004 and 2009 to see if grievant's name was mentioned anywhere in the email. Later, she claims, the Board was persuaded by agency counsel's argument that this would be overly burdensome, but, in any event, all e-discovery that the agency had promised to disclose has been disclosed.

Grievant maintains that e-discovery is not burdensome and is routinely disclosed. Therefore, she challenges the Board's conclusion that there was "no reason to believe there is anything else that can be gleaned from ten years ago that is not going to result in an undue burden on the agency."

Grievant also argues that the Board required the agency to contact prior counsel and confirm that he had completed a search of the electronic records. Current counsel advised the Board in a subsequent telephonic conference that the e-discovery search had been completed and that there were no outstanding unmet promises from the agency to grievant. Nonetheless, she

challenges counsel's representations because, in her view, an e-discovery search would likely produce a much larger number of documents than what has been produced.

3. Hearing

Grievant cites this Board's previous order in which we stated that "the issue whether to grant grievant's request for a hearing will be decided after the Board determines the issue of jurisdiction." Grievant states that although, the Board decided that it had jurisdiction, it did not give the parties a subsequent opportunity to brief the issue whether to hold a hearing. She argues that the reason why a hearing should be granted is that the case is likely to present conflicting testimony requiring credibility determinations that can best be made after receiving live testimony.

4. Interrogatories in Lieu of Depositions

Grievant argues that she should be given an opportunity to examine and cross-examine the witnesses in depositions. She cites the Board's Policies and Procedures ("P&P") that state that "parties may seek to obtain relevant evidence through the formal mechanisms of discovery," including producing "witnesses for oral recorded testimony under oath (Depositions)." P&P at pp. 7-8, 10. She also cites 22 CFR 906.8(a) that provides: "Each party shall be entitled to examine and cross-examine witnesses at the hearing or by deposition." Grievant contends that the reason why the Board refused to allow her to conduct depositions was our concern about the length of time depositions might take. She claims that the Board does not have authority to deny her request to take depositions except on relevance and materiality grounds and that the Board has already determined that the witnesses have both relevant and material testimony to offer. Grievant claims that she will be prejudiced if she is prevented from taking oral depositions of agency witnesses and restricted to submitting written interrogatories to those employees.

Grievant asserts that agency counsel has a conflict of interest between his role on behalf of the agency and his position vis-à-vis the witnesses. She claims that employees will be less candid if they are aware that their answers to interrogatories will be reviewed by agency counsel. Grievant speculates that employees are likely to believe that agency counsel is their attorney and might turn to him for advice. She then opines that agency counsel is in a position to influence answers to interrogatories in ways he could not if the witnesses were deposed.

B. Agency:

USAID opposes the motion for reconsideration on the ground that grievant does not offer newly discovered evidence, a change in the controlling law, or clear error. Instead, the agency argues, grievant simply disagrees with the authorized and discretionary rulings that were made by the Board. The agency argues that grievant does not offer any contrary law or undisputed fact that the Board rulings disregarded. Indeed, USAID argues that “Grievant apparently now believes that every Board decision is ripe for reconsideration. *See, e.g.*, Grievant’s June 18, 2014 Motion for Reconsideration in [REDACTED].”¹

1. Informal Complaints

USAID argues that there is no evidence that the Board committed clear error when it made discovery rulings at the status hearing. The agency notes that the Board discussed with the attorneys all outstanding discovery during a four-hour status conference and properly concluded:

The Board has considered the outstanding request for additional details [about informal complaints]. The Board has considered the Agency’s representation that they have exhaustively discussed outstanding complaints with everybody they could find who was in a position – who was either at one of the posts, worked for [grievant] or otherwise supervised her during that period of time. That’s what they say.

¹ USAID references a companion case filed by this same grievant that we have dubbed [REDACTED]. See, FSGB 2012-073 in which grievant makes the same claims as in this case [REDACTED] but she relies on a theory of racial discrimination.

They say anything else like sending out an email to every single USAID employee and asking them for more feedback would be burdensome. We agree with that conclusion and think it's completely unnecessary.

[Agency counsel] has represented that he will report whether e-discovery was employed. He will check with [his predecessor counsel] to see whether or not he made promises about getting emails and if he has produced those or he's followed up on that. Anything else that we have considered, we are satisfied is burdensome.

See, Transcript of Status Hearing 6/5/14 "Tr." at p. 91, line 9 – p. 92 line 7; Tr. p. 83, lines 21-22, "[O]ur view was that the issue of complaints has been exhausted reasonably;" and Tr. p. 87, line 21- p. 88 line 2, "I have no reason to believe that there is anything else that can be gleaned from ten years ago that is not going to result in an undue burden on the Agency."

USAID contends that after more than three years of discovery and numerous disclosures by the agency, the Board was correct and justified in concluding that no more is required. In addition, the agency argues that the renewed motion for sanctions is wholly unwarranted given that the agency has provided grievant with all unredacted documents as ordered by the Board.

2. E-Discovery

USAID argues that the first request for e-discovery was made by grievant's counsel at the status conference. In response to an order by the Board to look into the matter, agency counsel reported in a June 12, 2014 telephone conference call that the agency had previously produced all e-discovery and there were no outstanding promises for additional disclosures that were made by predecessor agency counsel that were not satisfied. Counsel also argued that the request for e-discovery was late by many months, if not years.

3. Hearing

The agency argues that pursuant to 22 U.S.C. § 4136(1), a hearing is required only in instances involving discipline, retirement, or where in the judgment of the Board, the issues "can

best be resolved by a hearing or presentation of oral argument.” USAID contends that this case does not involve discipline or retirement; therefore, the decision whether to hold a hearing is solely within the Board’s discretion. In response to grievant’s claim that a hearing is necessary to allow the Board to make credibility determinations, USAID states: “all findings of fact necessarily involve determinations of credibility regarding the source(s) of each proposed fact.” Thus, the agency contends, if employees were entitled to a hearing solely based on the need to determine credibility, Congress could have required a hearing in all grievances.

4. Interrogatories in Lieu of Depositions

The agency also argues that grievant does not establish clear error in the Board’s decision to restrict grievant’s additional discovery to written interrogatories to employees in lieu of written depositions. USAID cites 22 CFR § 903.6 as providing: “Each party shall be entitled to serve interrogatories upon another party, and have such interrogatories answered by the other party. . . .” The agency notes that there is no similar regulatory entitlement to conduct oral depositions. Moreover, the agency cites language in the regulations that “grievant or grievant’s representative . . . shall be given access to witnesses employed by the foreign affairs agencies.” 22 CFR § 903.10. USAID contends that nothing in this regulation authorizes an employee to take oral depositions when seeking access to witnesses. Indeed, the agency cites language in our P&P that: “Ordinarily, most relevant information may be obtained from a party through interrogatories and requests for documents and admissions.” *Id.* at p. 10.

USAID argues that grievant improperly cites 22 CFR 906.8 that applies only after the Board determines that a hearing is necessary. Thus, it begs the question to cite this regulation when the Board has determined that a hearing is not necessary. The agency cites as controlling, 22 CFR 906.1 that reads: “The Board will make an initial determination whether a hearing shall

be held in accordance with part 906 of this chapter, or whether the grievance shall be resolved without a hearing in accordance with part 907 of this chapter.” USAID argues that examination, cross-examination and depositions are not automatically required when the Board determines that the grievance should be resolved in accordance with part 907.

USAID also challenges grievant’s claim that agency counsel has a conflict of interest. Counsel states: “the undersigned, USAID counsel, represents the agency and does not personally represent any Agency employees.” He further contends that there is nothing in the applicable rules of professional responsibility, or in the case law, that establishes a conflict of interest on his part or a requirement for the Board to explain his relationship to agency employees. Finally, counsel for USAID notes that grievant offers no legal authority for her bald assertion that agency employees’ responses to interrogatories will be impacted or “chilled” by counsel’s representation of the agency.

IV. DECISION

Standard of Review

In FSGB Case No. 2013-005R (September 25, 2014), the Board stated: “Decisions of this Board are final, subject only to judicial review, as provided in Section 1110 of the Foreign Service Act of 1980, as amended.”² The FSGB has also held:

[R]econsideration is limited to matters encompassed in the decision on the merits; not what might have been argued. . . . Exercise of that discretion . . . is required only in “extraordinary circumstances” such as clear and material error . . . likely to change substantially the posture of the case.

FSGB Case No. 2002-043 (May 17, 2004) at p. 6, citing *White v. N.H. Dept. of Env. Security*, 455 U.S. 445, 451 (1982).

² 22 U.S.C. § 4137; and 3 FAM 4455(c).

The Board may reconsider a final decision based upon the presentation of newly discovered, or previously unavailable, material evidence.³ In addition, the Board generally follows an expanded version of the statutory and regulatory standards for reconsideration and will reconsider a final decision based on (1) an intervening change in controlling law, (2) availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. In the absence of one of these factors, the Board does not have the authority, obligation, or intent to revisit issues that have previously been addressed and decided. FSGB Case No. 2004-018 (August 31, 2005).

A. Informal Complaints

We carefully explained to the parties at the status hearing that we are persuaded that no more discovery responses are required from USAID on the only outstanding issue – whether informal complaints were filed against grievant by her subordinates that impacted her assignments or personnel decisions that were made since 2004. We have reviewed this issue repeatedly in several motions to compel further responses and in preparation for the status hearing on June 5, 2014. We reaffirm our conclusion that given the nature of the allegations in the grievance, there is no further need for the agency to disclose any more information about informal complaints that may have been made against grievant.

We concluded, then and now, that evidence that grievant’s subordinates may have informally complained about her has no relevance to grievant’s “pattern of assignments” claim. We reached this conclusion because a pattern of assignments claim requires proof that grievant received a series of unproductive assignments that deprived her of opportunities to demonstrate her potential for advancement. *Gaiduk v. United States*, 1990 U.S. Dist. LEXIS (August 12,

³ See, 22 U.S.C. § 4136(9) and 22 CFR § 910.1.

1987); FSGB Case No. 2007-023 (June 27, 2007); FSGB Case No. 1995-018 (April 26, 1996); and FSGB Case No. 1992-078 (February 22, 1994). USAID has repeatedly maintained that assignment panels were never given any information about any complaints that may have been made against grievant when the panels were making assignment determinations. Instead, the process for making assignments, according to USAID, was to provide to the assignment panels specified documents, including the bids, a short bio about the bidders, a statement (by the bidders), a self-assessment, a spreadsheet showing all SMG bidders and their bidding preferences, and a summary page prepared by OHR⁴ that includes a summary of all individual 360° feedback. Individual feedback comments are not reviewed by assignment panel members. In this grievance, the agency has disclosed to grievant all of the information that was considered by the assignment panels when it reviewed each of her bids for assignments over the past 10 years. The disclosed information included the 360° summaries as well as the 360° individual feedback comments, with sources redacted. As a result, grievant not only knows what the summaries said, but knows whether the summaries accurately reflected the individual comments. Grievant offers no evidence that any assignment panels improperly received any other complaint information, outside of the 360° summaries. Accordingly, we reaffirm our conclusion at the status hearing that evidence of informal complaints about grievant is irrelevant to her pattern of assignments claim.

Grievant also claims that she was the subject of adverse personnel actions that were influenced by informal, uninvestigated complaints made about her. In order to grieve an adverse employment action, grievant will have to prove that the adverse personnel decision is grievable and that her challenge to it was timely filed. *See*, 22 U.S.C. §§ 4131 and 4134. Assuming that

⁴ Office of Human Resources.

grievant can establish that she filed a timely complaint about a grievable adverse employment action, we deem relevant uninvestigated false complaints, if any, that grievant can prove were considered by the decision-maker(s) in taking the challenged employment actions.

USAID has to date made significant efforts to uncover and provide details of as many complaints as it could find over a very long period of time (since 2004). Pursuant to a Board order, the agency has disclosed, over its objection, information about the nature of these complaints, as well as the names of those who complained.⁵ USAID also disclosed the names of a number of employees whom it claimed might have information about complaints made against grievant. All of these employees will soon receive detailed interrogatories from grievant requesting additional details about the complaints. The agency also represented that it has communicated with all of grievant's subordinates and supervisors, as well as certain employees who were sent to investigate complaints about her in an effort to learn and disclose what these employees knew about any complaints that were lodged against grievant.⁶

It is true that the agency has not responded to grievant's request for a significant level of detail about each complaint, including: who made the complaint, when it was made, the person to whom the complaint was made, who may have been in a position to overhear the complaint or see a written complaint, where the written complaint was last stored, etc. Nonetheless, we are satisfied that the missing information is unavailable largely because of lapsed memories. We

⁵ Both USAID and the American Foreign Service Association protested the order of the Board that the agency must disclose the names of people who filed complaints. We determined that these names should be disclosed because there was no evidence that anyone who had raised a complaint against grievant had been promised confidentiality. *See*, Order: Motion for Reconsideration, dated February 18, 2014.

⁶ *See*, Discovery response letter from USAID to grievant, dated March 17, 2014.

conclude that what has been produced so far adequately and reasonably responds to the discovery requests and that any further inquiry by the agency would be burdensome.⁷

B. E-Discovery

The Board has accepted the representations of agency counsel that he consulted with his predecessor counsel, who was assigned to the case when it was initially filed, and that e-discovery was conducted and is now complete and all results have been disclosed to grievant. Grievant's claim that e-discovery ought to have resulted in a very large number of documents and her "doubt" about whether all information had been disclosed, is neither evidence nor a reason to believe that anything has been withheld. Grievant concedes that the agency has asked every one of her subordinates to search their own emails for any evidence of complaints about her. Yet, she argues that some of the subordinates are biased against her and therefore she should not have to rely on their voluntary disclosures. But, all discovery involves voluntary disclosure of information held by the persons who are subject to the discovery requests. Grievant also alleges that at the end of 2012, the agency changed its email service and transferred no more than the past 18 months of emails to the new service. She then alleges that: "Relying on the employees to search their own email necessarily limits the scope [of] email prior to June 2010." It is unclear if she meant to say "prior to 2012." In any event, e-discovery would require the agency to disclose all relevant emails and to advise if the change in service providers interfered with that obligation. Because the agency reports that all e-discovery has been disclosed, the change in email service providers is beside the point.

⁷ USAID has to date responded to discovery on October 31, 2011, February 15, 2012, September 29, 2012, November 20, 2012, May 17, 2013, March 17-19, 2014 and July 2, 2014. The agency has also responded to four motions to compel further discovery and to a motion for sanctions.

C. Request for a Hearing

Grievant challenges as error the Board's ruling that she must present her grievance without deposing employee witnesses and without a hearing. She argues that in so ruling, the Board violated federal regulations and its P&P.

22 CFR § 906.2 provides:

The Board shall conduct a hearing—(a) At the request of the grievant in any case which involves disciplinary action or a grievant's retirement from the Service for expiration of time-in-class or based on relative performance, or (b) In any case which in the judgment of the Board can best be resolved by a hearing or presentation of oral argument. The Board shall also conduct a hearing in separation for cause proceedings unless the charged employee waives in writing his or her right to such hearing.

In ruling as we did, the panel members concluded that this was not a case that could best be resolved by a hearing or after oral arguments. The claims in this case do not, as grievant argues, lend themselves to any credibility determinations and grievant has not cited any. Instead, she simply makes the claim that:

the Board is likely to receive conflicting testimony requiring credibility determinations that can only be made from live witness testimony. . . . the likelihood that those inside the [assignment panel] room will give conflicting testimony – is exactly why a hearing is necessary.

But grievant makes this argument based on a speculative remark made at the status hearing by the panel chairperson that perhaps one assignment panel member might assert that something improper was considered during an assignment deliberation. The decision to allow a hearing requires more than such speculation.

Grievant's pattern of assignments claim requires an analysis of her identified pattern of assignments and a determination whether the pattern deprived her of an opportunity for advancement. We see no credibility determinations implicated by that analysis. Likewise, her claim that adverse personnel actions were taken contrary to law, regulations or policy requires an

analysis of identified personnel actions and a determination whether any were motivated by false uninvestigated complaints about her. Again, we do not see how credibility is implicated by this analysis.

22 CFR part 9 does not entitle grievant to a hearing because she has not been the subject of a disciplinary action; she is not retiring from the Service after the expiration of her time-in-class; and she is not subject to a recommended separation for cause. The Board has considered the arguments and assertions of the parties during the extensive discovery disputes in this case and concluded that this case is not one that would best be resolved by a hearing.

At the same time, we acknowledge that our procedures provide:

A hearing will be held if the grievant requests one in any case involving disciplinary action, separation based on the expiration of the grievant's time in class, or based on the grievant's relative performance. A hearing is required in a case involving recommendations for separation under Section 610 of the Foreign Service Act, unless the charged employee waives his right to a hearing. In all other cases, the Board may, upon the request of the grievant *and after briefing by the parties*, order a hearing or oral argument if it decides that the matter can best be resolved by either means.

Grievant argues that she has not been given a specific opportunity to brief the issue of holding a hearing before we made the decision to deny her request for a hearing. She also contends that after we made the jurisdiction decision, the agency failed to object to her request for a hearing and, therefore, she became automatically entitled to one. She explains this by stating that the Board initially held:

The issue whether to grant grievant's request for a hearing will be decided after the Board determines the issue of jurisdiction. *See*, Ack. Letter, June 9, 2011[1].

She then states that after we found jurisdiction (*see*, Order dated September 28, 2011), the agency never objected to the request for a hearing. Therefore, she concludes, "the issue as to

whether a hearing was to be held was settled years earlier [than the status conference in 2014].” We disagree with grievant. The issue whether to hold a hearing was not decided automatically, or silently, in 2011. Rather, the issue was affirmatively considered and decided in preparation for the status hearing in 2014.

Notwithstanding our decision, however, it is true that we did not request briefs from the parties on the specific issue whether to hold a hearing and, therefore, we vacate our decision denying grievant’s request for a hearing and order the parties to brief the issue immediately. (*See*, the Conclusion section, below).

D. Interrogatories in Lieu of Depositions

Grievant also argues that she is entitled to depose witnesses as part of the discovery process, pursuant to federal regulations. She cites 22 CFR 906.8(a) as providing: “Each party shall be entitled to examine and cross-examine witnesses at the hearing or by deposition.” However, this provision clearly only applies after the Board has exercised its discretion and ordered a hearing. Under 22 CFR 906.1:

After deciding either to accept jurisdiction over a grievance or to postpone decision of that question under 904.2(a) of this chapter, the Board will make an initial determination of whether a hearing shall be held in accordance with part 906 of this chapter or whether the grievance shall be resolved without a hearing in accordance with part 907 of this chapter. The Board may reconsider its decision as to holding a hearing upon the written request of any party or on its own initiative.

22 CFR § 906.2 states:

Mandatory hearing. The Board shall conduct a hearing—(a) At the request of the grievant in any case which involves disciplinary action or a grievant's retirement from the Service for expiration of time-in-class or based on relative performance, or (b) In any case which in the judgment of the Board can best be resolved by a hearing or presentation of oral argument. The Board shall also conduct a hearing in separation for cause proceedings unless the charged employee waives in writing his or her right to such hearing.

Thus, only if a hearing has been determined to be appropriate under 22 CFR § 906.1, is grievant entitled to examine, cross-examine or depose witnesses, under 906.8(a).⁸ If a hearing has not been determined necessary or best, then there is no entitlement for grievant to present live testimony. Instead, 22 CFR 906.7 would apply:

(a) In a case in which a hearing is not required under § 906.1 of this chapter . . . (b) Each party will be offered the opportunity to review and to supplement, by written submissions, the record of proceedings, prior to the date fixed by the Board for closing of the Record. The Board shall then consider the case and make a decision based on that Record. This may include the ordering of a hearing in accordance with part 906.

In cases under section 906.7 where no hearing is ordered, a grievant is not automatically permitted to examine, cross-examine or depose witnesses. *See*, 22 CFR 903.6 allowing only for interrogatories.

The Board's P&P speak of depositions of witnesses; however, the procedures do not state when and under what circumstances a grievant may take oral depositions of witnesses. Instead, the procedures state in relevant part:

Ordinarily, most relevant information may be obtained from a party through interrogatories and requests for documents and admissions. However, a party may also be asked to respond under oath to questions, or to produce witnesses under its control, supervision or responsibility.

P&P at p. 10.

Under the federal rules of civil procedure, depositions sometimes require specific leave of court before they can be taken. Federal Rule of Civil Procedure (Fed. R. Civ. P.) 30(a)(2) states:

⁸ This regulation provides:

Each party shall be entitled to examine and cross-examine witnesses at the hearing or by deposition. A party wishing to take the deposition of a witness shall give the other parties reasonable notice of the time and place of the deposition and of the identity of the witness.

A party must obtain leave of court [to take deposition of witnesses], and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

- (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

Fed. R. Civ. P. 26(b)(2)(C) further provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Considering these rules as instructive, the Board concluded at the status hearing that because grievant has engaged in extensive discovery with USAID and because the agency has disclosed significant information and documents pursuant to grievant's requests, additional depositions of employee witnesses (originally sought for 109 witnesses) is unreasonably cumulative and duplicative of discovery that has already been given, as well as expensive, time-consuming and burdensome. The Board concluded that the burden and expense of deposing employee witnesses outweighs its likely benefit, given the issues in the case. Grievant's claims pertain to a pattern of assignments and certain adverse personnel actions. The pattern of her assignments requires little or no input from employee witnesses given that assignment decisions are not individually grievable. Rather, the Board will be asked to look at the pattern of grievant's assignments and decide whether they deprived her of a reasonable opportunity for advancement at USAID. This

deliberation will not likely be enhanced or aided by testimony from witnesses, whether through oral depositions or written interrogatories.

As for grievant's personnel action claims, although she has not fully identified them, the Board recognizes that she may wish to interrogate some or all of the individuals responsible for certain decisions, including, removing her as Office Director in the [REDACTED] [REDACTED] s in July 2009, assigning her to the [REDACTED],⁹ and placing her on the overcomplement in 2010. Grievant claims that some of these decisions were influenced by false, uninvestigated complaints that were made about her by subordinates. Accordingly, we recognize that she may wish to ask her subordinates about complaints they made and she may wish to ask supervisors whether they received any complaints and, if so, whether the complaints had any bearing on personnel decisions that affected her.

In order to accommodate grievant's need to interrogate some witnesses about some of the pending issues, the Board first reduced the total number of witnesses to 28, based on agency objections and grievant's proffered reasons for seeking to depose the witnesses. Then the Board considered the fact that many of the witnesses had already provided information in the disclosures that have been made by the agency to date. The Board also considered the fact that some witnesses were likely assigned overseas, thereby increasing the costs and burden to secure them for depositions. Finally, the Board considered the fact that the issues about which grievant seeks additional discovery from these witnesses pertain to matters that are almost a decade old. Thus, witnesses might need time to refresh their recollections and to procure documents, which might best be accomplished through interrogatories and requests for production of documents, rather than depositions. Accordingly, the Board concluded that any additional discovery

⁹ [REDACTED].

involving employee witnesses could only be taken by means of written interrogatories and requests for production of documents.

Grievant argues that there is a conflict of interest if counsel for the agency is provided copies of her interrogatories to employees. She claims that the employees will become confused about whether agency counsel represents their interests, as opposed to USAID's interests. She also speculates that employees will likely seek guidance and/or legal advice from agency counsel and may feel chilled in providing candid and forthright responses. We disagree with grievant and conclude that her interrogatories to employees should be submitted to counsel for USAID who will then forward them without comment or legal advice to the employees to provide responses. Our procedures state:

Interrogatories are questions submitted to a party. A grievant may ask interrogatories of named employees of an agency, but shall direct the interrogatories to the agency, which shall be responsible for obtaining responses from the named employees and providing the responses to the grievant. (Grievants may also seek voluntary statements directly from agency employees or any other persons, independent of the discovery process.)

Id. at p. 9. The process about which grievant complains is entirely consistent with our written procedures.

We note further that nothing in our procedures suggests that grievant may conduct discovery in two stages – first with the agency and only after that has been completed, then with agency employees. Our procedures state:

Discovery is the process that the parties may use to obtain relevant documents or other information in the possession or control of another party [including named employees of an Agency]. Discovery is initiated when a party submits written requests of the other. (p. 7) . . . Initial discovery requests by either party must be comprehensive, seeking all relevant information then reasonably discoverable. (p. 8). . . Within 20 days after the date of filing the grievance appeal, the grievant may submit discovery requests to the agency.

(p. 8). (Emphasis added.) Our P&P do not specifically allow a grievant to conduct discovery by first completing an exchange of requests with the agency and only then deciding whether to conduct additional discovery with employees of the agency. Initial discovery requests should be made to both the agency as well as individual employees according to the initial timeline – that is, within 20 days after the grievance appeal is filed. If responses to this initial discovery reveal additional sources of discoverable information, it is the purpose of follow-on discovery to allow limited additional discovery requests to the agency and/or to additional witnesses. The reason we expect grievant to conduct discovery with both the agency and agency employees all at once and at the initial stages of the grievance is that we wish to avoid precisely the circumstances we find extant here: discovery has become protracted well beyond the timelines established by our procedures and individual employees may have to respond for a second time to the same inquiries.

V. CONCLUSION

Grievant shall submit a brief in support of her request for a hearing by no later than November 21, 2014. The agency may file a responsive brief within 10 days after the initial brief is filed. Grievant may submit a reply within five days after the agency's filing. The previous ruling by the Board that no hearing will be held is hereby vacated until submission and consideration of the briefs from the parties. In all other respects, grievant's motion for reconsideration of the rulings made at the status hearing on June 5, 2014 is denied.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



James E. Blanford
Member



Jeanne L. Schulz
Member