

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2011-024

And

February 10, 2015

The United States Agency for International
Development

**ORDER: Motion for Reconsideration; Motion
for Sanctions; Motion for Hearing; Request
For Additional Information**

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. ISSUES

This Order concerns: (1) a motion, filed on November 5, 2014, by the United States Agency for International Development (USAID, agency) for reconsideration (MFR) of an October 31, 2014 Order of the Foreign Service Grievance Board (FSGB, Board) addressing objections to interrogatories; (2) grievant's November 19, 2014 motion for sanctions against the agency; (3) grievant's November 24, 2014 brief in support of a request for a hearing; and (4) this Board's request for additional information from the parties.

II. BACKGROUND

Since both the factual and procedural histories of this grievance are described at length in earlier orders, the parties' instant claims need only be sketched out here. In her January 5, 2011 agency-level grievance, the grievant, [REDACTED], asserted that the Agency failed to provide her with a reasonable opportunity to demonstrate her potential for advancement and made adverse personnel decisions influenced by false allegations without investigation or due process. As remedies, she requested removal of all unsubstantiated adverse information from agency records and immediate assignment to a Senior Management Group (SMG) position. In her June 3, 2011 appeal to this Board, grievant repeated her earlier contentions and added compensatory damages and payment of attorney's fees and costs to her remedies. The parties are currently engaged in discovery.

III. MOTION FOR RECONSIDERATION

A. Agency

USAID requests reconsideration of two rulings in the Board's Order, dated October 24, 2014 that it considers to be "clearly erroneous." The order addressed interrogatories and

requests for production of documents that grievant submitted to employees of the agency after having received complete discovery from the agency.

The first challenged ruling holds that agency counsel's communications with agency employees are not entitled to attorney-client privilege. The agency argues that, based on relevant authorities,¹ a governmental attorney-client privilege exists in civil suits between government agencies and private litigants. Accordingly, agency counsel argues that a privilege covers his communications with all agency employees.

The second challenged ruling appears to allow grievant to seek extensive production of documents from employees of USAID. The agency describes these document requests as overbroad, untimely and irrelevant and interposes the following objections to each of grievant's general document requests as follows:²

Doc. Req. 1. *Your contributions to any 360 review for [grievant].*

Doc. Req. 2. *Any other 360 contributions you know to be related to [grievant].*

USAID argues that these first two document requests should be stricken because they attempt to discover documents containing individual 360° feedback. It further reminds us that the Board previously denied grievant's request for this information when a similar document request was made to the agency and the Board sustained the agency's objection thereto. USAID argues that agency employees should not be required to disclose individual 360° feedback, both because this information was not ordered discoverable during agency discovery and it is irrelevant because no assignment panel considered such input.

¹ The agency cites, Restatement of the Law, Third, The Law Governing Lawyers, §74; *United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 530-33 (2nd Cir. 2005).

² The agency cites, Federal Rule of Civil Procedure 30(b)(2); *Canal Barge Co. v. Commonwealth Edison Co.*, No. 98-c-0509, 2001 U.S. Dist. LEXIS 10097, 2001 WL 817853, at *5 (N.D. Ill. July 19, 2001) (quoting *Carter v. United States*, 164 F.R.D. 131, 133 (D. Mass. 1995)); *BKCAP, LLC v. Captec Franchise Trust 2000-1*, 2010 U.S. Dist. LEXIS 40482, *7-8 (N.D. Ind.2010)); *Niederquell v. Bank of Am. N.A.*, 2013 U.S. Dist. LEXIS 18725, *6-7 (D. Col. 2013).

Doc. Req. 3. *Documents you reviewed to answer the interrogatories in this document.*

Other than stating a general objection to any document requests issued to employees, USAID states no further objection to this specific request.

Doc. Req. 4. *Documents or email sent to you by any attorneys for USAID or any persons in HR with USAID related to or to these requests.*

The agency argues that written communications between its employees and agency counsel regarding this litigation are covered by the attorney-client privilege. In addition, the contention is that a request to produce all documents sent by any person in Human Resources (HR) related in any fashion to grievant, with no date restrictions, is overbroad.

Doc. Req. 5. *Documents you have provided to anyone related to [grievant].*

Doc. Req. 6. *Reports or documents about [grievant] of any kind.*

Doc. Req. 7. *Your own notes or those of any other person in your possession related to [grievant].*

USAID contends that the above three requests are overbroad, not time limited and not tailored to the facts at issue in this case.

B. Grievant

Grievant points out that the Board did not decide that agency counsel does not represent the agency. He clearly does. However, grievant argues that USAID has offered no authority to establish that agency lawyers share an attorney-client relationship with individual employees, as opposed to the agency as an entity. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). Nor has the agency made an effort to properly invoke an attorney-client privilege vis-à-vis the employees. For example, it does not identify which communications it believes to be privileged. It simply claims a blanket privilege over any of agency counsel's communications with any of its employees, a claim grievant says has been

rejected by the D.C. Circuit Court of Appeals. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984).

Grievant also argues that the agency fails to support its MFR by presenting newly discovered evidence or a change of the prevailing law; it simply repeats previously failed arguments and declares the Board's rulings as "contrary to law," without identifying the contrary law. She contends that the Board should not entertain the agency's attempt to make new objections to discovery that was served in June.

C. Board Discussion and Findings

Under 22 CFR § 910.1, the FSGB may reconsider any decision upon the presentation of newly discovered or previously unavailable material evidence. Absent extraordinary circumstances, revisiting issues already addressed is not the purpose of a motion to reconsider. In FSGB Case No. 2011-005 (Order dated May 22, 2012), we ruled that reconsideration is appropriate if: (a) there has been an intervening change in controlling law; (b) newly discovered or previously unavailable material evidence is presented; or (c) there is the need to correct clear error or prevent manifest injustice. As will be explained, we conclude that some reconsideration here is necessary. There is not only a need to correct clear error, but some of our previous findings require further explanation.

Attorney-Client Relationship

Agency counsel agrees that he is not the private attorney for the agency's employees. Although he is the attorney for the agency, he concedes that he has no attorney-client relationship with the employees of the agency. Agency counsel therefore does not have standing to advise agency employees when they answer grievant's interrogatories. Nor are his communications with the employee witnesses privileged. Employees may be asked about

communications with him without intruding upon the attorney-client privilege that agency counsel has with the agency. Agency counsel's obligation, under our Policies and Procedures, is to submit the interrogatories to the employees and to transmit their responses exactly as written. We deny the motion for reconsideration insofar as it rests on a claim of attorney-client privilege.

Production of Documents

The Board acknowledges that it intended to, but failed to address grievant's requests for production of documents that were attached to ROP 091 at p. 60. In the Order under reconsideration, the Board resolved grievant's instructions and interrogatories including those that mentioned documents. We, however, inadvertently failed to decide the objections to the specific requests for production of documents. As a general matter, we concluded that grievant could properly request production of some documents related to the interrogatories, but we did not decide the specific document requests that were submitted by grievant. Thus, the agency properly seeks reconsideration of what it believed was a ruling approving all of the document requests.

With respect to the agency's specific objections, we amend our previous ruling as follows:

Doc. Req. 1 – The objection by the agency to this request is sustained because we previously concluded that source 360° feedback is not discoverable inasmuch as it was not reviewed by any SMG assignment panel. SMG assignment panel members reviewed only 360° summaries.

Doc. Req. 2 – The objection is sustained for the same reasons as 1 above.

Doc. Req. 3 – The objection is overruled. If witnesses review documents in order to answer the interrogatories, then they should disclose them.

Doc. Req. 4 – The objection is sustained because the request is overbroad both as to scope and time limits. This request could require production by employee witnesses of every document that pertained in any way to grievant from the beginning of her career until the present that came from or through anyone in HR or a USAID attorney.

Doc. Req. 5 – The objection is sustained because the request is overbroad as to scope and time limits. The request would require the employee witnesses to produce any document ever provided by the witness to anyone that involved, or even, mentioned grievant.

Doc. Req. 6 – The objection is sustained because the request is overbroad as to scope and time limits. The request would require the witnesses to produce any document ever created about grievant by anyone.

Doc. Req. 7 – The objection is sustained because the request is overbroad as to scope and time limits. This request would require witnesses to disclose documents in their possession that have ever been written by anyone that concerned grievant.

In addition, we grant the agency's general objection with respect to all documents requested by interrogatory 15.³ Witnesses are not required to identify or disclose regulations or policies, particularly since the agency has been asked to produce this information and has done so. It need not be produced again by employee witnesses.

In the absence of any additional objections, the current interrogatories and requests for production of documents as amended by Board Order should be presented to employees no later than 15 days after receipt of this order.

³ Interrogatory 15 requested that the witnesses identify “all regulations, policies, guidelines, notices or similar documents containing information about the criteria that should be applied by the SMG Panel when evaluating bids.”

IV. MOTION FOR SANCTIONS

A. Grievant

Grievant notes that Rule 3.1 of D.C.’s Rules of Professional Conduct provides that “[a] lawyer shall not . . . assert or controvert an issue . . . unless there is a basis in law and fact for doing so that is not frivolous.” She alleges that the agency’s MFR is frivolous and is solely intended to cause unnecessary delay and expense. In addition, she asserts that some employees have left the agency’s rolls during the pendency of this case, while other employees have allegedly informed grievant that the agency has a vendetta against her, only wants negative information about her, and has instructed employees not to speak with her. Grievant claims that the agency is litigating in bad faith and its MFR is an example of trying to avoid discovery by repeating failed arguments.

B. Agency

USAID contends that its motion for reconsideration was not frivolous as it clearly sought reconsideration in order to “correct clear error or prevent manifest injustice.”

C. Board Discussion and Findings

The Board finds that the agency properly sought resolution of an issue that was unresolved – a clear ruling on the specific requests for production of documents. We do not conclude that the agency’s motion for reconsideration was frivolous or motivated by a desire to delay the case. The agency’s “refusal” to submit the amended interrogatories to the witnesses until resolution of the MFR is consistent with the Board’s instructions to the parties. Pursuant to the Board’s Policies and Procedures at 9:

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.)

To the extent that the agency properly noted that our last order did not specifically address what were overbroad requests for production of documents, some of which has been resolved against grievant in earlier discovery disputes with the agency, it was appropriate for USAID to seek clarification before sending out the requested discovery.

V. REQUEST FOR EVIDENTIARY HEARING

A. Grievant

Grievant contends that an evidentiary hearing is necessary in this case because factual disputes are reasonably certain to exist that will require the Board to determine which witnesses to believe; because she must protect her right of access to witnesses; and because of her concerns about the integrity of the discovery process. She also claims that a hearing is necessary in order for her to be able to present testimony from former high-ranked USAID officials regarding the adverse impact her assignments have had on her advancement; for SMG panel members to explain how they applied their criteria; and for her witnesses to clarify that the 360° feedback is false and that she never had a fair opportunity to demonstrate her management skills. She alleges that she was removed from a position without due process, a fact she claims she will establish through testimony. She reiterates that multiple employees have reported to her that agency lawyers are seeking only to obtain negative information about her and have no interest in discovering anything that might place her in a positive light. If granted a hearing, she argues that she could press reluctant witnesses for more detailed answers. She concludes that without a hearing, the Board will have to decide “which faceless employee’s statement to believe.”

B. Agency

The agency maintains that over the span of this case, the Board has consistently concluded that this was not a case that could best be resolved by a hearing. USAID states that the Board's determination was entirely within its discretionary judgment and was appropriate, given the monumental time and expense that would be expended on an oral hearing.

USAID argues further that Congress could have chosen to make hearings mandatory for all FSGB cases, but it did not do so. It reminds us that the Board resolves many grievances that involve disputes of fact, yet does not usually require a hearing. The agency states that grievant has not shown that her access to witnesses has been hampered in any way. In this case, the Board has allowed grievant to depose, via interrogatory, more than 20 USAID employees. In terms of the number of employees, the agency claims that "this is unprecedented access." In addition, agency counsel claims that grievant's assertion that he will "influence" written interrogatory "answers" is also unsupported.

Lastly, USAID argues that denying grievant a hearing at this stage of the case is not forever binding on the Board. Should the Board, after receipt of grievant's supplemental statement and the agency's response, determine that an oral hearing is necessary, it has the discretion to revisit its prior ruling.

C. Board Discussion and Findings

Section 1106 of the Foreign Service Act states that "[t]he Board shall conduct a hearing at the request of a grievant in any case which involves . . . (B) issues which, in the judgment of the Board, can best be resolved by a hearing or presentation of oral argument." 22 U.S.C. § 4136(1)(B); *see also* 22 CFR § 906.1. As the parties are well aware, the Board seldom holds discretionary hearings. Even in matters involving discipline, in which a hearing is mandatory if

an employee requests it, few do. The present claims are not uncommon in the Board's experience. Grievant asserts an unproductive pattern of assignments and certain alleged improper adverse employment actions. Ordinarily the Board decides these kinds of claims on the parties' written pleadings. In fact, we are unaware of any pattern of assignments case in which a hearing was found necessary.

We are also not persuaded that any of the issues to be decided will require credibility determinations. Nor is there any other reason to conclude that this matter can otherwise best be resolved by means of a hearing. Accordingly, grievant's motion is denied without prejudice to its renewal if she develops non-speculative new evidence that demonstrates that credibility will be an important issue in this case.

Given grievant's assertions about her access to favorable information from employees, the Board wishes to remind both parties that our rulings concerning outstanding discovery do not preclude grievant's right to "seek voluntary statements directly from agency employees or any other persons, independent of the discovery process." *See Policies and Procedures* at p. 9. Accordingly, notwithstanding the agency's refusal to submit interrogatories to employees who have retired during the pendency of this case, grievant is free to request voluntary information/statements from all such employees as well as those who remain employed with the agency.

VI. BOARD REQUEST FOR INFORMATION

At this time, the Board has the following requests for additional information from the parties:

- A. The Board is prepared to address the timeliness of grievant's claims. Therefore, within 15 days of this order, grievant should identify each of her claims with

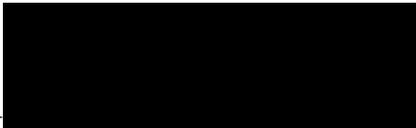
specificity and explain why the claim was timely filed. Grievant should identify every assignment within her pattern of assignments claim and every adverse employment action that she is grieving. The agency may respond within 15 days of receipt of grievant's response.

- B. Grievant should advise the Board within 15 days of this order whether she seeks to include within this grievance any assignments and/or personnel actions that occurred after she filed the grievance in January 2011 and her basis for such inclusion. The agency may respond within 15 days of such filing.
- C. Within 15 days of this order, the agency shall advise the Board about the exact wording of each 360° summary that was provided to each SMG assignment panel that reviewed grievant's bids, beginning in January 2009 (two years prior to the filing of the instant grievance).
- D. The agency shall submit to the Board copies of all position descriptions for each position that grievant held from 2009 to date.

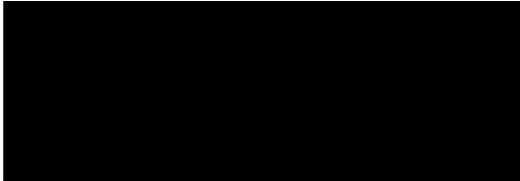
VII. DECISION

- 1. The Motion for Reconsideration is granted in part and denied in part.
- 2. The Motion for Sanctions is denied.
- 3. The Motion for a Hearing is denied.
- 4. The parties are to comply with the requests for additional information as specified above within the time limits stated.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



James E. Blanford
Member



Jeanne L. Schulz
Member