

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Record of Proceedings
FSGB Case No. 2011-024

April 6, 2015

The United States Agency for International
Development

**SUPPLEMENTAL 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 additional concerns/objections raised by the United States Agency for International Development (USAID, agency) in connection with grievant's outstanding requests for discovery directed at agency employees. In addition, it addresses a recently filed second motion for reconsideration of a ruling by this Board that USAID counsel does not have an attorney-client relationship with the employees who will receive grievant's discovery requests.

II. BACKGROUND

The background information has been recited in a number of orders previously issued in this grievance. Grievant, [REDACTED], claims that her employer, USAID, made adverse personnel decisions that negatively impacted her career based on false, uninvestigated complaints filed against her and that during her career she was given assignments that deprived her of a reasonable opportunity to "demonstrate her potential for advancement." The parties have been actively engaged in discovery for more than four years.

On June 5, 2014, the Board held a status hearing to resolve all outstanding discovery disputes. Although we concluded that the agency had made significant efforts to investigate and disclose all requested discovery, we nonetheless ordered USAID to provide limited further disclosure of documents that the Board had reviewed *in camera*. The Board also ruled that grievant could seek additional discovery from agency employees by way of written interrogatories and related requests for production of documents.

On June 19, 2014, pursuant to a Board order, grievant served on agency counsel interrogatories and requests for production of documents directed at USAID employees. On July 1, 2014, the agency noted in detail and in writing its objections to these discovery requests. The

Board issued an order resolving the requests for interrogatories, dated October 31, 2014 (“Objections Order”). On November 5, 2014, USAID filed a motion for reconsideration (MFR1), specifically challenging, *inter alia*, the failure of the Board to address grievant’s requests for production of documents in the Objections Order. Grievant responded by filing a second motion for sanctions because of the agency’s failure to follow the Board’s instructions to serve her interrogatories on the named employees within the time stated in the order. The Board issued an order, dated February 10, 2015 (MFR Order), that resolved the agency’s MFR1 and grievant’s motion for sanctions.¹ On February 20, 2015, the agency submitted an email request for a telephone status conference for the purpose of addressing two objections that USAID claims the Board failed to address in its MFR Order. Instead of scheduling a status conference, the Board advised the parties that it would issue a supplemental order that would address the agency’s concerns. Meanwhile, USAID has filed a second motion for reconsideration on February 25, 2015 (MFR2) requesting that the Board reconsider (a second time) that portion of the MFR Order that concluded that agency counsel does not have an attorney-client relationship with the agency employees who will receive grievant’s discovery requests.

III. POSITIONS OF THE PARTIES:

A. Additional Agency Objections

Counsel for USAID states in the February 20th email that the Board’s MFR Order of February 10, 2015 failed to address two objections that were contained in footnotes in its MFR1. USAID claims that in footnote 3 on page 5 of the motion, the Board “ignored” the agency’s objection to grievant’s request for production of documents No. 11 that is to be submitted to [REDACTED]. The agency argues that this document request is beyond the scope of this grievance, particularly in light of the dismissal of a related grievance (FSGB Case No. 2012-073). In

¹ The order also addressed grievant’s request for a hearing and requested additional information from the parties.

addition, the agency claims that in footnote 6 at page 8 of its motion, the Board did not resolve its objection to grievant's request for production of documents No. 9 that is to be submitted to [REDACTED]. USAID argues that this discovery request is improper for the same reason that the Board sustained its objection to interrogatory No. 11 for [REDACTED].

B. Attorney-Client Privilege

USAID also contends that when this Board reconsidered its initial ruling that agency counsel does not have an attorney-client relationship with agency employees, it committed plain error and misstated the law when we concluded that "Mr. Sacks does not have an attorney/client relationship with these witnesses. . . ." (Objections Order at p. 21.) The agency, through counsel, asks again that this Board reconsider this ruling.

Grievant filed an opposition to the agency's MFR1 or MFR2. She contends that the Board should deny the agency's request for an order sustaining its objection to two additional requests for production of documents. She also argues that the agency fails to establish the necessary elements to warrant a finding that there is an attorney-client privilege between agency counsel and each agency employee now subject to additional discovery requests.

IV. DECISION

A. Standard of Review

It bears repeating in this grievance that: "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 FSGB Case No. 2013-005R (Order dated September 25, 2014).

[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.

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

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).

“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 (Order dated August 31, 2005).

The difficulty we face in this grievance is that the parties have objected to and defended grievant’s proposed interrogatories and document requests in lieu of depositions without submitting a complete copy of the same to the Board. Thus, it was, and still is, unclear what is included in the complete discovery requests, except to the extent that individual requests are discussed by the parties. Initially, the Board reviewed objections filed by USAID in response to general instructions, definitions and several sets of interrogatories directed at different groups of employees, along with the agency’s general objection to grievant’s request for production of documents. In our Objections Order, the Board failed to notice the single page of document requests that was attached as the last page of the agency’s objections. When this oversight was brought to our attention in the MFR1, we addressed those eight document requests. However, in doing so, we did not address the two objections to additional document requests that the agency raised in footnotes in the MFR1. These document requests, though mentioned in the footnotes,

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

were not otherwise included in the single page of requests that was attached to the agency's objections and were nowhere else in the ROP.

USAID asked grievant's counsel if he was willing to voluntarily withdraw these two document requests before sending the email request to the Board for a status hearing. Counsel for grievant declined to withdraw the requests. Accordingly, we supplement our previous rulings as follows.

B. Additional Objections

In the MFR1, at footnote 3 on page 5, USAID stated that there is a proposed document request No. 11 that is directed at employees [REDACTED] that seeks:

Documents related to any investigation into the conduct of [REDACTED] including EEO investigations when she was in the Office Director Position.

USAID contends that this request is irrelevant to the existing issues in the case. Upon review of the Objections Order at pages 18-19, however, we note that we permitted grievant to submit interrogatories to these witnesses as stated in [REDACTED] 11 and [REDACTED] 12, which stated:

[REDACTED] 11. Identify and describe all complaints you have made about [REDACTED] management or supervisory skills, including treatment of subordinate staff. Your response should include the following: (1) the date of the complaint; the name and contact information of any individual you communicated your complaint to; (3) *a description of any action taken by the Agency to investigate or verify the complaint*; (4) a description of any action taken by the Agency to remedy the complaint; (5) whether you have any reason to believe that the substance of your complaint was shared, directly or indirectly, with any SMG Panel or SFS Selection Board; (6) a description of any conversations or written communications about your complaint.

[REDACTED] 12. Identify and describe all complaints of which you are aware, about [REDACTED] management or supervisory skills, including treatment of subordinate staff. Your response should include the following: (1) the date of the complaint, (2) the name and contact information of any individual you communicated the complaint to; (3) *a description of any action taken by the Agency to investigate or verify the*

complaint; (4) a description of any action taken by the Agency to remedy the complaint; (5) whether you have any reason to believe that the substance of your complaint was shared, directly or indirectly, with any SMG Panel or AFS Selection Board; (6) a description of any conversations or written communications about the complaint.

(Emphases added.)

In our Objections Order, we overruled the agency’s objections to these interrogatories because we recognized that one of grievant’s claims is that USAID allegedly made certain personnel decisions that were adverse to her in reliance on uninvestigated complaints that were made about grievant by subordinates. It follows, then, that witnesses may also be asked to disclose any documents they have that are related to any investigation into grievant’s conduct when she was in the position of Office Director. Accordingly, we conclude that the objection by USAID to this request for production of documents should be overruled.

In the MFR1 at footnote 6 on page 8, USAID stated that it objected to grievant’s request for production of documents No. 9 that, according to the agency, asks for:

Any documents (including email) you provided to Marc Sacks or any other USAID attorney in connection with [REDACTED] grievance.

USAID argues that the request “blatantly seeks information covered by the attorney-client privilege.”

In our Objections Order, we sustained the agency’s objection to Interrogatory No. 11 to employee [REDACTED] that asked:

Have you ever spoken with USAID attorney Marc Sacks about [REDACTED].
[REDACTED]? If so, what did you tell Mr. Sacks?

Objections Order at p. 21. We stated that it was not the purpose of the interrogatories to

investigate whether Mr. Sacks accurately and completely reported on behalf of USAID what he learned from his discussions with [REDACTED] . . . Although Mr. Sacks does not have an attorney/client relationship with

these witnesses, the objection to this interrogatory is sustained. The question may not be asked.

As we discuss below, we remain convinced that an attorney-client privilege has not been properly raised by USAID, the “client” who has the privilege. *Gangi, supra*, 2004 MSPB LEXIS at p. 25 (“The holder of the privilege, or the client, is the agency or department.”) Nonetheless, for the same reasons that we sustained the objection to the interrogatory, we likewise sustain the agency’s objection to the related document request. The purpose of these discovery requests is not to investigate whether agency counsel properly and completely disclosed all of the information requested by grievant in her discovery with the agency. Accordingly, there is no reason to require employee witnesses to disclose documents to grievant solely based on the fact that they were disclosed to Mr. Sacks. The disclosures to agency counsel may have been the result of different questions asked of the witnesses. Accordingly, the objection to this document request is sustained.

C. Attorney-Client Privilege

USAID counsel continues to argue in a second motion for reconsideration that it is clear legal error for this Board to conclude, as it has, that his communications with agency employees regarding this litigation are not protected by the attorney-client privilege. He cites *Gangi v. U.S. Postal Service*, at 97 M.S.P.R. 165, 168 (2004) MSPB LEXIS 1832 (September 1, 2004) in support of his position. However, in the *Gangi* decision, the MSPB cited with approval the procedure followed by the administrative judge establishing the requirements for a finding of an attorney-client relationship between an agency attorney and an agency employee. The MSPB concluded that the privilege applies only if there is evidence that:

- (1) The asserted holder of the attorney-client privilege was or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in

connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at p. 24, citing *United States v. United States Shoe Machinery Corp.*, 89 F. Supp. 357, 358-9 (D. Mass. 1950). The MSPB concluded that under the facts presented, the agency employee's assertion of the privilege, in the face of evidence of the existence of the same, should be recognized. *Ibid.* at p. 25.⁴

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 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

⁴ In *Gangi*, the agency employee submitted an affidavit providing all of the information under oath that permitted the administrative judge to decide whether the attorney-client privilege existed between the employee and the attorney for the agency.

made, pursuant to the factors set out in *Gangi, supra*.⁵ Accordingly, the MFR2 is again denied, albeit for different reasons.

V. CONCLUSION

1. The objection filed by USAID in opposition to grievant's document request directed at employees [REDACTED] that seeks "documents related to any investigation into the conduct of [REDACTED], including EEO investigations when she was in the Office Director Position" is overruled.
2. The objection filed by USAID in opposition to grievant's document request No. 9 directed at employee [REDACTED] that seeks "any documents (including email) you provided to Marc Sacks or any other USAID attorney in connection with [REDACTED] grievance" is sustained. This request may not be asked.
3. The second motion for reconsideration filed by USAID is denied.
4. Grievant shall submit to agency counsel a modified set of discovery requests consistent with this order and previous orders (dated October 31, 2014 and February 10, 2015) by no later than 10 days after receipt of this order.⁶ Agency counsel shall immediately thereafter submit the discovery requests to named agency employees, including [REDACTED].

For the Foreign Service Grievance Board:

[REDACTED]
Susan R. Winfield
Presiding Member

⁵ As noted above, according to *Gangi*, proof of an assertion of the attorney client privilege requires evidence that the privilege is "(a) claimed and (b) not waived by the client." (Emphasis added.)

⁶ The Board has under review grievant's proposed modifications to several of her discovery requests. We will issue an order upon receipt of all of the parties' pleadings. Meanwhile, this order requires grievant to submit all discovery requests as proposed to the extent that the Board has overruled the agency's objections thereto. Otherwise, grievant shall remove all discovery requests where the Board has sustained objections thereto by USAID, but where the Board has not modified the request. And, finally, grievant shall include in her requests for discovery all modifications of the requests as ordered by the Board. (See Orders dated October 31, 2014 and February 10, 2015.)



James E. Blanford
Member



Jeanne L. Schulz
Member