

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

The United States Agency for International
Development

Record of Proceedings

FSGB Case No. 2011-024

August 11, 2015

ORDER: Sixth Motion to Compel

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 sixth motion to compel additional discovery responses, filed by the grievant, [REDACTED]. The employer, the United States Agency for International Development (USAID), opposes the motion to compel and seeks an order from this Board declaring that discovery has been completed and requiring grievant to file a supplemental submission.

II. BACKGROUND

The background information for this grievance appeal has been recited in a number of previous orders. Grievant claims that her employer made adverse personnel decisions that negatively impacted her career based on false, uninvestigated complaints about her management and supervisory skills. She also claims that her employer gave her a series of assignments that deprived her of a reasonable opportunity to “demonstrate her potential for advancement.” The parties have been actively engaged in discovery since the grievance appeal was filed with the Foreign Service Grievance Board (FSGB, Board) on June 3, 2011.

After three years in discovery, the Board held a status hearing on June 5, 2014 to attempt 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 denied grievant’s request to depose more than 100 employees and ruled that grievant could instead seek additional discovery from a reduced number of agency employees only by means of written interrogatories and related requests for production of documents. Thereafter, USAID objected to almost every discovery request proposed by grievant, particularly the requests for production of documents. After grievant responded to the

objections, this Board issued an order, dated October 31, 2014 (“Objections Order”), resolving most of the disputed issues.

On November 5, 2014, USAID filed a motion for reconsideration, challenging, *inter alia*, the Board’s silence in the Objections Order on whether grievant was permitted to file requests for production of documents. Grievant responded by filing a 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 Objections Order. The Board issued an order, dated February 10, 2015 (MFR Order), resolving the agency’s motion for reconsideration and grievant’s motion for sanctions. On February 20, 2015, the agency submitted an email request for a telephone status conference to address two objections that the Board had not addressed 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 filed a second motion for reconsideration on February 25, 2015, requesting that the Board reconsider that portion of the MFR Order that concluded that agency counsel does not have an attorney-client relationship with those agency employees who were to receive grievant’s discovery requests. On March 9, 2015, grievant filed a motion for leave to serve additional discovery requests on the employees, to which the agency filed an opposition on March 19, 2015, along with a motion to stay discovery. In an order dated April 6, 2015, the Board resolved the agency’s two additional objections, denied the second motion for reconsideration regarding the attorney-client privilege and set a schedule for delivery and return of the discovery requests.

Grievant filed her discovery requests as ordered by the Board on April 14, 2015. Agency counsel, in turn, forwarded them to the named employees on the next day; however, when

grievant did not receive responses when she thought they were due, she filed a fifth motion to compel discovery responses on May 12, 2015. USAID filed an opposition to the motion to compel on May 19, 2015 stating that with one exception occasioned by an employee's illness, all employees had filed timely responses to the discovery requests on May 15, 2015, thirty days after receipt of them. Accordingly, the agency asserted, the fifth motion to compel was moot. By memorandum from the FSGB Executive Secretary, dated May 28, 2015, the Board dismissed grievant's fifth motion to compel as moot.

On May 29, 2015, grievant filed the instant sixth motion to compel further discovery responses from certain employees on the ground that many responses are incomplete. The agency filed an opposition on June 12, 2015 and grievant filed a reply on June 22, 2015. On June 23, 2015, grievant filed a (third) motion for sanctions. The motion for sanctions is not addressed in this order.

III. POSITIONS OF THE PARTIES AND DECISIONS OF THE BOARD

A. Instructions and Conversations Concerning the Discovery Requests

Grievant challenges the sufficiency of several employees' responses to Interrogatories 1, 2 and 6 and Document Request 1 on the assertion that they are incomplete or wholly nonresponsive. Except as noted below, the agency responds generally that the witnesses have made sufficient efforts to respond to the discovery requests and should not be required to do any more. USAID chastises the Board for allowing any discovery requests to be filed with agency employees. It argues: "The Board now reaps what it has sown." In addition, the agency argues that procedurally, the instant motion is defective because grievant's counsel failed to confer with agency counsel before filing the motion and failed to file a certification that such a conference occurred. Agency counsel also relies on statements made by the chair of this panel at the status

hearing held on June 5, 2014 concerning how discovery would proceed, notwithstanding subsequent contrary orders of this Board issued since that time.

The Board accepts grievant's assertion that she intended to raise objections to the employees' responses in connection with her fifth motion to compel and that she consulted with agency counsel before filing that motion. Because the Board denied the fifth motion to compel as moot (after responses were filed) before grievant filed her objections to specific employee responses, we conclude that she has not violated our Policies and Procedures that require a consultation between the attorneys before a motion to compel may be filed because the consultation that occurred prior to filing the fifth motion to compel serves as essentially the required consultation for the instant sixth motion to compel.

Interrogatory 1 reads: 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.

Interrogatory 2 reads: Identify all *other* persons with whom you spoke about these requests, other than your attorney, and tell us the details of each conversation.

These interrogatories are somewhat confusing, because although Interrogatory 2 seeks information about the details of conversations between the witness and all persons other than the witness's attorney, the request at first glance seems to exclude all attorneys, given the juxtaposition of this inquiry to Interrogatory 1. Despite the possible confusion, the Board reads Interrogatory 2 to require the witnesses to provide information detailing all conversations they had with 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:

- [REDACTED] (conversation with Marc Sacks, USAID counsel);
- [REDACTED] (conversation with [REDACTED], Resident Legal Officer (RLO) in [REDACTED]);
- [REDACTED] (conversation with [REDACTED], RLO in [REDACTED]);
- [REDACTED] (conversation with [REDACTED], RLO in [REDACTED]);
- [REDACTED] (conversation with Sacks);
- [REDACTED] (conversation with Sacks);
- [REDACTED] (conversations with [REDACTED], General Counsel Attorney, and Sacks);
- [REDACTED] (conversation and meeting with Sacks);
- [REDACTED] (conversation with Sacks);
- [REDACTED] (conversation with Sacks and [REDACTED], RLO in [REDACTED]);
- [REDACTED] (conversation with Sacks);
- [REDACTED] (conversation with Sacks);
- [REDACTED] (conversation and meeting with Sacks);
- [REDACTED] (conversation with Sacks);
- [REDACTED] (conversation with [REDACTED], RLO);
- [REDACTED] (conversation with [REDACTED], RLO).

Interrogatory 6 reads: What instructions have you received regarding these requests and from whom?

The agency asserts that most of the witnesses who answered this question affirmatively indicated that they received instructions about the requests from named individuals, but failed to

provide details of what the instructions were. The agency opposes this request on several grounds: that counsel's instructions to the witnesses are protected by the attorney-client privilege; the instructions are privileged as attorney work product; and the Board ordered at the June 5, 2014 status conference that there would be no disclosure of Mr. Sacks's communications with the witnesses.

The Board agrees with grievant's assertion that the approved interrogatory specifically calls for details about instructions the witnesses received about the discovery requests. Moreover, notwithstanding the agency's argument that this request 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*, 97 MSPR 165, 168 (2004), MSPB LEXIS 1832 (September 1, 2004). 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. These factors include evidence that:

- (1) The holder of the attorney-client privilege was or sought to become a client;
- (2) the attorney to whom the communication was made (a) is a member of the bar of a court and (b) is acting as a lawyer with respect to the communication;
- (3) the communication related 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 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.

The agency offers no information that disclosure of the instructions given by its attorneys to its employees would reveal a privileged legal opinion or advice to a client, or a privileged communication from employees to the attorneys that would enable the lawyers to represent the agency client. Indeed, all of the witnesses claimed that they were not represented by the

attorneys who provided the instructions, and there is no evidence that the employees solicited the instructions. The Board finds that the agency did not prove its entitlement to this privilege. *See, United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 605 (D.D.C. 1979), citing *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D.Del.1974):

“A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the affidavit is precise to bring the document within the rule, the Court has no basis on which to weigh the applicability of the claim of privilege. An improperly asserted claim is no claim at all. . . . In short, a party resisting disclosure on the ground of attorney-client privilege must by affidavit show sufficient facts as to bring the identified and described [communication] within the narrow confines of the privilege.”

The agency states: “There can be no dispute that all aspects of this ‘test’ [in *Gangi*] are met by the situation at issue. Any communications related to Grievant’s discovery to Agency employees were between a USAID attorney and USAID employee related to assistance in this legal proceeding, and the Agency claims the privilege.” Far more is required, beyond this conclusory assertion, to establish that the instructions given by agency lawyers to employees are protected by the attorney-client privilege.

The Board also concludes that there is no evidence, whatever, offered to support the agency’s claim of work product privilege. *See, Chevron U.S.A., Inc. v. United States*, 83 Fed. Cl. 313, 323 (Fed. Cl. 2008):

[S]ince almost all Government action is prepared “in anticipation of litigation,” the intent or purpose for which a Government attorney authors or reviews a document is not relevant to whether the attorney work-product privilege applies. What is relevant is the qualitative content for which the privilege is asserted. . . .”

USAID argues that “a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial *by or for another party or its representative.*” (Emphasis

added). Federal Rules of Civil Procedure 26(b)(3)(A). None of the witnesses who received the discovery requests is a party in this grievance and none claimed that agency counsel represented them. Thus, USAID established no basis on which we could find that instructions from agency lawyers were prepared on behalf of individuals whom they represented.

Finally, we find that USAID's reference to statements made at the June 5th status conference ignores subsequent events of which counsel is well aware. USAID cites the following statement by the panel chair on June 5, 2014:

[Grievant's Counsel]: . . . but I ought to be entitled to see what [agency counsel] sends to [the employee witnesses] because the issue of counsel for these witnesses, in my view, is a very important issue in this case and I want to know what communications [agency counsel] has with these witness[es].
[Panel Chair]: I know you do and I don't see a reason for such an order[,] so the request is denied.

By citing this colloquy, agency counsel suggests that at the present time, grievant is under a Board order that she may not discover the instructions agency counsel gave to employee witnesses before they answered her discovery requests. However, this ignores the fact that after further consideration of the agency's objections to grievant's discovery requests, this Board approved a request for agency employees to disclose all instructions they received from anyone, other than their personal attorney(s), regarding discovery. *See*, Objections Order at p. 14:

Despite our agreement that the question [What instructions have you received regarding these requests and from whom?] seeks information about how the discovery process was conducted, nonetheless, grievant may inquire whether any instructions were given regarding the interrogatories and, if so by whom. The objection to this interrogatory is overruled.

Accordingly, the Board grants the motion to compel and concludes that there is no evidence of an attorney-client or work product privilege that protects any responses. All of the

following witnesses who provided incomplete answers must provide additional details about the precise instructions that they received about the discovery requests:

- ██████████ (received instructions from Sacks – no details provided);
- ██████████ (received instructions from ██████████ and asserted: “[T]hose communications, as I understand it, are covered by the attorney-client privilege);
- ██████████ (received an email from ██████████ – no details provided);
- ██████████ (received “emails from USAID lawyers” – no details provided);
- ██████████ (received instructions from Sacks – no details provided);
- ██████████ (received written instructions – no details provided);
- ██████████ (received instructions from Sacks – no details provided);
- ██████████ (received instructions from Sacks – no details provided);
- ██████████ (received instructions from Sacks and ██████████ – no details provided);
- ██████████ (received instructions from Sacks – no details provided);
- ██████████ (instructions from Sacks described only generally. The witness asserted: “I received general instructions from Attorney Advisor Marc Sacks, including my obligation to respond, procedures for sharing the response and associated documentation, and explanations of the questions.” This witness must provide complete details about all of the instructions received and all explanations of the questions that were received.);
- ██████████ (email from Sacks – no details provided);
- ██████████ (instructions from Sacks – details not provided. ██████████ states: “Our communications are covered by the attorney-client privilege (between an Agency lawyer and Agency employee in communicating about ongoing litigation against the agency)”);
- ██████████ (email from ██████████ forwarding instructions from Sacks – details not provided);
- ██████████ (instructions from Sacks via ██████████ – details not provided).

Document Request 1 reads: Documents you reviewed to answer the interrogatories in this document.

Grievant complains that some witnesses provided no documents in response to this request, but did not say that there were none to provide. USAID contends that the request for production of documents does not require employees to provide written responses. All that is required is for the employees to produce the documents. USAID argues that if the employee produced no documents, then the only conclusion that obtains is that there were no responsive documents to produce. The agency also contends that if the employee stated that documents were produced to USAID during this grievance appeal, the Board should order that the witness need not reproduce the documents to grievant, because there would be “no utility” in requiring reproduction of the documents. USAID states:

The Agency, now years back, sought responsive documents from Agency employees and *produced them to Grievant*. There is no utility in those employees, years later, conducting another search to produce the same documents that *were already produced to Grievant*. Of course, if relevant documents had been generated between that search (2012-2013) and the present, then supplementation would be required.

Instruction 5 of the discovery requests reads:

In any instance where you are unable to . . . provide the specific documents . . . for which discovery calls, so state, state why you are unable to . . . provide the . . . document requested, give the best information that you can provide on the subject and identify every person whom you believe may have the requested . . . document.

In addition, Instruction 12 also provides:

Each document produced should be referenced by the number(s) of the Request(s) to which each document is responsive. In this way, no document need be produced more than once.

Given these two instructions, the Board concludes that when no document can be found that is responsive to the document request, the witness was required, at a minimum, to so state. In addition, the documents that were produced should indicate the number(s) of the request(s) to which they are responsive, and the witness should state if there were no responsive documents to

any request. If requested documents were previously produced to the agency, the witness must nonetheless reproduce the document in response to grievant's instant requests. Finally, if a witness received written instructions on how to respond to the discovery requests, including emailed instructions, the witness was required to produce a copy of the email in response to this document request.

The Board orders that the motion to compel additional responses to this Request for Production of Documents is therefore granted. The following witnesses must supplement their responses and indicate if their non-production of documents was the result of not finding any that were responsive to the request and indicate which documents were related to which requests. In addition, if witnesses previously produced documents to agency counsel, the witness must reproduce the same documents to grievant if the document remains available. If the document(s) is/are no longer available, the witness should explain this, in accordance with the instructions. Finally, if witnesses received written instructions concerning how they should respond to the requests, they must submit a copy of those instructions:¹

- ██████████ (no response to the document request);
- ██████████ (email from ██████████ not provided; witness also provided responsive documents, but did not indicate which documents were responsive to which requests; nor did she indicate if there were no responsive documents to any requests);
- ██████████ (“emails from USAID lawyers” not provided);
- ██████████ (provided documents, but did not indicate which documents were responsive to which requests; nor did she indicate if there were no responsive documents to any requests);
- ██████████ (witness asserted that she provided documents to USAID. These same documents must be provided to grievant if they are still available. If not, the witness should provide an explanation consistent with the instructions);

¹ There may be additional witnesses who must supplement their responses based on their receipt of written instructions. It was unclear from some of the responses whether the witnesses received written or oral instructions.

- ██████████ (no response);
- ██████████ (written instructions not provided; no response to the document request);
- ██████████ (no response);
- ██████████ (emails from Sacks and ██████████ not provided);
- ██████████ (witness asserted that she provided documents to USAID. These same documents must be provided to grievant if they are still available. If not, the witness should provide an explanation consistent with the instructions);
- ██████████ (witness provided several documents, but there is no indication which documents are responsive to which requests; nor is there any indication whether there were no responsive documents to any requests);
- ██████████ (emailed instructions not provided);
- ██████████ (witness asserted that she provided documents to USAID. These same documents must be provided to grievant if they are still available. If not the witness should provide an explanation consistent with the instructions).
- ██████████ (email from ██████████ forwarding instructions from Sacks not provided);
- ██████████ (instructions from Sacks via ██████████ not provided).

Finally, after reviewing each of the employees' responses, the Board concludes that the motion to compel further responses to Interrogatories 1, 2, and 6 and Document Request 1 should be denied as to the following witnesses for the reasons stated:

██████████ – This witness stated that she was instructed by Mr. Sacks to “fully comply.” This appears to be a complete explanation of the conversation and the instructions she received. Therefore, no further explanation is required. The motion to compel a further response from this witness is denied.

██████████ – This witness stated that she had a conversation with Mr. Sacks only about why she was a witness in this matter. She did not state that she had a conversation with anyone about the discovery requests, and she stated that she received no instructions regarding

them. Accordingly, the motion to compel further responses from [REDACTED] about instructions received is denied.

[REDACTED] – This witness stated that she was unaware of any written document concerning complaints about grievant’s management or supervisory skills. She stated that she thought she may have made informal oral complaints, but she was not aware of any related documents. Accordingly, although she did not write “none” in response to the document request related to any complaint identified in her response to Interrogatories 8 or 9, it is clear from her responses to those interrogatories that she had no responsive documents. Accordingly the motion to compel further responses from [REDACTED] to Document Request 1 is denied.

[REDACTED] – This witness stated that she had a conversation with Mr. Sacks in which he instructed her to complete the interrogatories to the best of her knowledge and provide any and all documentation that the witness had in her possession that relates to this case. This appears to be a complete response to the Interrogatories 1, 2, and 6 and, therefore, no more information is required. The motion to compel a further response from [REDACTED] is denied.

B. Individual Witness Responses

In response to grievant’s motion to compel responses from individual employees, USAID offers generalities, including: “Many of Grievant’s contentions are absurd” and “none of the 20 employees who provided discovery responses are lawyers – each employee did his/her best to answer the question to the best of his/her abilities and recollections.” USAID also states: “Grievant has already burdened 20 Agency employees with unprecedented discovery obligations – the employees have done their part and they should be bothered no further by this meritless case that dates back more than 10 years and is extremely painful and/or infuriating for numerous employees to discuss/recollect. Enough is enough.”

Grievant responds that agency counsel offers opinion and speculation that the employees provided the best information available to them. In addition, grievant claims that employees are required to respond to her requests for production of documents by stating whether there are any responsive documents and, if so, which documents are responsive to which requests. Grievant also asserts that employees are required to produce documents, despite having previously produced them to the agency.

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Interrogatory 8 - Grievant contends that ██████████ response to Interrogatory 8 is incomplete because the interrogatory calls for the witness to describe “all complaints you have made about [grievant’s] management or supervisory skills, including treatment of subordinate staff. . . ,” while ██████████ response states that she has never made a *formal* complaint regarding [grievant’s] management or supervisory skills. The agency argues that ██████████ may not remember events from 11 years ago. Grievant replies that this is speculation and irrelevant to whether the witness made informal complaints about her.

The Board concludes that the motion to compel should be granted and that ██████████ should supplement her response concerning any complaints she may have had – whether formal or informal – about grievant’s management and/or supervisory skills.

Interrogatory 9 – Grievant contends that this witness did not provide a complete response to the request for information concerning “all complaints of which you are aware, about [grievant’s] management or supervisory skills, including treatment of subordinate staff.” The witness responded that she provided “verbal input,” “verbal feedback,” and “anonymous written feedback” about grievant to different individuals on three different occasions. She provides no details about the nature of this feedback.

The Board agrees that the response does not completely answer the question posed. We therefore grant the motion to compel and order ██████████ to supplement her response by providing details about the feedback that she provided on these three occasions, with the exception of confidential 360° individual feedback that she may have communicated to others. She must also identify (as that term is defined in the instructions) the person(s) to whom she provided the written feedback in 2005.

Document Request 2 – Grievant contends that ██████████ did not provide a copy of the written feedback in response to this request that seeks: “Any documents related to any complaint identified in response to Interrogatories 8 or 9.” The Board grants the motion to compel and orders ██████████ to provide a copy of the written feedback, if it is available to her and if it does not disclose anonymous individual 360° feedback comments. ██████████ must follow the instructions that are included with the discovery requests if she is unable to produce the document.

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Interrogatories 8 and 9² - Grievant argues that ██████████ response to Interrogatory 8 is inadequate because instead of fully explaining why grievant was removed from her position as Office Director for ██████████ in July 2009, the witness responded that there were “concerns . . . [about] working in a hostile environment” that were raised by “staff” to the “Union,” without explaining the details of the concerns, which staff members raised the concerns and which union members received the reported concerns. In addition, ██████████ states: “the change in director was made a few months early” without identifying who was responsible for this decision, if she knows. In response to Interrogatory 9, ██████████ states

² Although the interrogatories given to different witnesses bear the same numbers, the requests are not necessarily the same.

that she was “given a date [for the change in leadership],” but does not state who gave her the date, or when and what the communication was.

The Board grants the motion to compel a more complete answer to these interrogatories as discussed above.

Interrogatories 10 and 11 - Grievant complains that [REDACTED] failed to provide details concerning all complaints the witness made, or of which she was aware, concerning grievant’s management and supervisory skills, including her treatment of subordinate staff. [REDACTED]

[REDACTED] responded to the two interrogatories that:

Information was shared that [grievant’s] staff were working in a hostile environment. Most of the information was directed to our Front Office, [grievant’s] supervisor [REDACTED] and management officials. . . . There were conversations also with the AFGE Union representatives. In response to the issues raised, decisions were made to accelerate the end of tour date of [grievant] given that her replacement was in Washington, DC. . . . I have not provided any direct complaints about [grievant] to anyone. My concern has been for her staff and ensuring that all staff are in a safe work environment.

Grievant states that it is unclear from this response what information was shared, by whom, and who in the Front Office, which management officials and which union representatives received the information. The response also does not explain who made the decision to require grievant to leave her position early, whether the witness communicated the complaints of the staff members to anyone and, if so, what she communicated and to whom.

In addition, [REDACTED] stated:

I remember being advised that the front office was aware of the issues and was also concerned about staff welfare. I do know there was something in writing either to or from the AFGE Union regarding the hostile work environment.

Grievant argues that this additional response does not explain who told the witness that the front office was aware of “the issues,” how and when this information was shared, what the specific

issues were, and what information was shared with the witness and by whom about the written document to or from the AFGE union.

The Board grants the motion to compel further responses from [REDACTED] as discussed above.

[REDACTED]

Interrogatory 3 – Grievant asserts that [REDACTED] failed to respond to this interrogatory that seeks information about “the efforts [the witness] made to obtain the documents that are requested. . . .” [REDACTED] stated that she provided all of her documents to GC (General Counsel). This is nonresponsive to the request.

The Board grants grievant’s motion to compel a response to this inquiry.

Interrogatories 8 and 9 – Grievant complains that [REDACTED] responses about the complaints that either she made, or she was aware of, concerning grievant’s management or supervisory skills were incomplete. As for the complaints she made, [REDACTED] either reported the details of the complaints, but failed to clearly indicate the individuals to whom she reported them, or she identified individuals without explaining which complaints she made to each of these persons. In addition, grievant asserts that [REDACTED] reported that in 2009, someone she did not identify made a complaint about a classified piece of equipment that was left on a desk unprotected. The gist of [REDACTED] comment is that grievant was responsible for leaving the equipment unprotected on a subordinate’s desk.

The Board agrees that [REDACTED] should clarify which of her complaints she made to which individuals and should identify who made the 2009 complaint about the unprotected equipment. It is otherwise clear what the 2009 complaint is, therefore, the witness is not required to provide any further details. The motion to compel is granted in part.

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Interrogatories 7 and 9 – Grievant argues that ██████████ provided an insufficient response to these interrogatories that requested information about whether the witness “believe[s] [grievant’s] allegation [about receiving an inappropriate pattern of assignments] is accurate or not . . .” and information about all complaints that the witness was aware of about [grievant’s] management or supervisory skills. In response to these inquiries, ██████████ responded that she was told by an employee, whom she does not name, that “there was a rumor [about grievant] slapping an FSN. According to ██████████, the person went on to say that at a Mission wide town hall, someone had been singled out as abusive and difficult to work with.” ██████████ also responded: “. . . [I] was told by other members of the ██████████ . . . that every person in the office at least once, had gone to either ██████████ or to the Assistant Administrator for ██████████ to complain about [grievant].” Grievant claims that ██████████ fails to identify the complainants whom she mentions in her responses; she does not identify the Administrator for ██████████ to whom the complaints were made; she fails to identify the person who reported that all staff had either complained to ██████████ or to the Assistant Administrator; and to the extent that she knows, what the details were of any of these complaints.

The Board grants the motion to compel further responses from ██████████. The witness must provide complete responses to these two interrogatories. The Board reminds this witness to review the definition of “identify” that was included with the interrogatories.

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Interrogatories 8 and 9 – Grievant complains that this witness stated that she did not provide a *written* complaint about [grievant’s] management or supervisory skills, but admitted that she made “informal comments to the ██████████ Bureau Administrative and Management

Support Staff as well as one of the Deputy Assistant Administrators,” while stating that she did “not remember to whom I made these comments.” ██████ did not respond to that part of Interrogatory 8 or 9 that asked whether the witness had reason to believe that the complaints were shared, directly or indirectly, with any Senior Management Group (SMG) Panel or Senior Foreign Service (SFS) Selection Board. ██████ also stated: “Please see my response to questions 7 and 8,” in which she stated: “. . . [W]hen I was coach to the Presidential Management Interns . . . , there were PMIs [who] commented that in supervising PMIs, [grievant] was often less than clear in communicating instructions and expectations.” ██████ went on to explain in detail the inadequate feedback the unidentified PMIs received from grievant.

Grievant states that her discovery requests are not restricted to written complaints; that ██████ failed to describe the details of her informal comments, and it is unclear whether the witness did not remember the persons in the ██████ Bureau Administrative and Management Support Staff or the Deputy Assistant Administrator to whom she made the comments. In addition, grievant complains that ██████ did not identify any of the PMIs who made the comments to her, or state whether she had any reason to believe that their information reached any SMG Panel or SFS Selection Board.

The Board grants the motion to compel additional responses from this witness. The witness must supplement her responses as specifically directed in the instructions to the Interrogatories 7 and 9.

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Interrogatory 3 and Document Request 1 – Grievant complains that this witness makes two statements that are contradictory. On the one hand, ██████ states: “I reviewed my

personnel files and my email” in response to the question: “Describe the efforts you made to obtain the documents that are requested by [grievant]. . . .” On the other hand, ██████████ states: “I did not have any documents in my position [sic] or review anything to answer these questions” in response to the document request: “Documents you reviewed to answer the interrogatories in this document.” USAID contends that “the plain language reading of the two responses . . . is that ██████████ looked for responsive documents but found none, such that in answering the interrogatories she did not review any documents relevant to the interrogatories/responses. There is no ‘contradiction.’” Grievant replies that this is speculation on the part of agency counsel.

The Board concludes that the responses of the witness are not contradictory. ██████████ responded that she reviewed her files and that she found none that were responsive to the requests. The motion to compel additional responses from ██████████ is denied.

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Interrogatory 9 – Grievant complains that ██████████ response is nonresponsive to the inquiry: “Please describe the process by which HR received 360° source feedback for [grievant] and summarized that information for the SMG Panels that reviewed her bids.” Grievant claims that ██████████ did not describe the process by which her 360° feedback was summarized. Grievant argues: “[F]or example, what information would be included in the summary when two or more sources provided contradictory information?”

The Board grants the motion to compel. ██████████ should fully describe the process by which HR summarized individual 360° feedback and submitted the summary to SMG Panels. ██████████ should also identify all persons who reviewed and created the summaries as requested.

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Interrogatories 3, 8 and 9 – Grievant argues that ██████████ responded to Interrogatory 3, “Describe the efforts you made to obtain the documents that are requested by [grievant] in this document,” by stating that she provided documentation to the agency attorney. In further response to Interrogatories 8 and 9 regarding all complaints that either she made, or of which she was aware, ██████████ stated that although she did not remember the date, she communicated a complaint with the ██████████ Bureau Front Office staff, to ██████████ and to ██████████. In addition, ██████████ reported that “The staff of ██████████/██████████ made a verbal complaint . . . in March of 2009, to the ██████████ Bureau Front Office [against grievant].” ██████████ then described a letter that was sent to the “██████████ requesting relief for the staff.” This letter has been produced several times in the Record of Proceedings (ROP). (*See*, USAID Opposition to Grievant’s Motion for Sanctions, Exhibit 11, dated March 20, 2014).³

The Board grants the motion to compel a further response to these interrogatories. ██████████ ██████████ must produce all documents that she previously provided to agency counsel if they are still available to her. If they are not, then she must offer an explanation consistent with the instructions provided with the document requests. In addition, ██████████ must provide details about each complaint that she made and the name of the person(s) to whom she made the complaint in the ██████████ Bureau Front Office. Because the letter that ██████████ described has been produced by the agency and is in the record and in grievant’s possession, the witness is not required to reproduce it again.

³ Indeed, grievant included this document in her Rebuttal to Opposition to Motion for Sanctions, at Exhibit 7, filed on March 31, 2014. *See also*, responses provided by ██████████.

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Interrogatories 8 and 9 – Grievant complains that this witness did not completely respond to these two requests that sought information about any complaints made by the witness or of which the witness was aware. ██████████ stated that he “never made any *formal* complaints about [grievant’s] management or supervisory skills, nor have I made any *formal* complaint about [grievant’s] treatment of subordinate staff.” Similarly, he stated: I have no knowledge or awareness of any *formal* complaints about [grievant’s] management or supervisory skills, nor do I have any knowledge or awareness of any *formal* complaint about her treatment of subordinate staff.” Grievant notes that her requests did not limit the inquiry to formal complaints; therefore, the witness ought to fully answer whether he made or is aware of any complaints, formal or informal.

The Board concludes that the motion to compel should be granted and that ██████████ should supplement his response concerning any complaints he may have made about grievant’s management and/or supervisory skills, or complaints of which he became aware – whether they were formal or informal.

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Interrogatory 7 – Grievant complains that this witness did not adequately respond to the inquiry about whether the witness believed that the grievance allegations are accurate or not. Grievant argues that ██████████ refers to individuals by their positions rather than by name. In her response to this interrogatory, ██████████ states, for example: “I witnessed [grievant] abuse and bully staff to [the] point where the office became so hostile that our office – that was once staffed with 15 people – dwindled down to 5 staff. Because of [grievant’s] unprofessional and undesired behavior against staff within the office and in other Bureau office’s [sic], ██████████ gained such

an unpopular reputation throughout the Bureau and Agency that we could not recruit or retain staff.” According to grievant, [REDACTED] never names any of the staff members who were affected by grievant’s reported behavior. Likewise, she does not identify the individuals in the “Bureau Front Office” who “slowly attempted to remedy the situation.”

The Board denies the motion to compel because it is clear that in response to Interrogatories 8 and 9, [REDACTED] provided detailed descriptions of 40 complaints about grievant, either by herself or by others. She offered names, positions, dates and details that explain her statements in response to Interrogatory 7. No more is required.

IV. CONCLUSION

1. Grievant’s motion to compel further responses to her discovery requests is granted in part and denied in part as previously stated. The above named witnesses shall provide supplemental responses to these interrogatories and requests for production of documents on or before the 30th day after receipt of this order.
2. The Board denies grievant’s pending request to serve additional discovery requests. Discovery has been ongoing for more than four years and grievant has not shown legitimate reason why the additional discovery could not have been included in what has previously been served and reviewed by this Board.
3. The Board denies the agency’s request to stay discovery.

For the Foreign Service Grievance Board:

[REDACTED]
Susan K. Winfield
Presiding Member



James E. Blanford
Member



Jeanne L. Schulz
Member