

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Record of Proceedings
FSGB Case No. 2011-024

October 31, 2014

United States Agency for International
Development

ORDER: Objections to Interrogatories

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 objections filed by the United States Agency for International Development (USAID, agency) to grievant's proposed interrogatories (in lieu of depositions), instructions, definitions and requests for production of documents.

II. BACKGROUND

██████████ filed a grievance on January 5, 2011 asserting that beginning in 2004, the agency made "adverse personnel decisions based on false, uninvestigated allegations" and failed to afford her reasonable opportunities "to demonstrate her potential for advancement." The agency denied her grievance and she subsequently appealed to this Board on June 3, 2011.

The parties have been actively engaged in discovery for more than three years and they are not done yet. 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 USAID had made significant efforts to investigate and disclose information about any and all informal complaints that may have been made against her by subordinates.¹ The Board ordered USAID to disclose to

¹ The parties have expended considerable discovery time on what informal complaints have been lodged against grievant by her subordinates during the years 2004-2009. The Board determined that this issue is irrelevant to grievant's "pattern of assignments" claim that requires proof that grievant received a series of assignments that deprived her of opportunities to demonstrate her potential. *Gaiduk v. United States*, 1990 U.S. Dist. LEXIS (August 12, 1987); FSGB Case No. 1992-078 (February 22, 1994); FSGB Case No. 1995-018 (April 26, 1996); and FSGB Case No. 2007-023 (Order dated June 27, 2007). However, grievant does not offer any evidence that her assignment decision-makers considered, or were influenced by, any informal complaints that were filed against her. Accordingly, we conclude that this information is irrelevant to the pattern of assignments claim.

Grievant also contends that false, uninvestigated complaints about her caused the agency to take "adverse employment actions" that negatively affected her career. We note that there is no cognizable "pattern of adverse employment actions" claim. *See, Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) ("The continuing violation doctrine does not apply to discrete and easily identifiable employment actions such as 'termination, failure to promote, denial of transfer, or refusal to hire.'") *See also, Harris v. S. Huntington Sch. Dist.*, 2009 U.S. Dist. LEXIS 27392 (E.D.N.Y. March 30, 2009). Therefore, in order to grieve what she calls a pattern of adverse actions, grievant will have to prove that each adverse action was timely filed and grievable. *See, Order: Motion to Dismiss*,

grievant documents that had recently been reviewed by the Board *in camera*, with limited personal information redacted. In addition, the Board asked agency counsel to confer with his predecessor and advise the Board whether e-discovery had been completed. On the basis of 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 then discussed grievant's outstanding request to depose as many as 109 witnesses who are current USAID employees, retirees, and employees of other agencies. The agency strenuously objected to depositions of that number of witnesses, particularly the large number of high-ranking individuals. The panel denied grievant's request to depose any of the 109 witnesses, allowing grievant instead to send interrogatories in lieu of taking depositions. We concluded that none of the outstanding issues required in-person depositions under oath.

The panel then required grievant's counsel to submit a list of witnesses to whom he wished to send interrogatories. In colloquies with counsel for both parties, the Board learned from grievant's counsel why he wished to interrogate each witness and resolved agency counsel's objections thereto. The list of 109 witnesses was reduced to fewer than 30.

The Board next set a schedule for grievant to submit interrogatories to agency counsel; agency counsel would then note objections and grievant would reply. The panel anticipated that if objections were filed, it would schedule a telephone conference call to try to resolve the matters quickly. However, when USAID noted its objections, the Board reconsidered trying to resolve objections in real time by telephone, without the benefit of reading and reviewing them

issued on September 29, 2011 in the instant case; 22 U.S.C. §§ 4131 and 4134. Assuming that grievant can establish a timely grievable adverse employment action, we recognize that if uninvestigated false complaints influenced the employment action, these complaints are relevant and may be the subject of discovery.

in advance. The Board, therefore, ordered the agency to submit its objections in writing. USAID submitted the 75 pages of objections that are at issue here.

The Board reviews and rules on the objections in the format submitted by USAID as follows:²

III. DISCUSSION AND RULINGS

Agency Objections I-IV – Number of Objections, Requests for Production of Documents

USAID objects to almost all of grievant's interrogatories on substantive grounds and also asserts that she exceeds the 30-count limit on questions (including subparts in the questions, introduction and instructions) allowed by Board Policies and Procedures. The agency also objects to grievant's requests for production of documents, contending they were not authorized by the Board in the June 5 hearing. USAID also challenges as unauthorized grievant's Definition No. 1 because it addresses a request for production of documents and, according to the agency, the Board has not permitted grievant to serve separate requests to produce documents on each witness, and the Board has declared that discovery is complete. The agency also objects to grievant's introduction that identifies agency counsel by name as the agency representative.

Ruling: The Board repeatedly told grievant's counsel that he would be restricted to filing no more than 30 interrogatories, including all subparts in the questions, introduction and instructions. However, upon consideration of grievant's response to the agency's objections, we are persuaded that: "As long as the questions pertain to a single topic, they may be considered a

² Ordinarily, the Board would review the objections to the discovery requests along with the arguments in favor of each request and either sustain or overrule the objections, without suggesting specific changes to the proposed interrogatories that we believe would overcome the objections. However, in view of the time expended by the parties to date in discovery and litigating objections to the discovery, we have proposed changes to each interrogatory to which we have sustained an objection in order to avoid further litigation in an attempt to expedite the process. In each instance where the Board has sustained an objection to an interrogatory, grievant may either delete the request entirely, or she may adopt the Board's suggested edits to the question.

single interrogatory.” *See*, Grievant’s Response to USAID’s Objections to Grievant’s Interrogatories in Lieu of Depositions, at p. 4; *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004). We conclude that grievant may submit no more than 30 interrogatories, including subparts, and that “interrogatory subparts [are] to be counted as part of . . . one interrogatory if they [are] logically or factually subsumed within and necessarily related to the primary question.” *Ginn v. Gemini, Inc.*, 137 F.R.D. 320, 320 (D. Nev.1991). If any subpart is logically or factually distinct from the primary question, it will increase the number of subparts by the number of logical and factual issues covered.

As for grievant’s requests for production of documents, although agency counsel contends that grievant was never authorized to submit requests for production of documents, the transcript of the hearing indicates otherwise. At the status hearing, the presiding panel member stated:

109 people will all start at the same time. They'll start writing their little answers [to interrogatories] out. They will turn over whatever request for production of documents that you attach to your interrogatories and you'll have what you need. *See*, Transcript of Status Hearing 6/5/14 at p. 118.

Therefore, the Board overrules USAID’s objection to the request for production of documents because such requests were specifically authorized at the status hearing.

The Board also overrules the agency’s objection to that part of the introduction in which grievant identifies Mr. Sacks by name as counsel for USAID. Grievant’s counsel may properly identify, as he does, who the attorneys are in the case and whom they represent.

The Board agrees with agency counsel that witnesses are not required to answer interrogatories under oath. Only the Board can impose such a requirement and it has not done so. The Board orders, pursuant to 28 U.S.C. § 1746, that witnesses shall sign and date their

responses and certify their accuracy by including the following declaration: “I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.”

The Board lastly rules that the definition of “documents” is difficult to understand.

“Documents” are defined in the interrogatories as:

includ[ing], but is not limited to, any written, typed printed, recorded, electronic or photographic material of any kind, however produced or reproduced, including, any retrievable data or information, however stored, recorded or coded. The types of documents include, but are not limited to, preliminary or final drafts of correspondence, letters, telegrams, memoranda, interoffice memoranda, reports, notes, agreements, or electronic mailings (“e-mails”). Specifically included are all files such as personal diaries, appointment books and calendars. In all cases where originals and/or non-identical copies of the documents are not available, “documents” also means identical copies of original documents and copies of non-identical documents.

The objection is sustained to the extent that it requires witnesses to produce “identical copies of original documents” and “copies of non-identical documents.” This definition, if given, shall read:

“Documents” are defined in the interrogatories as:

includ[ing], but is not limited to, any written, typed printed, recorded, electronic or photographic material of any kind, however produced or reproduced, including, any retrievable data or information, however stored, recorded or coded. The types of documents include, but are not limited to, preliminary or final drafts of correspondence, letters, telegrams, memoranda, interoffice memoranda, reports, notes, agreements, or electronic mailings (“e-mails”). Specifically included are all files such as personal diaries, appointment books and calendars. In all cases where originals of the documents are not available, “documents” also means identical copies of original documents.

Agency Objection V - Instructions

USAID objects to instructions 2 – 13 because they “are lengthy, legalistic and improper” and have numerous subparts.

Instruction 2. In answering these discovery requests, furnish all information/documentation, which is available to you, or in the possession of your attorneys, agents, or representatives. If you lack the information necessary to

answer any of these interrogatories, describe the efforts made by you or by anyone on your behalf to ascertain the information and state as definitely as possible when you anticipate obtaining the information.

Ruling: The objection to this instruction is sustained to the extent that it asks witnesses to investigate or provide information in the possession of their attorneys, agents, or representatives. This is not required. Likewise, if a witness does not have information necessary to answer a question, the witness is not obligated to make any efforts to ascertain the information. That is, witnesses are not required to investigate the questions or try to ascertain answers. The instruction, if given, must be redacted to read:

Instruction 2. In answering these discovery requests, furnish all information/documentation, which is within your personal knowledge and available to you.

Instruction 3. In answering each interrogatory, identify all evidence/documents/, which contain, refer to, and/or possess personal knowledge of, the information requested in the interrogatory.

The agency argues that this instruction is overbroad and improper because it seeks documents.

Ruling: The Board sustains the objection in part to the extent that it requires the witness to discover and disclose evidence or documents that “refer to and/or possess personal knowledge of” the information requested. The instruction, if given, must be redacted as follows:

Instruction 3. In answering each interrogatory, identify all evidence and documents that are within your personal knowledge or control that contain the information requested in the interrogatory.

Instruction 4. In any instance where you deny personal knowledge or information sufficient to answer a discovery request or any part thereof, or if you relied on information not within your knowledge, identify each person who knows or may possess, such personal knowledge and/or information.

The agency objects to this instruction as overbroad and improper, contending that “[I]f a witness has no personal knowledge regarding the factual inquiry, that witness is not required, unless specifically asked, to identify others who may have such knowledge.”

Ruling: The objection to this instruction is sustained to the extent that it asks witnesses to speculate about who “may” have information. Witnesses should provide information within their personal knowledge and identify any other witnesses who have knowledge of the requested subject. This instruction, if given, must be redacted as follows:

Instruction 4. In any instance where you deny personal knowledge or information sufficient to answer a discovery request or any part thereof, or if you relied on information not within your knowledge, identify each person whom you know has personal knowledge and/or information.

Instruction 5. In any instance where you are unable to answer an interrogatory or to provide the specific document or to provide only partial information or a partial document for which discovery calls, so state, state why you are unable to answer the interrogatory or provide the information/document requested, give the best information that you can provide on the subject and identify every person whom you believe may have the requested information and/or document.

The agency objects, claiming that if an employee is unable to answer an interrogatory, s/he is not required to state why. In addition, the agency argues that this is a multi-part question. USAID also contends that the instruction that the witness must name others also requires a separate question.

Ruling: The objection to this instruction is sustained to the extent that it calls for a witness to speculate about what other witnesses may know. Witnesses are not required to explain why they do not have information or full information. Witnesses are also not required to identify other persons whom they believe might have additional information. This instruction, if given, must be redacted as follows:

Instruction 5. In any instance where you are unable to answer an interrogatory or to provide the specific document or to provide only partial information or a partial document for which discovery calls, so state, state

why you are unable to answer the interrogatory or provide the information/document requested, give the best information that you can provide on the subject and identify every person whom you believe may have the requested information and/or document.

Instruction 6. Where discovery calls for you to “identify” a document or written communication, your response should include the title or nature of the document (Letter, memorandum, note, e-mail, etc.), the date of the document, a summary of its contents, the author(s) or person(s) who prepared it and any signatories to it, its present location and custodian, the identity of its addressees and all other persons receiving it or copies of it, how it was prepared (e.g., handwritten, by typewriter, word processor, etc.). If the document so identified is not in your actual or constructive possession, custody or control, you should state what disposition was made of it and when, including, but not limited to, its last known custodian and location.

The agency argues that this interrogatory is unduly burdensome and contains too many subparts.

Ruling: The objection is sustained in part to the extent that it requires the witness to know who prepared a document that they may only have seen. The instruction, if given, must be amended as follows:

Instruction 6. Where discovery calls for you to “identify” a document or written communication, your response should include all information within your personal knowledge, including: the title or nature of the document (Letter, memorandum, note, e-mail, etc.), the date of the document, a summary of its contents, the author(s) or person(s) who prepared it and any signatories to it, its present location and custodian, the identity of its addressees and all other persons receiving it or copies of it, how it was prepared (e.g., handwritten, by typewriter, word processor, etc.). If the document so identified is not in your actual or constructive possession, custody or control, you should state what disposition was made of it and when, including, but not limited to, its last known custodian and location.

Instruction 7. Where a discovery request calls for you to “identify” an oral communication, your response should include the means of communication (e.g. telephone, personal conversation), or if unknown, its approximate date, the identity of each person who was party to, overheard or may have overheard the communication, the substance of what was said, who said it and to whom, and whether the communication or any part thereof is recorded, described or referred to in any document, and, if so, identify such documents according to the above definition of “identify.”

The agency objection is the same as for instruction 6.

Ruling: The objection to this instruction is sustained in part. Witnesses are required to disclose only information known by the witness. Witnesses are also not required to speculate as to what another person overheard or may have overheard. Accordingly, instruction 7, if given, must be redacted as follows:

Instruction 7. Where a discovery request calls for you to “identify” an oral communication, your response should include all information within your personal knowledge about the following: the means of communication (e.g. telephone, personal conversation), or if unknown, its approximate date, the identity of each person who was party to the communication, the substance of what was said, who said it and to whom, and whether the communication or any part thereof is recorded, described or referred to in any document, and, if so, identify such documents according to the above definition of “identify.”

Instruction 8. Where a discovery request calls for you to “identify” a person, your response should provide an identification sufficient to contact such a person and to notice a deposition of such person to require his or her presence at a place of examination and should include the person’s full name, title or occupation, grade, present or last known address, present or last known business affiliation, home and business telephone number, title or occupation, grade, and each of his or her positions during the applicable period covered by any answer referring to such person.

The agency objects to this instruction as unduly burdensome and containing too many subparts.

Ruling: The objection to this instruction is sustained in part to the extent that it asks the witnesses to give information that may not be within their personal knowledge. It is therefore unduly burdensome. The instruction, if given, must be redacted as follows:

Instruction 8. Where a discovery request calls for you to “identify” a person, your response should include the person’s full name, title and occupation, or last title and occupation, if known.

Instruction 9. With respect to each of the following, you may answer an interrogatory in whole or in part by attaching to your answer a copy of a document(s) which contain(s) information sufficient to do so, by referring to such

document in your response, and by identifying the paragraph, portion or provision of the document that is relevant to the interrogatory.

The agency objects to this instruction because it requires the witness to produce documents.

Ruling: The objection to this instruction is overruled. The instruction is permitted.

Instruction 10. If any document requested herein, or fairly comprised within the scope of the following requests, has been lost or destroyed, you are required to provide, in lieu of a true and correct copy thereof, a list of each document so lost or destroyed, together with the following information: (a) date of origin of such document; (b) a brief description of such document; (c) the author of such document; and (d) the date upon which document was lost or destroyed.

The agency objects on the grounds that the instruction requires production of documents and because it contains too many subparts.

Ruling: The objection is overruled. The instruction is permitted.

Instruction 11. In the event that any document requested herein, or fairly comprised within the scope of the following requests is not in your actual or constructive possession, custody or control, you should state what disposition was made of it and when, including but not limited to, its last known custodian and location. A document is deemed to be in your control if you have the right to secure the document or a copy thereof from another person or public or private entity having actual physical possession thereof.

USAID objects to this instruction on grounds that it contains “legalese” and is not appropriate for lay witnesses.

Ruling: The objection is sustained in part. This instruction, if given, must be amended to read as follows:

Instruction 11. In the event that any document requested herein is not in your actual possession, custody or control, you should state what happened to the document, when, and the last person known to have the document and its location.

Instruction 12. 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.

USAID objects on the ground that grievant is not entitled to document production.

Ruling: The objection to this instruction is overruled. The instruction is permitted.

Instruction 13. If any interrogatory or request for production is not answered fully under claim of privilege, work product, or for any other reason, state 1) the basis for your refusal to answer and identify all privileged oral and written communications containing information requested by the interrogatory; and 2) the basis for your refusal to produce all privileged responsive documents. State the precise privilege or privileges you are interposing with respect to the interrogatory or document request. Supply sufficient factual detail to enable the Foreign Service Grievance Board to determine whether or not such document or communication is truly privileged, including: a) the nature of the document (i.e., letter, memorandum, etc.) b) its date; c) its author(s); d) the title or position of its author(s); e) its recipient(s); f) the title or position of its recipient(s); g) its number of pages; h) its subject matter; i) the paragraph of this request to which such document responds; and j) the basis for the claim of privilege.

USAID objects that this instruction contains too much legalese for lay witnesses.

Ruling: The objection is sustained in part for the reasons stated by the agency. Instruction 13, if given, must be amended to eliminate the technical language as follows:

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

Agency Objection VI - “Common” Interrogatories Nos. 1-10

USAID objects to these interrogatories on the basis that they are overbroad (1 and 9), seek privileged information (2-8 and 10), seek irrelevant information and seek to “intimidate” employees.

1. Attached to this document as Exhibit A is the formal Grievance [REDACTED] [REDACTED] has filed with the Foreign Service Grievance Board. Please read the document and describe what information you are aware of that is related to her allegations.

Ruling: The objection to this interrogatory is sustained as overbroad and because it asks lay witnesses to analyze grievant's legal claims, including one that has been withdrawn, a technical jurisdictional issue and allegations that cover a very long period of time.

2. If you talked with an attorney regarding these requests, please identify the attorney and state whether the attorney represents you in connection with these requests.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

3. Identify all other persons with whom you spoke about these requests, and tell us the details of each conversation.

Ruling: The objection to this interrogatory is sustained in part. Requiring witnesses to disclose their conversations is overbroad and may potentially conflict with an attorney/client or other privilege. The interrogatory, if given, must be redacted as follows:

3. Identify all other persons with whom you spoke about these requests, other than your attorney, and tell us the details of each conversation.
4. Describe the efforts you made to obtain the documents that are requested by ██████████ in this document.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

5. If any documents are missing or have been destroyed that are responsive to the request for documents, describe how that occurred, and identify anyone responsible.

The agency objects on the basis that the request for documents is unauthorized and that it seeks to investigate improprieties rather than grievant's claims.

Ruling: The objection to this interrogatory is sustained in part. The interrogatory, if given, must be amended as follows:

5. If any documents are missing or have been destroyed that are responsive to the request for documents, describe how that occurred, if you know, and identify anyone responsible.

6. If anyone has obstructed your efforts to obtain documents to respond this request, please identify all such persons and describe what each did.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

7. What instructions have you received regarding these requests and from whom?

USAID objects on the basis that the question does not request factual information about grievant's claims. Instead it attempts to investigate how the discovery process was conducted.

Ruling: Despite our agreement that the question 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.

8. Do you understand that you have the right to speak with the attorneys for [REDACTED] or have your attorney speak with them about her allegations?

The agency objects to this interrogatory on the basis that it does not seek information about grievant's claims. Instead it seeks to investigate the circumstances of the witnesses' responses to discovery.

Ruling: The objection to this interrogatory is sustained. Again, the purpose of interrogatories is not to advise employees of their rights; it is to discover material and relevant evidence.

9. In her grievance, [REDACTED] has alleged that the pattern of her assignments at USAID have not provided her with an opportunity to demonstrate her potential to serve in senior-level positions or her potential for promotion to the Senior Foreign Service. Please describe in detail whether you believe this allegation is accurate or not, include any facts upon which you base your belief, and identify any persons [who] have information related to this allegation.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted as drafted, with the above suggested edit in brackets.

10. State every position and personal rank you have held with USAID since January 1, 2004, indicating the dates during which you held each position and rank.

USAID objects to this interrogatory as overbroad and seeking irrelevant information.

Ruling: The objection to this interrogatory is sustained. The information requested is irrelevant to the instant claims and may improperly seek comparator information. The Board has previously ruled that comparator information is irrelevant to a “pattern of assignments” claim.

Objections VII - “Common” Interrogatories to SMG Panel Members (11-18)

The agency observes that interrogatories 11-15 are identical and are addressed to SMG Panel members [REDACTED]. [REDACTED] alone is asked three additional interrogatories – 16-18.

USAID objects to these interrogatories on the ground that it has produced all relevant information responsive to these questions. Therefore, the agency argues there is no reason to ask the same questions that have already been answered of every single SMG panel member who participated in making grievant’s assignments over the years. The agency asserts that having produced all of the information concerning the assignment process and the documents that were reviewed in each instance when grievant bid on a position, the interrogatories are overbroad and duplicative. USAID states that it has no objection to grievant asking the panel members whether they complied with the assignment procedures. The agency lastly argues that the interrogatories are vague because they do not define or explain what is meant by assignment “criteria.”

[REDACTED] 11. Please identify the criteria you applied when evaluating bids as a member of the SMG Panel.

Ruling: The objection is sustained in part because the interrogatory does not pertain to issues relevant here – that is, grievant’s bids. The interrogatory, as written, is overbroad, repetitive of

interrogatories that have been answered by USAID and irrelevant to the instant claims. This interrogatory, if given, must be redacted as follows:

11. Please identify the criteria you applied as a member of the SMG Panel when you evaluated [REDACTED] bids and explain in what way, if any, the criteria were different when you evaluated bids from other employees.

[REDACTED] 12. Please identify all information available to SMG Panel members when considering employee bids.

Ruling: The interrogatory, as written, is overbroad, repetitive of questions previously answered by the agency and is irrelevant to the claims. If this interrogatory is given, it must be redacted as follows:

12. Please identify all information made available to you as an SMG Panel member when you considered [REDACTED] bids and explain in what way, if any, the information was different when you evaluated bids from other employees.

[REDACTED] 13. Please identify all information, other than that provided to the SMG Panel by the Office of Human Resources, that the SMG Panel considers when evaluating bids.

Ruling: The interrogatory, as written, is overbroad, repetitive of questions previously answered by USAID and is irrelevant to the claims. The question, if asked, must be redacted as follows:

13. Please identify all information, other than that provided to the SMG Panel by the Office of Human Resources that the SMG Panel(s) on which you served considered when evaluating Grievant's bids and explain in what way, if any, the information was different when you evaluated bids from other employees.

[REDACTED] 14. Please identify all personal knowledge that you had, or that you have reason to believe any other SMG Panel member had, about [REDACTED] skills and qualifications.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

[REDACTED] 15. Please 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.

USAID contends that the question asks a fact witness to describe what legal regulations govern SMG Panel service, which is a question for the agency and one that has been answered by the agency.

Ruling: The objection to this interrogatory is sustained. This interrogatory requires witnesses to opine about criteria that “should be applied” when bids are evaluated. The question is irrelevant to what procedures/criteria were actually applied in [REDACTED] case or in others. At best, the question calls for a legal conclusion and at worst, it calls for irrelevant legal opinions of lay witnesses. The question may not be asked.

[REDACTED] 16. Attached to this document as Exhibit B is the OHR Summary Page for [REDACTED] bids during the 2010/2011 Major Listing Cycle (Fall 2009). Please describe how the information in the “HR Comment,” “Feedback” and “Issue” influenced your evaluation of [REDACTED] bids.³

USAID objects to this interrogatory on the basis that it seeks to analyze the deliberative process of individual SMG panel members. The agency contends that because assignment decisions are not grievable, this interrogatory is improper.

Ruling: The Board sustains the objection to this interrogatory on the basis that it unreasonably asks witnesses to isolate and describe the extent to which specified information from OHR influenced the witnesses’ overall evaluation of [REDACTED] bids, as compared with the influence of any other information provided and considered.

[REDACTED] 17. Please explain why the SMG Panel selected the following individuals for the assignments identified, during the 2010/2011 Major Listing Cycle (Fall 2009).⁴

a. [REDACTED]

³ This interrogatory is stated differently by USAID in this objection and in its listing of all interrogatories at ROP p. 57. It was quoted in the listing of all interrogatories slightly differently as follows: “Attached to this document as Exhibit B is the OHR Summary Page for [REDACTED] bids during the 2010/2011 **Extended Listing (September 2010)**”

⁴ This interrogatory is not included in the agency’s listing of all interrogatories at ROP p. 56.

- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]
- e. [REDACTED]
- f. [REDACTED]

USAID objects to this interrogatory as having been prohibited by the Board in its rulings that comparator information is not relevant to a “pattern of assignments” claim. In addition, the agency notes that this question contains numerous subparts pertaining to seven different positions.

Ruling: The objection to the interrogatory is sustained. This interrogatory seeks comparator evidence which the Board has found irrelevant. The question may not be asked.

[REDACTED] 18. Please explain why the SMG Panel did not accept [REDACTED] bids for each of the following assignments during the 2010/2011 Major Listing Cycle (Fall 2009).

- a. MD Dominican Republic
- b. MD Mexico
- c. Director, LAC/Cuba
- d. Student National War College
- e. Student National War College
- f. Student National War College
- g. MD Guatemala

USAID argues that this interrogatory asks for witnesses to disclose their deliberations regarding specific assignment bids by [REDACTED]. Again, the agency argues that since individual assignments are not grievable, this interrogatory is improper.

Ruling: The objection to this interrogatory is overruled.

Agency Objection VIII - “Common” Interrogatories Regarding “Complaints”

Counsel for USAID states that grievant proposes to ask two additional common questions of 13 employees who will also receive the above Common Interrogatories 1-10.⁵

⁵ Those employees are: [REDACTED]

██████████ 11. Identify and describe all complaints you have made about ██████████ ██████████ 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 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.

The agency argues that this interrogatory is vague because it does not distinguish “complaints” from 360 degree feedback; it is overbroad because it does not limit “complaints” to those made to management; and it is unduly burdensome because it contains many subparts.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

██████████ 12. Identify and describe all complaints of which you are aware, about ██████████ ██████████ 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.

The agency repeats its objections as in No. 11, immediately above.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

Agency Objection IX - “Common” Interrogatories Regarding Complaints About Others

For seven employees⁶ there are two additional interrogatories regarding complaints. The agency maintains that both are improper because they seek information unrelated to the facts in this appeal.

██████████ 13. Identify and describe all complaints you have made about your current or previous supervisors – other than ██████████ – regarding the supervisor’s management skills, supervisory skills, or treatment of subordinate staff. Your

⁶ ██████████.

response should include the following: (1) the date of the complaint; (2) 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.

The agency objects to this interrogatory as vague, overbroad and unduly burdensome.

USAID argues that “complaints” are not defined as distinguishable from 360° feedback.

Moreover, the request for information does not limit the scope of the inquiry to complaints made to supervisors/managers. In addition, the agency claims that the question contains too many subparts.

Ruling: The objection to this interrogatory is sustained. The Board has previously ruled that complaints about other supervisors are not relevant to the issues on this appeal, except under circumstances not addressed by this question. The Board previously held that the agency should disclose whether any complaints were made against a particular supervisor that were investigated and found to be unsubstantiated. The agency responded that there were no such complaints made. The question at issue here does not ask for that limited information and the relevant question has been previously answered. This question may not be asked.

■ 14. For any complaint identified in response to interrogatory 12, identify and describe all complaints by that person of which you are aware, about the person’s current or previous supervisors other than ■ – regarding the supervisor’s management skills, supervisory skills, or 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 SFS Selection Board; (6) a description of any conversations or written communications about the complaint.

USAID objects to this question for the same reasons as it objects to the previous interrogatory.

Ruling: The objection to this interrogatory is sustained for the reasons stated immediately above. The question may not be asked.

Agency Objection X - Interrogatory No. 11 to [REDACTED]

[REDACTED] 11. Have you ever spoken with USAID attorney Marc Sacks about [REDACTED].
[REDACTED] If so, what did you tell Mr. Sacks?

Agency's counsel maintains this question seeks to breach the attorney/client privilege and does not seek facts regarding the grievance.

Ruling: The purpose of these interrogatories in lieu of depositions is to enable grievant to discover additional evidence that may support her claims. Grievant may therefore ask what [REDACTED] knows. It is not the purpose of interrogatories to investigate whether Mr. Sacks accurately and completely reported on behalf of USAID what he learned from his discussions with [REDACTED] as reported in the March 17, 2014 supplemental discovery response. 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.

Agency Objection XI - "Common" Interrogatories to [REDACTED] Bureau Management

Additional Interrogatories, 11-14, are directed to three employees - [REDACTED]

[REDACTED].

[REDACTED] 11. Please explain why [REDACTED] was removed from her position as [REDACTED] in July 2009. Include the name of any person involved in the decision, the role of each person involved, the information considered, and the reason for the removal.

USAID does not object to this interrogatory, but claims that it contains four subparts.

Ruling: This interrogatory is allowed.

██████████ 12. Please describe all communications about removing ██████████ from the Office Director position, including, but not limited to all communications with ██████████. For each communication identified, include the following information: (1) the date of the communication; (2) the name and contact information of any party to the communication; (3) the substance of the communication; and, (4) the method and physical location where the communication occurred.

The agency objects on grounds that this is duplicative of No. 11 above, and is unduly burdensome.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

██████████ 13. Is it fair to say that ██████████ was reassigned in order to ease friction in her work environment? If not, explain why not.

The agency objects on grounds of vagueness and duplication. USAID argues that it is unclear what is meant by the phrases “fair to say” and “to ease friction” and this is not a proper question for a fact witness because grievant is seeking opinions. In addition, the agency contends that this interrogatory is duplicative of No. 11, which asks for personal knowledge of why grievant was removed from the office director position.

Ruling: The objection to this interrogatory is sustained. The purpose of interrogatories is not to elicit witnesses’ opinions about why a decision-maker reassigned ██████████. The question may not be asked.

██████████ 14. Describe any 360 Reviews for ██████████ you are aware of.

The agency objects on grounds that it has already produced the 360° summaries and the SMG Panels do not receive the “raw” 360° feedback.

Ruling: The objection to this interrogatory is sustained. Although the 360° summaries are relevant, they have been fully disclosed by the agency. This inquiry is repetitive of questions that have been previously answered by USAID. There is no reason to believe that employees

would have better information than the agency. Moreover, the question risks disclosure by a witness of 360° feedback sources. This question may not be asked.

Agency Objection XII - Interrogatories to [REDACTED]

■ 11. Please describe any role you have had in connection with the SMG assignment process, including any role in the collection, preparation, or presentation to the SMG Panel, of information regarding candidates.

USAID objects on the basis that this interrogatory is overbroad in that it seeks general information about the SMG assignment process and is not specifically relevant to grievant's claims.

Ruling: The objection to this interrogatory is sustained in part. If it is given, it must be amended as follows:

■ 11. Please describe any role you have had in connection with the SMG assignment process involving [REDACTED], including any role in the collection, preparation, or presentation to the SMG Panel, of information regarding her bids.

■ 12. Please describe the process by which HR receives 360 source feedback and summarizes that information for the SMG Panel. Include the identity of any person that receives, reviews, or compiles (sic) the information, and any criteria relevant to determining what to include or exclude from that summary.

USAID makes the same argument as with ■ 11 above.

Ruling: The objection to this interrogatory is sustained in part as seeking irrelevant general information. If it is given, it must be amended as follows:

■ 12. Please describe the process by which HR received 360° source feedback for [REDACTED] and summarized that information for the SMG Panels that reviewed her bids. Include the identity of any person who you know received, reviewed, or compiled the information, and any applicable criteria used to determine what to include or exclude from that summary.

■ 13. Attached to this document as Exhibit B is an email exchange from May 2013. Please review the email and explain why HR rejected [REDACTED] proposed 360 sources. If HR's action was based on any regulation, policy, guideline, notice or similar document, please identify the document.

The agency objects on the basis that the email is dated more than two years after the grievance was filed and therefore well after the events that are the bases of the grievance. In addition, USAID objects because the interrogatory asks ██████████ to explain an email to which she was not a party.

Ruling: The objection to this interrogatory is sustained. The question asks the witness about events that post-date the filing of the grievance by two years. More importantly, it asks the witness to explain an email to which she was not a party and that she did not write. This question may not be asked.

██████ 14. Please explain the process by which USAID decided to assign ██████████ ██████████ to the complement as a Backstop 2 to work on the Quadrennial Diplomacy and Development Review (“QDDR”). Include an identification of any individual involved in the decision-making process as well as their role in that process.

USAID does not object to the first sentence but argues that the second sentence contains excessive subparts and is unlikely to lead to relevant information given that discovery has closed.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

██████ 15. Please identify the criteria used by USAID for assigning employees to the QDDR.

USAID objects on grounds that grievant was not “assigned” to the QDDR.

Ruling: The objection to this interrogatory is overruled. Although the request is general, grievant may use one of her 30 interrogatories to ask this question. If grievant’s work for the QDDR was not an assignment, as the agency claims, the witness will so state.

██████ 16. Please describe all communications about ██████████ bids or assignments, including, but not limited to, all communications with ██████████. For each communication identified, include the following information: (1) the date of the communication; (2) the name and contact information of any party to the communicat[ion]; (3) the substance and purpose of the communication; and, (4) the method and physical location where the communication occurred.

USAID argues that this interrogatory is “ridiculously overbroad” because there is no time limit to the question and it does not limit the request to communications to which the witness was a party.

Ruling: The objection to this interrogatory is sustained. The request is overbroad requiring the witness to duplicate the e-discovery that the agency has already produced and requiring this one witness to produce literally every communication involving every assignment request and decision throughout grievant’s entire career with the agency. It is unduly burdensome to this witness. The question may not be asked.

■ 17. Describe all efforts by USAID to find ■ a suitable posting following her removal from the ■. Include all jobs or duties assigned to ■ following her removal, and any difficulties USAID encountered in finding an appropriate assignment.

USAID objects to this question because it has been answered in detail by the agency and should not have to be duplicated by the witness. In addition, the agency contends that “suitable position” and “appropriate assignment” are undefined phrases. The agency argues that all of grievant’s assignments have been suitable and appropriate. Finally, USAID claims that the question is overbroad and unlimited as to the time period covered.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

■ 18. During the time that ■ was on the complement, where was she physically located and who was responsible for her evaluations?

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

Agency Objection XIII - Interrogatories to [REDACTED]

The agency propounded 14 additional questions (11-24) to [REDACTED]. Questions 11-16 are identical to those propounded to [REDACTED].⁷ Therefore, the agency incorporates its objections to questions 11-16 as propounded to [REDACTED] and adds the following objections to additional questions addressed to [REDACTED].

Ruling: The Board repeats the same rulings regarding interrogatories 11-16 as were made regarding interrogatories [REDACTED] 1-16.

[REDACTED] 17. Is it accurate to say that you told [REDACTED] that she was not receiving favorable assignments due to negative 360 feedback? If not, explain why you believe this statement is not accurate.

USAID objects on the grounds that 360° feedback is not at issue in this case.

Ruling: The objection to this interrogatory is overruled. The interrogatory is permitted.

[REDACTED] 18. Describe any comments made by [REDACTED] about [REDACTED] which you heard or heard about which were derogatory in nature.

USAID argues that the question is irrelevant and vague. Moreover, the term “derogatory” is undefined.

Ruling: The objection to this interrogatory is overruled. The question is allowed, but is limited to the 2004 – June 2011 timeframe (the date of filing the instant appeal).

[REDACTED] 19. How many FSOs do you know who were assigned to the complement during the time when you worked in HR?

The agency argues that this question is seeking comparator information which is not allowed. The number of others placed on the complement during grievant’s time on the complement is irrelevant.

⁷ There is a minor difference between the two interrogatories No. 14. The one to [REDACTED] adds the words “complement as a Backstop 2 to work done on the” that are not found in the corresponding interrogatory to [REDACTED].

Ruling: The objection to this interrogatory is sustained in part. The question calls for information about events that occurred during [REDACTED] entire tenure in HR. Grievant does not establish that this is a relevant time period. The question, if asked, must be edited to refer specifically to 2004-2011 as follows:

[REDACTED] 19. How many FSOs do you know who were assigned to the complement during years when you worked in HR between 2004 - 2011?

[REDACTED] 20. Do you agree that being placed on the complement is harmful to an FSOs career? If not, please explain why not.

USAID objects on grounds that [REDACTED] is not an expert witness and should not be required to give her opinion about the effect of being on the complement on an employee's career. The agency also claims that the question is overbroad and vague because "the circumstances that motivate placement on the complement are as relevant, if not more relevant, than the fact of being placed."

Ruling: The objection to this interrogatory is overruled. The question is allowed.

[REDACTED] 21. For each of [REDACTED] bids, please identify the members of the "small SMG committee" that makes the final recommendations to the Administrator.

The agency objects to the interrogatory as irrelevant and overbroad and characterizes it as a fishing expedition.

Ruling: This objection to this interrogatory is sustained in part. If this question is asked, it must be limited to the years 2004 – June 2011 and "small SMG committee" must be defined.

[REDACTED] 22. Please state whether [REDACTED] was recommended for any position by the large SMG committee that is made up of all Bureau and Office representatives with open positions. If so, was she removed as a candidate by the small SMG group, the Administrator, or any other person or body?

The agency repeats its objection as stated in No. 21.

Ruling: The objection to this interrogatory is sustained in part. If the question is asked, it must be limited to the timeframe 2004 – June 2011 and both “large SMG committee” and “small SMG group” must be defined.

██████ 23. What counsel or guidance, if any, did you provide ██████████ in connection with her bids.

USAID objects on relevance grounds.

Ruling: The objection to this interrogatory is sustained in part. If the question is asked, it must be limited to the 2004 – June 2011 time period.

██████ 24. Are you aware of any letter of complaint about ██████████? If so, describe the letter and state how and from whom you received it.

USAID objects on grounds that the question is vague and irrelevant.

Ruling: The objection to the interrogatory is sustained in part. If the question is asked, it must be limited to the 2004 – June 2011 time period.

Agency’s Objection XIV- Grievant’s Interrogatories to ██████████

Grievant has propounded seven additional interrogatories (Nos. 11-17) to ██████████ in addition to the common interrogatories 1-10. No 17 is identical to ██████████ No. 20. The ruling, therefore, is the same. The agency raises the following objections to interrogatories 11-16 as propounded to ██████████.

██████ 11. Describe the process that led to removal of ██████████ as the ██████████, including identification of all persons involved and their roles.

The agency contends that this interrogatory in substance is the same as that propounded to ██████████ *et al.*⁸ and that it is vague, overbroad and unduly burdensome.

Ruling: The objection to this interrogatory is sustained in part. If it is asked, it must be amended as follows:

⁸ VIII. No. 11.

USAID objects on grounds that the interrogatory is overbroad, irrelevant and vague. The question is not limited to a relevant time period and “covers every person in the agency who may have communicated with [HR]. . . .”

Ruling: The objection to this interrogatory is sustained. The question is overbroad, is not limited to information within the witness’s knowledge and does not seek information that is relevant to the claims in this appeal. The question must be deleted.

Agency Objection XV - Interrogatories to [REDACTED] and [REDACTED]

The agency does not recite the interrogatories propounded to these two individuals. Instead, it points out that grievant’s counsel had averred that they were members of [REDACTED] Bureau Management at the time grievant was removed as [REDACTED] and therefore had knowledge relevant to circumstances of her departure. Grievant’s interrogatories, directed to management officers [REDACTED] [REDACTED], regarding her departure from the [REDACTED] position, were not directed to these two. In fact, USAID argues, the interrogatories propounded to [REDACTED] demonstrate that grievant views them “as employees with alleged knowledge of complaints regarding Grievant.”

The agency notes that during the status hearing, the Board overruled the agency’s objection to [REDACTED] believing that “by listing the[se] individuals in its March 17, 2014 letter,” the agency opened the door to further discovery from the listed individuals. USAID now contends that neither [REDACTED] was listed in that letter and that there is no evidence to support grievant’s counsel’s claim that these witnesses were managers. The agency further contends that the names of these two witnesses do not appear in any documents produced by the agency that “contain or reference complaints regarding Grievant while she was the [REDACTED]

██████████.” The agency requests that the interrogatories prepared for these two employees be stricken.

Ruling: The objection to this interrogatory is sustained. ██████████ were not identified by USAID as employees who might have knowledge of grievant’s claims, or having knowledge of complaints made against her, or as being a part of the management team in the ██████████ office. Grievant, moreover, does not respond to this specific objection. Accordingly, the entire set of questions propounded to these two individuals must be withdrawn.

Agency Objection XVI - Interrogatories to ██████████

Grievant incorrectly reversed the name of ██████████ as ██████████.” The agency asks that the Board order grievant to correct this employee’s name on the set of interrogatories prepared for him.

Ruling: The request that grievant amend this set of interrogatories to correctly state the witness’s name is granted.

IV. DECISION

The objections filed by USAID are sustained in part and overruled in part as stated above. The Board overrules the agency’s objection to the number of subparts in each question, instruction and definition; however, we conclude that grievant has exceeded the total number of authorized questions including subparts. Grievant shall therefore modify the interrogatories consistent with this order, but she shall make no other changes or add any additional questions. The interrogatories shall be served on the witnesses, through agency counsel, by no later than November 14, 2014. Agency counsel shall immediately forward the interrogatories to the witnesses. Responses to the interrogatories shall be filed with both grievant’s counsel and agency counsel, by not later than November 28, 2014.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



James E. Blanford
Member



Jeanne L. Schulz
Member