

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2013-032

April 11, 2014

**ORDER: MOTION TO COMPEL
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

James E. Blanford
Margaret E. Keeton

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Daniel M. Creekman
Attorney Advisor
HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO COMPEL DISCOVERY

I. THE ISSUE

██████████ (grievant), a Diplomatic Security (DS) Special Agent with the Department of State (Department, agency), grieved a seven-day suspension without pay and the placement of a disciplinary letter in his Official Performance File (OPF). This discipline arose from an incident between the grievant and ██████████ on July 23, 2011, at the grievant's apartment in ██████████. The charge underlying the discipline was "Engaging in a Physical Altercation with a Dangerous Weapon." During the discovery process of this appeal, the grievant filed the instant motion to compel. He seeks an order from the Board compelling the Department to provide a response to the Grievant's Document Request 6. This relates to the medical records for treatment ██████████ received at post, for cuts to his fingers. In addition, the grievant seeks an order compelling the Department's answers to Grievant's Interrogatories No. 1 and No. 2. This order addresses both issues in the motion to compel.

II. BACKGROUND

The incident giving rise to the discipline grew out of a social gathering. On the evening in question, the grievant was part of a group of people who had been drinking at a local bar. The group departed and re-assembled at the grievant's apartment. The group included ██████████ the grievant, and three summer-hire employees of the Embassy. ██████████ and his girlfriend began to argue. Eventually the grievant and ██████████ engaged in personal conversation on the balcony. According to the grievant, ██████████ became emotional about personal matters and began to disparage grievant for not helping him in a more demonstrative way. During this verbal

confrontation, ██████ allegedly blocked the grievant from returning to the inside of the apartment. ██████ somehow sustained cuts to one of his hands. In subsequent interviews, the grievant admitted that he had restrained ██████ but denied using any knife against him.

Eventually, ██████ sought medical treatment for the cuts. He allegedly told multiple, different stories about how he had been injured. According to the grievant, ██████ told the Embassy nurse that he had been “playing around” with a knife, a statement he later admitted was untrue. Allegedly, he told the Detachment Commander two other stories: that he had cut himself while cooking and that he had cut himself during a fight. Ultimately, the Decision Letter relies on yet a more involved claim of ██████ *i.e.* that the grievant pulled out a knife, grabbed ██████ from behind and cut him.

██████ did receive medical treatment for cuts to one hand. The grievant sought medical treatment for a headache and difficulties processing information, based upon his claim that ██████ had slammed his head into a wall.

Originally, the grievant received a letter from the agency proposing a suspension of 20 days. After his written response and oral presentation to the Deputy Assistant Secretary for Human Resources, he received a Decision Letter requiring him to serve a seven-day suspension without pay.

The grievant challenges his suspension on several grounds. Among them are his contentions (1) that the Department failed to reconcile or resolve the multiple, conflicting statements of ██████ (2) that the Department failed to consider the factors that allegedly justified the use of force in self-defense and failed to consider other mitigating factors; and (3) that the discipline was overly harsh and inconsistent with lesser discipline previously imposed for similar or more egregious cases.

III. POSITIONS OF THE PARTIES

A. The Grievant:

The disputed discovery requests are summarized and explained as follows.¹

First, in Document Request No. 6, the grievant demands “[a]ll medical records from [REDACTED] post medical file relating to any treatment he received for the cuts to his fingers.” In the motion to compel, the grievant explains the relevance and necessity for this discovery. The proverbial bottom line is that the actual medical records – never reviewed by the agency in its investigation of the incident – might show whether there is a factual basis for some of the conclusions in the Report of Investigation (ROI). The issue is the true severity of [REDACTED] injury – compared to statements made by [REDACTED] and his credibility or lack thereof. The ROI (in one of its 19 attachments) refers to “stitches or butterfly sutures.”² Yet, there is so far no proof in the record that [REDACTED] actually required any sutures for the cuts on his hand. Furthermore, the grievant contends that the condition of the skin (as depicted in the photograph of the cuts) may be attributable to acne or some other problem that is not traceable to any injury caused by the grievant.

Second, the two Interrogatories seek information about the prior history of [REDACTED] as an aggressive person in a fight. Interrogatory No. 1 states:

Upon information and belief, [REDACTED] started a fight with Marine Security Guard (MSG) [REDACTED] some time in 2012, after I was curtailed from post. Please ask the MSG [REDACTED] [REDACTED] and any Local Guard force member present at post that day whether they witnessed this fight between [REDACTED] and [REDACTED] and if so, to describe what they saw.

¹ At the Board’s request, for the sake of completeness, grievant has filed a full copy of the discovery requests.

² The entire ROI is in the record of proceedings (ROP) of this appeal. Attachment 1 (the report of the interview of [REDACTED] contains the reference to stitches or butterfly sutures.

Interrogatory No. 2 states:

Please ask [REDACTED], a U.S. Embassy [REDACTED] receptionist, whether she is aware of the fact that [REDACTED] started a fight with MSG [REDACTED] in 2012 and, if she was aware, to then ask her to describe what she knows about the fight.

The grievant asserts that the answers to these interrogatories are material to his claim that he acted in self-defense and that his manner of defending himself was reasonable. In his motion to compel, the grievant states, “My request for information about a fight [REDACTED] had with a Marine Security Guard is relevant and material to my grievance because it shows that [REDACTED] has engaged in similar conduct with others and that he has carried things too far, requiring others to forcibly restrain him, for example by placing their hands on his neck.”

B. The Department:

The Department opposes the grant of any relief as far as the motion to compel is concerned. With respect to the medical records, the agency notes that there is no lawful basis for releasing the medical records – in the absence of an order from this Board authorizing or requiring such release. The Department’s only substantive argument for opposing the motion is the agency’s view that the fact that [REDACTED] sustained the cuts is not in dispute. The agency tersely suggests that the nature of the treatment received is “entirely irrelevant.”

Where the Interrogatories are concerned, the agency raises several points in opposition to producing the discovery. One, the Department contends that any fight between [REDACTED] and another MSG – a year after the present incident – is not relevant to whether the grievant pulled a knife on [REDACTED]. Moreover, the agency criticizes the grievant’s reliance on Rule 404 of the Federal Rules of Evidence, as grievant cites this Rule to support the relevance and admissibility of so-called “character” evidence.

Two, the Department emphasizes that it cannot obtain information about an internal Marine matter, and, even though the grievant is free to make inquiries with the Marines, the Department of State cannot be compelled to do so.

Three, in support of this motion to compel, the grievant has provided to the Board a tape and transcript of a telephone conversation between [REDACTED] and others, regarding the alleged fight. The agency argues that if the grievant is in contact with her, he is free to interview [REDACTED] himself. The transcript does not show that [REDACTED] has any first-hand knowledge of the fight. If anything, she was listening to an account of the incident, rendered to her by others. The agency asserts that her recollections would be inadmissible hearsay.

Four, the Department asserts that MSG [REDACTED] is “no longer at post” and no longer under Chief of Mission Authority. In addition, the two MSGs involved in the alleged fight are also no longer at post and are not under the control or authority of the Department of State.

Five, the Department regards the request for the [REDACTED] incident as “an overly burdensome blind fishing expedition.” The Department complains that the grievant not only does not know the date of the alleged fight but does not identify any particular individual to whom the Department could direct an inquiry.

IV. DISCUSSION

The principle guiding our decision is that a grievant is entitled to obtain, through discovery, information from the agency that is not privileged and that is relevant and material to the issues presented in the grievance. Relevant and material information is that which tends to prove or disprove a fact that is of consequence and that may affect the disposition of the grievance or is likely to lead to the discovery of such information. For the reasons that follow, the Board will exercise its discretion to grant the motion in part and deny it in part.

The Medical Records of [REDACTED] The Board concludes that grievant is entitled to inspect the records of medical treatment provided to [REDACTED] relating to the cuts sustained in the altercation with grievant. The Board herein will require the Department to permit the grievant to view the records in the presence of a Department employee designated by the Department, subject to the requirement of grievant maintaining the confidentiality of such information.³ The Board is persuaded that such medical records are likely to contain specific information about whether the cuts required any stitches or suturing of any kind – clarifying the severity of the injuries. Moreover, the specific medical details may reveal whether the cuts were caused by a knife and may otherwise reveal how the injury was categorized. Assumptions about the severity of the cuts appears to be a key feature of the ROI, and the grievant is entitled to explore whether the nature of the discipline would have been or should have been affected by the true facts surrounding the injury. Furthermore, since medical care providers typically ask a patient how an injury was sustained, the medical records may contain statements by [REDACTED] that may have affected the disposition of the grievance. The agency's argument that such records are not relevant lacks merit.

Interrogatory No. 1. We find that most of the arguments of the agency in opposing compulsion of answers to this interrogatory are logical and convincing. As a threshold matter, the Board perceives no legal basis for ordering the Department to search out and obtain statements from Marines. The grievant has not suggested any legal basis for doing such. The grievant does not dispute that [REDACTED] is no longer at post. Under the totality of circumstances, the Board concludes that there is no basis for issuing an order of compulsion as to [REDACTED] or the Marines. This aspect of the motion will be denied.

³ The Board intends that such records may be used only in this litigation and that such records shall not be divulged to any persons other than the parties and their counsel.

The Board concludes that the only remaining potential witnesses whose statements are discoverable are Local Guards who were at post during 2012 and who are presently still at post. In partially granting relief to grievant, the Board endeavors to tailor the agency's responsibility to the one layer of this interrogatory that is justified. The Board finds that grievant is entitled to know the identities and recollections (if any) of Local Guards who were witnesses to the alleged fight or altercation between [REDACTED] and [REDACTED] at this post during calendar year 2012 and who are still available at post. The Board finds that it would be inappropriate to require the Department to search out Local Guards who are no longer working at the Embassy. In satisfaction of Interrogatory No. 1, the Board will require only that the Department do the following: (1) inquire of present Local Guards if they were witnesses to the alleged incident and (2) if so, to provide to the grievant their personal recollections of what they saw and/or heard. The Department shall then memorialize what those persons have to say and shall provide that documentation to the grievant as an Answer to Interrogatory No. 1. Limiting the discovery response to such statements reasonably addresses the Department's concern about an unfocused "fishing expedition" and appropriately avoids any appearance of broadly coercing foreign nationals to provide testimony or to become embroiled in litigation.

Interrogatory No. 2. Where [REDACTED] is concerned, the Board accepts some, but not all, of the agency's objections to this interrogatory. First, the Board must reject the agency's complaint that the recollections of [REDACTED] are inadmissible hearsay. As an administrative body, the Board may consider (as the agency may consider) evidence that is disallowed as hearsay in judicial proceedings. *See* FSGB Case No. 2003-012 (August 27, 2004). Indeed, the Supreme Court has held that hearsay is admissible in administrative proceedings. *Richardson v. Perales*, 402 U.S. 389 (1971). Even though the Board generally may admit hearsay as evidence,

it is premature to make rulings on final admissibility where discoverability is the issue. In adjudicating the merits, the Board eventually may or may not admit certain evidence, depending on the circumstances. For this reason, hearsay is not typically a basis for objecting to discovery. Thus, to be fair to the grievant, the Board focuses on the grievant's explanation of why he desires this discovery.

The grievant contends that [REDACTED] information about the alleged fight (including information about the identities of eyewitnesses) is vital to demonstrating that he acted in self-defense and that the agency failed to give sufficient weight to self-defense as a "mitigating factor" in determining the discipline. In this appeal, he seeks to support this argument by amassing evidence of the aggressive behavior of [REDACTED]

The Board has considered both the grievant's arguments and the agency's arguments on whether this discovery should be compelled. For the following reasons, the Board ultimately finds that the motion should be granted as to Interrogatory No. 2.

Even though one of the grievant's arguments is legally without merit, the Board must recognize the practical nature of what he is seeking. As a faulty argument, the grievant specifically cites Rule 404 of the Federal Rules of Evidence in support of his demand for [REDACTED] answer to this interrogatory. He argues that the Rule permits the introduction into evidence of "character" evidence or evidence of a pertinent trait. Here, that trait is physical aggressiveness. While neither the agency nor this Board is strictly bound by the Federal Rules of Evidence, it is a fact that Rule 404 simply does not apply to non-criminal cases. On its face, the Rule provides in pertinent part as follows:

- (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. (2) Exceptions for a Defendant or Victim in a

Criminal Case. The following exceptions apply in a criminal case: . . . (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait

Fed. R. Evid. 404(a)(1)-(2) (emphasis added).

At this point in this litigation, “character traits” are not the issue, as opposed to factual information about a person’s behavior. Even if Rule 404 would not support admissibility for final adjudication, the Board is satisfied that the underlying, practical nature of the discovery request is still within the range of information that is discoverable. The Board is persuaded by the following considerations. First, the Board sees the link between the discovery request and the particular behavior that allegedly triggered the need for the grievant to defend himself. In his appeal, the grievant specified that “the altercation developed from [REDACTED] suicidal ideation and aggressive behavior.” For the sake of brevity, we will not pause to repeat all of those details. The record speaks for itself. It is clear that the grievant is searching for facts about specific behavior, not merely the simplistic detail of which man threw the first punch in the earlier incident. Indeed, in sustaining the proposed discipline, the Deputy Assistant Secretary of State for Human Resources acknowledged to the grievant that “[REDACTED] was aggressive with you on the night of the incident.” The grievant was not accused of being the instigator of the altercation.

Fights between two different sets of human beings turn naturally on the motivations and circumstances of the moment and can be influenced by history between the parties and other factors. Nonetheless, the grievant is looking for something more specific and sophisticated than ordinary “character” evidence.

The Board’s interpretation of the discovery request about the [REDACTED] incident applies equally to the Local Guards and to [REDACTED].

In satisfaction of Interrogatory No. 2, the Board will require the Department only to provide to the grievant [REDACTED] answer to the Interrogatory in writing. The Department must provide her with a copy of the Interrogatory itself, so that she will know what she is being asked.

The Board will not speculate on how useful the interrogatory answers will be to the grievant. However, we certainly cannot discount the possibility that witness recollections may reveal peculiar behavior of [REDACTED] that is relevant to his alleged unusual (allegedly suicidal and oddly explosive) behavior in the present case. This is an important distinction from whether [REDACTED] was simply the “aggressor” in the [REDACTED] incident. The unique behaviors of [REDACTED] (if any are found) may impinge on credibility findings and/or the interpretation of material facts in the present case.

V. ORDER

The motion to compel is granted in part and denied in part. The Department shall provide discovery as specified herein, compliant with the Board’s instructions, within 20 days of receipt of this order.

For the Foreign Service Grievance Board:

[REDACTED]

Cheryl M. Long
Presiding Member



James E. Blanford
Member



Margaret E. Keeton
Member