Foreign Service Grievance Board

Annual Report for the Year 2001

Message from The Chairman

Foreign Service Grievance Board

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I am pleased to transmit the Annual Report of the Foreign Service Grievance Board for the year 2001. It is intended to provide information and historical perspective on the operations and responsibilities of the Grievance Board and to meet the obligation of Section 1105(f) of the Foreign Service Act (22 U.S.C. 4135(f)). Thus the part of this Report which shows in tabular form statistics depicting the number of cases decided meets the basic requirement of law. However, I am providing additional narrative so that the report becomes more meaningful.

One of the most significant matters to report is the dramatic decrease in the workload of the Grievance Board for the past calendar year. Whereas I anticipated in my Annual Report of last year that 90 grievances might be expected to be filed during 2001, the actual number was only 49. That caseload is the lowest annual intake in many years. Needless to say, that sharp reduction was not anticipated. It is uncertain whether this was an unusual year or harbinger of a trend. For the early months of calendar 2002, our input is at a pace somewhat ahead of the pace for 2001, and more in line with the usual intake.

The bulk of the decline is in performance evaluation cases. The reason for this sharp decline in filings is not readily discernible. Certainly there is every indication that the foreign affairs agencies have taken corrective action at the source and have settled more cases before they mature into a formal grievance appeal. And the Board does not overlook the likelihood that these agencies have become more efficient thereby reducing the possibility of an actionable grievance being filed

Most grievance appeals come from employees in the Department of State. Far behind in case filings is the United States Agency for International Development. This is no surprise for State has, by far, the largest number of employees.

Several developments during the period covered by this report warrant further mention. All Board members work under contract on a part-time basis, and none are full-time. Indeed, not all are located locally. In order to foster greater collegiality the Board convenes general membership meetings several times each year. For the most part these meetings focus on current problems and issues. That the membership has keen interest in the Grievance Board work is clear from the substantial and willing attendance of the members at these meetings. These meetings have proven to be a useful method for the free exchange of ideas and discussion of issues pending before the Grievance Board. They will be convened at least quarterly during 2002.

The accompanying Report provides a realistic portrait of the work of the Board during the past year. Our mandate, as set forth at Section 101 (b)(4) of the Foreign Service Act (22 U.S.C. 3901 (b)(4)), is to process cases promptly all the while

maintaining a fair and effective system for the resolution of grievances that will ensure the fullest measure of due process for the members of the Foreign Service. That mandate continues to be our beacon. Unquestionably there are times when the issuance of a decision lingers. These are becoming less often for overall our decisions are timely, that is within 90 days of closing the record. Cases that consume more time typically have novel or complex issues.

From time-to-time our decisions are appealed to the Federal Courts. Last year was no exception. Significant Federal court decisions are highlighted in this Report and serve to provide guidance when similar issues come before us.

In the mid-nineties the caseload was just over 100 filings per year, so the current workload is essentially half of that sum. As a consequence the Board has been notified that its membership, currently 27, will be significantly reduced. Typically the Board has had a membership of about 20, equally divided among professional arbitrators and retired Foreign Service personnel. The Grievance Board work is very labor intensive.

As I reported last year, a prime goal for 2001 was to enhance our electronic retrieval capability. Accomplishment of that goal is nearly at hand. Our report provides a full explanation of current developments.

In April, along with the Board's Executive Secretary, I met personally with Secretary Powell. The Secretary was briefed on the work of the Grievance Board, and expressed his support for the important work that it performs and encouraged our pursuit of improved research capability.

During 2001 the percentage of disciplinary actions filed showed an increase. Among the more prevalent issues were those related to security violations and abuse of the Internet.

Sincerely,

Edward J. Reidy
March 1, 2002

Board Members, Executive Secretary and Staff

Under Section 1105 of the Foreign Service Act of 1980, as amended (the Act), Congress established the Foreign Service Grievance Board, which consists of no fewer than 5 members who are independent, distinguished citizens of the United States. Well known for their integrity, they are not employees of the foreign affairs agencies or members of the Service. Each member -- as well as the Chairman -- is appointed by the Secretary of State for a term of two years, subject to renewal. Appointments are made from nominees approved in writing by the agencies served by the Board and the exclusive representative for each such agency. The Chairman may select one member as a deputy who, in the absence of the Chairman, may assume the duties and responsibilities of that position. The Chairman also selects an Executive Secretary, who is responsible to the Board through the Chairman.

As of December 31, 2001, Edward J. Reidy was the Chairman of the Board and he selected Edward A. Dragon as Deputy. Don Cooke was Executive Secretary.

Members of the Board

Charles D. Ablard	David Lazar
James E. Blanford	Lawrence B. Lesser
David Bloch	Caroline V. Meirs
Steven M. Block	Victor B. Olason
Garber A. Davidson	Edward J. Reidy (Chairman)
Barbara C. Deinhardt	John H. Rouse
Edward A.Dragon (Deputy Chairman)	Jeanne L. Schulz
Jake M. Dyels	Gail P. Scott
Charles Feigenbaum	Barry E. Shapiro
Margery F. Gootnick	Paul G. Streb
Lois C. Hochhauser	John C. Truesdale
Theodore Horoschak	Keith L. Wauchope
Anthony M. Kern	Richard H. Williams
Warren R. King	

As of December 31, 2001, the Board had two Senior Advisors, Barnett Chessin and Donna Anderson. Larry Panasuk retired on December 31 after serving as a senior advisor for most of 2001. The Support Staff consisted of Conchita M. Spriggs, F. Elena Cahoon, and Lena Steinhoff. Unless the workload increases, that staffing is sufficient.

Structure of The Board

The Act which created the Grievance Board was designed to revamp the personnel system within the Foreign Service just as the Civil Service Reform Act (Pub. L. No. 95-454, 92 Stat. 1111 (1978)) aimed to accomplish improvements for the Civil Service personnel system. Congress established this Board to assume an appellate adjudicatory function except in disciplinary and separation for cause proceedings where it has original jurisdiction. Consonant with the objectives of the Foreign Service Act to ensure procedural protections for Foreign Service employees, the Grievance Board must resolve the tensions which sometimes develop between the need to protect employee rights and the desire to enhance Foreign Service efficiency.

The Board operates from a single location, State Annex 15, in Rosslyn, Virginia. Although it may conduct hearings abroad, it was not necessary to do so in 2001. Most, yet not all, grievances are adjudicated on a record without an oral hearing.

The Board may operate as a whole, through panels, or individual members designated by the Chairman. Currently, the Board functions almost exclusively through panels of three members. Each panel is chaired by an experienced arbitrator and also includes two retired members of the Foreign Service. Since 2000, on a pilot basis, the Board has used single member panels for less complex cases and this practice continued in 2001. This procedure is designed to enable more prompt decision-making while preserving the rights of the parties.

The Secretary of State may remove a Grievance Board member for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform, established at a hearing; no such action has been required in the history of the Grievance Board.

The Chairman has delegated to the Executive Secretary the authority to assign cases to the members for decision. Cases are assigned to panels according to complexity and consistent with the experience, availability, and workload of each member. This system has proven responsive to the needs of all and will continue to be followed. No member is ever assigned a grievance where the assignment may even appear to create a conflict of interest.

The Board obtains facilities, services, and supplies through the administrative services of the Office of the Secretary of State. Expenses of the Grievance Board are paid out of funds appropriated to the Department of State. No serious budgetary problems arose in 2001. None are anticipated for 2002.

Records of the Grievance Board are maintained in-house by the Board and kept separate from all other records of the Department under appropriate

Structure of The Board

safeguards to preserve confidentiality of the grievant. The Board is charged with making every effort, to the extent practicable, to preserve the confidentiality of the grievant or the charged employee in matters brought before it. This requirement is closely adhered to.

Based on its statutory authority, the Grievance Board has issued regulations concerning its procedures. These regulations are set out at 22 CFR §§901 et seq. Some modest changes are now being finalized. No wholesale changes are seen as necessary or even desirable.

Jurisdiction

The Board's jurisdiction extends to any grievance, as defined in section 1101 of the Act, and to any separation for cause proceeding initiated pursuant to section 610(a)(2). In determining what is grievable, the legislative history makes clear that this Board is to avoid a narrow interpretation of its jurisdiction. That policy prevails when close questions of jurisdiction are encountered.

While the Act grants broad jurisdiction for grievances of current members, former members have limited grievance rights. A former member, or surviving member of the family of a former member of the Service, may file a grievance only with respect to an alleged denial of an allowance, premium pay, or other financial benefit. Grievances from former members are infrequent.

Most often questions as to jurisdiction are handled at the very outset, for if the Board lacks jurisdiction, it has no power to act. Jurisdictional issues recur regularly. Although the workforce of the Foreign Service agencies consists of a blend of Civil Service and Foreign Service employees, the jurisdiction of the Foreign Service Grievance Board is limited to current and former members of the Foreign Service. Civil Service employees may have recourse to the Merit Systems Protection Board.

The Board has jurisdiction with respect to Labor-Management implementation disputes under FSA §1014. These disputes have been uncommon. None were submitted to the Board under this provision in 2001. In addition, the Board hears appeals of claims of overpayment of Foreign Service retirement annuities under 22 CFR Part 17 and certain appeals under the Foreign Service Pension System as specified in FSA §859. Grievances under these latter two provisions have been rare.

Board Decision-Making

The principal function of the Board is to provide a forum for the fair review and adjudication of grievance appeals. Its primary responsibility in satisfying that function is to interpret and apply the Act. Many decisions involve the application of our regulations and the interpretation of agency regulations, policies, and procedures known as the Foreign Affairs Manual. In

processing grievances, the Board recognizes the need to accommodate the many employees appearing without legal counsel or other representation. Oftentimes they obtain assistance from the American Foreign Service Association (AFSA). Able assistance from AFSA is welcome because that often accelerates case processing while providing the grievant professional help. Regulations and precedent establish the procedural bases for practice before the Board. Federal Court decisions do, of course, have a dramatic impact on Board law. Our decisions are made available to the public, but in excised form, thereby preserving employee confidentiality.

Remedies

The remedial power of the Grievance Board is broad. It may, in general, direct the agency to take any corrective action deemed appropriate provided it is not contrary to law or a collective bargaining agreement. See 22 CFR § 908.1.

In this connection if the Board finds a grievance meritorious, it has the authority to direct the agency to retain a member in the Service; reinstate a member with back pay; reverse an agency decision denying compensation or other financial benefits authorized by law; reverse or mitigate the penalty in a disciplinary action; and correct personnel records. Where it may not direct, the Grievance Board may recommend agency action. Section 908.3 of our regulations provides it may recommend remedial action that relates directly to promotion, tenure or assignment or "to other remedial action not otherwise provided for in this section . . .." In those circumstances the agency "shall implement the recommendation . . .." unless it is rejected as contrary to law or would adversely affect the foreign service or national security of the United States. The Board may also award reasonable attorney fees if the grievant is the prevailing party and if warranted in the interest of justice.

Research Capability and Computerization

The Grievance Board made significant progress in its goal of applying information processing technology to the Board's work in order to speed the processing of cases and to make the Board's research capabilities available to the broadest possible audience. In 2001, the Board, through the Executive Office of the Secretary of State, contracted with Alphatech Corp, to design and implement an Internet web site. The web site for the Board will contain the Board's regulations, policies, and procedures and will have a searchable database of the Board's significant Orders and Decisions. At year's end, Alphatech had completed the major development work and it is expected that the Board's web site, *www.fsgb.gov*, will be fully functional early in 2002. The Grievance Board has also acquired an upgraded computer network so that Board members and staff will have access to the latest information technology on the desktop. Installation of the new network will be completed in March 2002. The Board has taken the first steps in establishing video-conferencing capability in order to reduce travel costs associated with participation of Board members, parties, and witnesses in hearings and other meetings convened by the Board.

Renovation of the FSGB Offices

As a part of the lease renewal process for State Annex 15, where the Grievance Board's offices are located, the FSGB office suite was completely renovated in 2001. During the renovation, the Board spent two months in temporary offices in SA-15. Changes in the layout of the offices increased the working space available to the Board. A new conference room was added in the place of an unused corridor. Phase two of the renovation project will be completed in 2002 and will provide a more efficient and pleasant atmosphere for the Board's work.

Judicial Review

Final actions of the Board are reviewable in the district courts of the United States. Requests for judicial review must be filed within 180 days of the Board's or the Secretary of State's final action. The Act provides that the standards of the Administrative Procedure Act, as set forth in Chapter 7 of Title 5, United States Code, shall apply to a judicial review of a Board decision

The following are summaries of judicial decisions rendered in 2001:

Menyhert v. Department of State, Civil Action No. 99-3018 (CKK), United States District Court for the District of Columbia (D.D.C. February 24, 2001)

In this proceeding the Board denied the appeal by grievant of his low rankings in 1994, 1995, and 1997, and his designation for selection out in 1997. Menyhert had competed for promotion both as an administrative officer and as a multifunctional (MFL) officer. The department established the MFL category to afford eligible officers a second opportunity for promotion in the highly competitive Foreign Service system. In Menyhert's case, however, the result was just the opposite: because he was low-ranked by the MFL selection boards (while being mid-ranked by the administrative boards), Menyhert was referred to a Performance Standards Board (PSB) in 1997, which then designated him for selection out.

Menyhert's grievance alleged, among other things, that the Department failed in its obligation to provide appropriate counseling to him concerning his best promotion and retention strategy; namely, that he should have withdrawn from MFL competition once it became clear that he was not competitive in that category.

The Department denied the grievance, and the Grievance Board also denied Menyhert's subsequent appeal -- while discussing in some detail the nature of the Department's obligation to provide reliable career counseling to its employees. The Board found that Menyhert's situation was not covered by existing guidance at the time and thus the Agency did not provide effective counseling to any employee finding himself or herself in Menyhert's position.

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But it also found that while the Agency may have mismanaged the MFL category, it had not violated law, regulation or published policy.

In deciding this appeal, the Court found that our decision upholding the designation for selection out and the low rankings by three MFL selection boards, arbitrary and capricious. The Court supported its opinion with language from the Foreign Service Act that the agency will ensure "effective career development" (22 U.S.C. sec. 3901(b)(1), and from the Board's decision in *In re OF-1 Cohort Grievants* (No G-87, 0420-State-32. of Nov. 13, 1990). The Court opined, the Board "recognized that available precedent does require an agency to advise the employee of an error it knew or should have known the employee was making" (internal quotations omitted). As applied to Menyhert's case, the Agency "failed to notify applicants and participants of the potential pitfalls [of MFL designation], failed to indicate to Plaintiff that he could or should withdraw his MFL status, and failed to counsel Plaintiff on how to withdraw from MFL status. The Court remanded the case to the Board and his reinstatement was ordered.

Shea v. United States, et al, Civil No. 00-748 (RCL), (D.D.C. June 27, 2001).

In this case grievant William Shea challenged the findings of the Department's Commissioning and Tenure Board for failing to grant him tenure in 1995. (Since then Shea has been tenured.) The Grievance Board had sustained the Board's prior decision which found that Shea had failed to show that his EER contained falsely prejudicial statements which may have been a substantial factor in his tenure denial. The Court affirmed the decision of the Grievance Board which upheld the Department.

Importantly the Court also found that agency determinations of law and fact are accorded deference.

Cairo, et al v. United States et al, Civil No. 99-910 (RCL), (D.D.C. June 18, 2001).

This case involved a determination of whether a number of grievants were entitled to overtime pay under the Fair Labor Standards Act (FLSA). The Grievance Board had found they were not so entitled thereby affirming the Department. The case turned on the determination of whether grievants were administrative employees for, if so, they would be exempt from the overtime pay provision of the FLSA.

In a decision affirming the action of the Grievance Board, the Court commended "the comprehensiveness" of the Grievance Board decision. In finding the grievants were exempt, the Grievance Board had given weighty consideration to each employees actual work duties, with consideration also

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accorded to work requirement statements and declarations by the employee. The Court approved of the approach taken and added that the interpretation of the Grievance Board was entitled to substantial deference.

Olson v. Colin Powell et al, Civil Action No. 99-2957 (GK) (D.D.C. October 15, 2001).

Grievant challenged various employment actions, namely the failure to promote him and several unfavorable performance evaluations. At the root of his grievance was his contention that he was the victim of discrimination in that the Consular Selection Board faulted him for making sexist remarks which might be inappropriate for heterosexuals but were not for him because he was homosexual.

The Court concluded that, contrary to Olson's arguments that his grievance was based upon sexual orientation discrimination, this grievance was actually based upon a theory of gender discrimination. For that reason he was required to file his appeal to a Federal Court within 90 days after final agency action and because his appeal was not filed until 176 days after the Board decision it was not timely and therefore dismissed the case.

Gonzalez v. U.S. Dept. of State, et al, 131 F. Supp. 2d 193 (D.D.C. March 23, 2001).

Grievant was a Foreign Service Officer recommended for separation from the Foreign Service because of several performance deficiencies noted in twelve Employee Evaluation Reports (EER). He filed a grievance claiming that information in two of these EERs was falsely prejudicial and erroneous and that he was treated unequally because at least one member of the Board which selected him out should have been an African-American.

In holding that grievant failed to establish his claim, the Court made some additional rulings of importance to the Board.

Among those were findings:

(a) That ratings and promotions are discretionary matters with which Courts will be scrupulous not to intervene unless clear error is shown; and

(b) Even if a grievant establishes that certain statements in a performance evaluation were falsely prejudicial, there must also be a showing that those comments were a substantial factor in a decision adverse to him.

Gregoire v. U.S. Department of State, Civ. No. 00-2735 (TFH) (D.D.C. August 15, 2001).

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Gregoire, having prevailed before the Grievance Board, filed a request for an award of attorney fees and costs. The Board awarded attorney fees but in an amount less than grievant had sought. In his court appeal, Gregoire argued that the Board had abused its discretion in reducing both the number of hours billed and the hourly rate of one of his attorneys.

The District Court upheld the Board noting that:

> Central to the Court's finding that the Board did not abuse its discretion is the fact that the Board based its determination on the appropriate legal standards and that it undertook a detailed analysis of the facts in the record, thus showing that it took deliberate care in coming to its decision.

The Court also made clear that this Board's discretionary authority in determining a reasonable hourly rate is not bound by the Laffey matrix as derived from *Mary Pat Laffey, et. al., v. Northwest Airlines, Inc.* 746 F.2d. 4 (D.C. Cir. 1984). [The Laffey matrix is a guide to awarding attorney fees under various federal statues, prepared by the U.S. Attorney for the District of Columbia. It reflects rates within and applies to the Washington, D.C. legal community.] The Court stated that:

> Although plaintiff might disagree with the Board's use of discretion in deciding to reduce the hourly rate, the Board did not abuse its discretion in coming to this conclusion since the Board considered the hourly rates of plaintiffs previous counsel in light of their work for plaintiff and also considered the rates of other attorneys who came before the Board.

The Gregoire decision constitutes an important reaffirmation of the Board's discretionary authority in setting a reasonable fee. It further affirmed that this Board has the authority to determine what forum should be used to determine those rates. Specifically, the forum in which grievance appeals are adjudicated is the Foreign Service Grievance Board and not the broader Washington, D.C. legal community.

Additionally, the Court affirmed the Board's ruling that the word "attorney" in section 1107(b) of the Foreign Service Act of 1980 does not "encompass a layperson representing himself."

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FSGB-Case No. 98-081 (February 7, 2001) and
FSGB Case No. 2000-069 (August 10, 2001)

Decisions in these two cases required agencies to expunge falsely prejudicial EERs and rescind low rankings that had followed from prejudicially flawed evaluations. In the first of those cases the Board found that the rating was fatally flawed -- "on its face" -- by being unfairly negative and unbalanced. There was no reviewing officer for the evaluation, and the agency failed to utilize other available safeguards that could have provided some measure of balance.

In the second case the EER was prepared by an individual who unexpectedly became the rating officer just one week before the end of the rating period, and with whom the employee had a strained relationship. The resulting EER cited serious performance problems, and the rated employee took issue with the rating in the employee's rated officer statement. As in the prior case, however, there was no reviewing officer for the EER nor any further review of the EER before it reached the Selection Board.

In both cases this Board found that the agency had failed to follow the negotiated precepts to assure the fairness and balance of performance evaluations. Where the rating officer has cited serious performance problems and the rated employee has taken issue with the rating, the agency's failure to assure fairness may support a grievant's contention that the EER contains falsely prejudicial material, and the rating may be declared invalid. The Board noted that agencies must be particularly watchful if, for whatever reason, the EER includes no reviewing officer statement.

FSGB-Case No. 2001-015 (November 14, 2001)

In this case, the Grievance Board took the unusual step of overruling prior precedent. In this case the grievant received a Letter of Criticism from a Foreign Service Selection Board. Grievant had prepared, as the rating officer, an Employee Evaluation Report which the Selection Board found "inadequate and lacking substance." As a result the officer rated was found to have been "left at a distinct competitive disadvantage." Grievant challenged the issuance of the Letter of Criticism contending it resulted from a misapplication of controlling precepts.

The agency did not deal with the merits of the grievance since it concluded that the letter was not grievable because it was a judgment of a

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Selection Board and for that reason was not a grievable matter. It relied on Section 1101(b)(2) of the Foreign Service Act.

The decision ruled that the statutory limitation which excluded from our jurisdiction judgments of Selection Boards only applied in connection with the judgment of such boards "in comparative evaluation of Foreign Service Officers." Because the letter was clearly not such a comparative evaluation, it was grievable. It was this finding which overruled precedent.

The decision is, of course, in harmony with the concept that the Grievance Board should view generously issues where its jurisdiction is in question.

FSGB Case No. 2000-084 (February 12, 2001)

The Board dismissed this case for lack of jurisdiction. The grievant had sought a "concurrence" from the State Department in a worker's compensation claim he had submitted to the Department of Labor. Because there exists a specific statutory hearing procedure outside the Grievance Board, the Board ruled that this claim could not be entertained under Section 1101(b)(4) of the Foreign Service Act which specifically excludes from our jurisdiction a complaint "where a specific statutory hearing procedure exists."

FSGB Case No. 2000-068 (November 19, 2001)

In this case, the Grievance Board was confronted with the question of whether the Department, in curtailing the assignment of a Deputy Chief of Mission, had followed governing regulations in so doing. The fundamental question was whether the employee curtailed voluntarily or not. If the curtailment was involuntary, regulations require the Director General to notify an employee of the reasons for the curtailment and to afford the employee an opportunity to submit comments before the curtailment decision is reached.

In a split decision, the Grievance Board found that the curtailment was involuntary and that the regulations applicable thereto had not been followed. The matter was remanded to the agency to determine whether it would still have curtailed the grievant absent its failure to comply with the regulations.

The finding that the curtailment was coerced resulted from the majority's analysis of the following test: (a) whether the employee involuntarily accepted the agency's terms; (b) whether the circumstances permitted no other alternative and (c) whether these circumstances were the result of coercive acts of the agency.

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In applying that test the Grievance Board said that it had reviewed those factors from the perspective of a reasonable employee upon consideration of the totality of the circumstances.

FSGB-Case No. 2001-017 (June 15, 2001)

In this proceeding, the Grievance Board was presented with the question of whether the performance evaluation of grievant contained an example of performance to support the low ranking of grievant by the Selection Board.

The decision found that the difference between an example and a general critical statement "is a matter of specificity." The Board recognized that specificity is a matter of degree and that a determination of whether an example is met is determined from the perspective of a reasonable person and as to whether the rated employee is given adequate notice of a deficiency in performance so as to be able to respond to it. The import of the case was in its establishing criteria upon which to decide if a required example had been cited.

FSGB Case No. 2001-001 (July 13, 2001)

Grievant appealed his low ranking by the 2000 Selection Board arguing that it resulted from a failure to follow Selection Board Precepts regarding the need for examples in the Area for Improvement section of evaluations before an officer can be low-ranked. The Department argued that a change in the Precepts for the Year 2000 meant that examples were not required in any AFI sections as long as the Selection Board did not rely on a single AFI. The Procedural Precepts for the 2000 Senior and Intermediate SB stated that in low-ranking an employee, the Board "should not rely solely on critical comments in a single Areas for Improvement section unless supported by one or more examples there or elsewhere in the Official Personnel Folder."

In this case, the Grievance Board took the unusual step of deciding on grounds other than those argued by the Parties. The Board noted that in addition to the change in the Selection Board Precepts, the instructions for the evaluation form changed for the 1999-2000 rating period. Instructions for the AFI section of the 1999-2000 EER state specifically "Justify your recommendations with examples . . .." In addition, the Review Panel certification states "Examples of Performance: Specific examples have been provided in all sections ____ Yes *(if not, return for rewrite)*". The Board determined that the clear intent was that the AFI in a 1999-2000 EER must have an example. Since the Selection Board made its decision on a procedurally and fatally flawed EER, the low ranking was rescinded. In addition, the Board ordered that the entire EER be removed from the file, that the grievant be non-rated for the year and given a one-year extension of time-in-class.

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Essentially this grievance uncovered the fact that the precepts for 2000 evaluation reports indicated one procedural approach, the EER instructions specified a different and conflicting approach.

FSGB Case No. 97-090 (May 16, 2001)

In this grievance appeal of many issues, filed by a group of Foreign Service Criminal Investigators, grievants alleged that the decision of the USAID Inspector General to, among other actions: (a) terminate the special differential pay that they had been receiving; (b) no longer promote investigative personnel to the level of FS-01 or higher; and, (c) convert current foreign service positions into civil service were actions taken against them in reprisal for their protected conduct as whistleblowers.

In denying the grievance appeal, the Grievance Board made a number of important findings. First, it set out a detailed analysis of the whistleblower law as it applied to members of the Foreign Service. The Board ruled that, to establish a prima facie claim of reprisal for whistleblowing, grievants must show by preponderant evidence that they made protected disclosures which in turn prompted adverse personnel actions and which were a contributing factor regarding the actions grieved. If so, the agency can defend itself only if it shows by clear and convincing evidence that it would have taken the same actions even in the absence of such disclosures.

Based on the facts presented and using the analysis just outlined, the Board denied the grievance appeal. The decision concluded that whistleblowing was a contributing factor in some of the personnel actions but that the agency had made a clear and convincing showing that it would have taken the same action anyhow.

Even though the Grievance Board found against grievants here, it made it clear that it considered the whistleblowing law salutary as having the purpose of encouraging the disclosure of government wrongdoing while in turn protecting whistleblowers from retaliation. Moreover, the Board found that even when a disclosure is not rooted in the overall public good but rather is prompted by some form of personal motivation, that conduct can be protected. Of course, in those situations the Board will “cast a wary eye” on the validity of the whistleblowing claim.

Case Statistics 2001

A.	Number of Cases Filed	49
B.	Types of Cases Filed	
	EER	13
	Financial	10
	Disability	0
	Discipline	14
	Separation	14
	Jurisdiction	2
	Assignment	1
	Attorney Fees	0[1]
	Implementation	0
		49
C.	Disposition of 2001 Cases	
	Affirmed	5
	Reversed	4
	Partially Reversed	2
	Settled	2
	Withdrawn	2
	Dismissed	3
	Pending (as of 12/31/2001)	33
D.	Oral Hearings Duration: 1, 2 and 7 Days	3
E.	Interim Relief	11

[1] **In early 2000, the Board changed the procedures for classifying cases. The Board no longer assigns new case numbers for attorney fee cases, but treats them as a continuation of the underlying grievance. In 2001, the Board issued 9 orders on attorney fees.**

F. All Cases Closed in 2001
(Including Prior Year Cases)

Total	55
Affirmed	23
Reversed	14
Partially Reversed	3
Settled	6
Withdrawn	3
Dismissed	6
	55

The average time from filing to resolution was a total of 44 weeks, an increase over the 37.1-week average in 2000. This average was skewed by the resolution of two FLSA cases; each took 261 weeks to resolve. Absent the FLSA cases, the average would have been 35.8 weeks. The longest time between filing and resolution was 261 weeks for the two FLSA cases. The shortest was 6 days.

As of December 31, 2001, there were 48 cases pending before the Board.