Foreign Service Grievance Board

Annual Report for the Year 2000

Message from The Chairman

Foreign Service Grievance Board

Annual Report for the Year 2000

This Report of the varied activities of the Foreign Service Grievance Board covers calendar year 2000. As required by law, it shows in tabular form, statistics depicting the number of cases decided. In narrative form it highlights some of the more significant matters disposed of by us. I invite you to read this Annual Report as a record of our accomplishments; the resources used; and the nature of the matters we are presented with daily. The activities and accomplishments identified in this Report continue the Board's long tradition of effective and fair decision-making. This conclusion is traceable to a talented and dedicated membership and staff. There has been an insignificant decrease in the actual number of decisions issued in the last two years. Yet numbers are not a true reflection of the workload shouldered during the reporting year. The Board has no control over the number of grievances filed nor of the degree of complexity in the cases submitted. Thus, while the workload for the future cannot be predicted with any confidence, if the past is a prologue, we can expect about 90 cases in this year of 2001.

There are several reasons why numbers alone do not truly mirror the scope of the task. For instance, there has been a gradual but noticeable increase in the number of cases where the grievant is represented by counsel. Often this translates into increased effort because additional and novel issues are advanced. In addition, more grievants are making use of the Board discovery procedures, causing a need to resolve more disputes arising from discovery practice. During the year certain attorney fee questions created an unexpected increase in our workload. Neither do the numbers reflect the substantial effort required of the support staff when our decisions are challenged and the records of cases must be prepared for the court.

Our current membership and staff is commensurate with the existing and anticipated workload. Members are appointed by the Secretary of State for two years and can be and often are, reappointed for similar terms. This year the position of Executive Secretary changed hands. The new incumbent is Don Cooke who comes to us from the State Department Bureau of East Asian and Pacific Affairs where he was Deputy Director in the Office of Economic Policy.

A need for major changes to our case processing is not perceived, but we are not blind to promising initiatives. In our search for improvements we are now increasing our efforts to enhance our electronic case retrieval capability. Accomplishment of this goal will be a giant stride toward improving our research capability, a capability of prime importance in our

Message from The Chairman

decision making. Once achieved, this initiative holds promise of yielding dividends for years to come. While we had hoped to be further along in our efforts, we have now been promised the necessary support and additional vigor will be applied as it is at the top of our priority list.

It is worth emphasizing that this Board is an independent entity whose independence continues to be respected by all the agencies we service. Nothing is more vital to our effectiveness than recognition of this freedom of action. Rarely is compliance with our Orders a problem. The exclusive Foreign Service bargaining representative, AFSA, plays an important role in assisting grievants.

The importance of this Board to the overall Foreign Service personnel system cannot be overstated. Our grievances emanate from any Foreign Service post in the world. For the concerned grievant, we can be a refuge. To the extent that the Board detects systemic problems it was invited by the Director General to bring these matters to his attention.

Efforts to encourage the parties to enter into settlement agreements continue. When, however, matters reach the appellate level of a board action the attitude of the parties often has become fixed and settlement at this level is not readily attainable.

We acknowledge that some matters might drag on well beyond what seems to be a reasonable time to reach a decision. Typically there are valid reasons behind the delay, not all of which are within our control. Even so, we strive to hasten all decisions with due regard to the rights of the parties.

Our experience during the reporting year reveals that all too often grievances which concern employee evaluations and which we find are falsely prejudicial can be attributed to a lack of care or attention to the process by the evaluators involved. Required procedures sometimes are ignored, or comments in evaluations are unbalanced or lack support. The consequence is that some members are retained in the Foreign Service who, perhaps, would not be had the evaluation process been given more attention. In that evaluation reports play such a significant role in the determination of whether an employee might achieve promotion, or even be separated from the Foreign Service for failure to meet class standards, this inattention is somewhat surprising.

Sincerely,

Edward J. Reidy

March 1, 2001

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 Department 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 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, 2000, Edward J. Reidy was the Chairman of the Board and Edward A. Dragon had been selected as Deputy. Don Cooke replaced James M. Griffin as Executive Secretary on October 1, 2000.

Members of the Board

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

As of December 31, 2000, the Board had three Senior Advisors, Barnett Chessin, Donna Anderson, and Lane Cubstead. The Support Staff consisted of Conchita Spriggs, Elena Cahoon, and Mary T. Kenny.

* John C. Truesdale is a member but is on inactive status while serving as Chairman of the National Labor Relations Board.

Structure of The Board

The Act which created the Foreign Service 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 the Board to assume the appellate adjudicatory function. Consonant with the objectives of the Foreign Service Act to ensure procedural protections for Foreign Service employees, the 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 2000.

The Board may operate as a whole, through panels, or individual members designated by the Chairman. Currently, the Board operates 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. In 2000, on a pilot basis, the Board has used single member panels for less complex cases and likely will continue, if not increase, this practice in the future. As long as the rights of the parties are protected, this practice assists in the prompt resolution of disputes.

The Secretary of State may remove a 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 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.

The Board obtains facilities, services, and supplies through the administrative services of the Office of the Secretary of State. Expenses of the Board are paid out of funds appropriated to the Department of State.

Records of the Board are maintained by the Board and kept separate from all other records of the Department under appropriate safeguards to preserve confidentiality. 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 Board has issued regulations concerning its procedures. These regulations are set out at 22 CFR §§ 901 et seq.

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. While these disputes have been infrequent, four cases were submitted to the Board under this provision in 2000 as opposed to none in 1999. 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 two provisions are rare and none were received in 2000.

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 Foreign Service Act of 1980, and subsequent amendments. Many decisions involve the application of our regulations and the compilation 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 or other representation. Oftentimes they obtain assistance from AFSA. Regulations and precedent provide 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, in excised form, preserving employee confidentiality.

Remedies

The remedial power of the Board is broad, and it may, in general, take any corrective action deemed appropriate provided it is not contrary to law or a collective bargaining agreement.

More particularly, if the Board finds a grievance meritorious, it has the authority to retain a member of 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. It may recommend that the agency promote an employee or even grant tenure as appropriate. The Board may also award reasonable attorney fees if the grievant is the prevailing party and if warranted in the interests of justice.

Research Capability and Computerization

The Board continues its plan to apply 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. That effort is focused on three areas. The first is setting up a web site for the Board that contains the Board's regulations, policies, and procedures and will have a searchable database of the Board's previous Orders and Decisions. The second area is to upgrade the computer network of the Foreign Service Grievance Board so that Board members and staff have access to the latest information technology on the desktop. A third area is 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. The first step, to be completed in the first half of 2001, is the specification of a system and preparation of an estimate of the cost. Funds will then be sought and the project should proceed during 2001.

Court 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's final action. The Act provides that the standards of the Administrative Procedures Act, as set forth in Chapter 7 of Title 5, United States Code, shall apply to a judicial review of a Board decision. Court review is not uncommon and provides guidance for the Board.

In 2000, the Board received three judicial decisions which are summarized below:

Court Review

William D. Jones v. United States, No. CA 99-2847, (D.D.C. filed Sept. 22, 2000). In this case, the plaintiff, William D. Jones, sought judicial review of a Board decision denying his claim that the U.S. Agency for International Development (USAID) failed to abide by its regulations when he was unable to obtain job assignments. The U.S. District Court for the District of Columbia, in a decision rendered on the government's motion for summary judgment, upheld the Board's decision.

Jones became a Foreign Service officer in 1973, and served in a variety of assignments, mostly overseas, until 1987. In 1987 he became the head of the Labor and Employees Relations Division in the Office of Human Resources, a Civil Service position. In 1991, he began an unsuccessful campaign for a Foreign Service position. He applied for temporary assignments and training to make himself more competitive, all to no avail.

In 1995, Jones filed a complaint with USAID alleging that it had violated its own regulations with regard to his assignments. Upon appeal to the FSGB from the USAID denial of his claim, Jones complained that USAID had not followed its assignment policies, specifically that USAID had not given him "priority consideration" or "special review." He also complained of a low evaluation, inaccurate, and incomplete evaluation files.

In its decision, the FSGB held that (1) USAID had given Jones priority consideration; (2) that he either did not require special review or, alternatively, that he received it; (3) that USAID had not violated its own regulations; (4) that Jones had not met his burden of ensuring that USAID adhere to its own regulations: and (5) that the burden of proof did not need to be shifted under 22 CFR 905.1(c).

The Court sustained each of the substantive findings of the Board. The Court also considered an issue relating to the time limitations within which a plaintiff must seek judicial review. The Foreign Service Act, at section 1110 (22 U.S.C. 4140) provides that a plaintiff must file a request for judicial review within 180 days of the FSGB's final action. In this case, Jones filed his complaint with the court more than 180 days after the original decision, but within 180 days of the Board's decision on his motion for reconsideration. The court held that the time period did not begin to run until the request for reconsideration was denied.

Steven M. Toy v. United States, No. CA 2000-929(RMU), (D.D.C. filed Dec. 7, 2000). The plaintiff in this case, Steven M. Toy, sought judicial review of a Board decision denying a grievance in which he requested the removal of a negative employee evaluation report (EER) from his official performance folder. The U.S. District Court for the District of Columbia,

while intimating no opinion on the merits of the Board's decision or reasoning, remanded the case to the Board for a more specific finding of facts and a clear, full statement of its reasons for denying Toy's appeal.

Toy, a tenured class 3 Foreign Service officer, joined the Foreign Service in 1984. From August 27, 1995 to April 15, 1996, he served as an Administrative Officer in Bombay (now Mumbai), India. As the Administrative Officer, he supervised two American employees and indirectly supervised 15 Foreign Service Nationals, and a 66-person guard force. One of the American personnel was the General Services Officer (GSO). The parties agreed that Toy and the GSO had a difficult and contentious relationship from the outset.

Court Review

In the EER in question, both the rating officer and reviewing officer cited Toy's relationship with the GSO as troublesome. The rating officer wrote: "Steve's method of showing disapproval to his GSO subordinate helped contribute to a significant conflict that required intervention to maintain Post morale." The reviewing officer added: "The major shortfall in Steve Toy's Performance has been in the area of interpersonal skills, and more specifically with the untenured junior officer [name] who serves as General Services Officer under his guidance." In July, 1996, Toy's tour of duty at Mumbai was curtailed and he was transferred to duty in Washington, D.C.

The Court held that, in sum, the Board recounted the parties' competing versions of the facts but did not make clear which factual contentions it adopted and which it rejected, and why it did so. The Board stated its conclusion but did not sufficiently articulate the requisite "rational connection" between that conclusion and its factual findings.

Emmanuel Obasiolu v. Brian Atwood, et al., No. CA 98-2970 (ESH), (D.D.C. filed August 2, 2000). In this case, Emmanuel Obasiolu challenged the contents of his Annual Evaluation Form (AEF) from April 1, 1995 through March 31, 1996, and a subsequent recommendation by a Commissioning and Tenure Board that he not be granted tenure in the Foreign Service. The U.S. District Court for the District of Columbia, while affirming the Board's decision regarding the contents of the AEF, remanded the case to the Board for it to consider Obasiolu's argument that the agency violated its regulations by failing to counsel him regarding his performance deficiencies.

Obasiolu began employment with the U.S. Agency for International Development (USAID) in July 1991 as a financial management officer at the FS-04 grade level. His employment was as an untenured employee with a limited appointment, normally not valid for more than five years. He served in Washington, D.C., Pakistan, and Haiti, where he received positive evaluation reports. In April 1995, he was assigned to Indonesia to serve as the Deputy Mission Controller until March 1996.

At the end of his year in Indonesia, he received an AEF which was prepared by the Mission Appraisal Committee and which did not recommend him for tenure at the time, but suggested that he be given a final probationary year to work on two performance areas. In May 1996, the Tenure Board recommended against giving him tenure and the agency then denied him a career appointment.

Obasiolu's claims were two-fold: (1) the AEF contained falsely prejudicial material that was contradicted by other information in the AEF, and (2) the agency violated its own regulations by not counseling him regarding the deficiencies that were identified in the AEF.

Court Review

As noted above, the Court affirmed the FSGB's decision on the first claim, and remanded the case to the Board to address the second claim because the Board did not have an adequate opportunity to address the issue of whether the agency action was in fact a violation of its regulations, and if so, what remedy, if any, Obasiolu is entitled to receive.

Summary of Significant Cases for The Annual Report

During calendar year 2000, the Board addressed a wide variety of important issues. Those of most significance are highlighted in the following sections. Actions by the Board are adjudicatory in nature and we follow precedent. To be sure, we are bound to unless we change precedent, a change which must have a rational basis. Our decisions are important to grievants, to the agency, and to any prospective grievant. Thus they must be accessible in a reasonable fashion. Our proposed web site will facilitate this availability.

AFSA-State Implementation Dispute, FSGB Case No. 2000-027

When AFSA learned that the Department of State had selected a career SES Civil Service employee to be DCM in Lima, Peru, it opposed "this assignment on the grounds that it violates the letter and spirit of agreements established between AFSA and the Department, and that it undermines the integrity of the career Foreign Service." AFSA asserted that the appointment violated 3 FAM 2210 in that the Director General (DG) had not issued a required certification of need before appointing someone from outside the Foreign Service to a Senior Foreign Service (SFS) position. The DG rejected AFSA's arguments, and AFSA filed an Implementation Dispute with the Department, on March 9, 2000. AFSA appealed the Department's denial to the Board on May 10, 2000.

The issue before the Board was whether the Department had negotiated

procedures to be used in making such SFS appointments, and if so, whether that agreement had been breached. The Board held that the bargaining history showed that the Department had negotiated procedures for non-bargaining unit positions and that the Department was bound by 3 FAM 2217.4 which governs Limited Non-Career Appointments. The Board held in its August 18, 2000 Decision that the Department had not provided, as required by the FAM, a valid "certification of need" when it assigned the Civil Service employee to the DCM position. The Board requested that both parties negotiate provisions for the employee's curtailment from Lima. Negotiations failed, and the Board issued a Decision on October 31, 2000 recommending to the Secretary that the assignment be curtailed after one year and that the position be placed on the Open Assignments list. The Secretary's response, received November 30, disagreed with the Board's conclusions but accepted the Board's jurisdiction. The Secretary partially rejected the recommendation of the Board on the grounds of adverse affect on U.S. foreign policy. The Secretary did agree to curtail the DCM's assignment after two years, instead of the planned three-year rotation, and to place the position on the Open Assignments list for the summer of 2002.

Summary of Significant Cases for The Annual Report

In FSGB Case No. 98-96 (May 26, 2000) we ruled that the usual presumption of regularity normally afforded to the selection board process was negated by the factual predicate presented. In this case, grievant and the chair of the selection board that low-ranked him had participated in a serious adversarial relationship, which was particularly acute during the time the board was deliberating. Because there was credible evidence that the Chair had expressed to others feelings of bias, hostility and anger toward grievant, we found that it was all too likely that the Chair's reading of the grievant's file would be affected and that even if no wrong-doing was demonstrated, a serious question of fairness was evident.

The decision in FSGB Case No. 99-38 (March 30, 2000) dealt with the question of an alleged demonstration of poor judgment by a grievant. We emphasize that when it is shown that an employee displays judgment so poor that it may reasonably affect an individual or the agency's ability to carry out its responsibilities or mission, the potential for disciplinary action, even separation, exists. Poor judgment resulting in discipline arises most often, we noted, where essentially personal misconduct has occurred, even though failure to execute professional responsibilities revealing poor judgment can be a basis for discipline. In the latter instances, however, the Board will review these allegations carefully so as to determine whether they are a more appropriate fit to commentary in a performance evaluation as distinguished from a matter of discipline.

In FSGB Case No. 99-26 (March 30, 2000) we were confronted with the question of whether a grievant was eligible for and entitled to retirement annuity benefits under Section 811 of the Foreign Service Act of 1980, as amended. We ruled that under the law the Secretary had the right to withhold consent to a request for an immediate annuity where the agency harbored serious national security concerns over grievant's conduct.

In FSGB Case No. 99-36 (April 6, 2000) the Board ruled that it would not accept jurisdiction in a proceeding where "a grievant is merely raising an issue previously presented and litigated . . ." In doing, so we applied the doctrine of issue preclusion finding that the matter in question had been directly adjudicated in a prior case, was conclusively settled there, and had never been vacated or reversed.

Summary of Significant Cases for The Annual Report

In FSGB Case 2000-37 (November 3, 2000) the Board authorized the imposition of a suspension of a member of the Foreign Service for misuse of Government property. In this case the charged employee had used, for personal and inappropriate purpose, a Government computer during work hours. Even though the use of computers was allowed at post, the decision made it clear that there is "no principle in the area of Foreign Service employment that anything is permissible unless it is specifically prohibited" and where there is a serious breach of the standards of conduct, disciplinary action is justified.

In FSGB Case No. 98-30 (August 23, 2000) the Board ruled that the withdrawal of either a medical clearance or a security clearance is not a disciplinary action within the meaning of controlling regulations. The importance of that finding is that when a grievant seeks relief for impermissible agency action, the burden of proof falls upon the one complaining.

FSGB Case No. 98-19 (June 9, 2000) involved a grievant who claimed that the Department engaged in prohibited discrimination by not accommodating a medical disability as required by the Rehabilitation Act of 1973 and the Americans With Disabilities Act of 1990. We found grievant had not met the burden of proof required because the facts showed that the disability was a lingering one likely to persist in some form well into the future. We concluded there is no requirement to accommodate an employee for an indefinite period of time in the hope that medical treatment might someday enable a return of the employee to full duties.

In FSGB Case No. 2000-44 (decision pending), grievant claimed that he had been the subject of an improper OIG investigation in which he was accused of giving "incomplete, misleading and possibly perjurious" testimony to a congressional committee. The agency denied the grievance because it claimed that the conduct of an OIG investigation did not fall within the definition of "grievance" in 3 FAM §4412 c(2).

In the appeal to this Board, the agency asserted that the Board had no jurisdiction or control over OIG activities. The Board issued a finding that it did have jurisdiction (FSGB Case No. 99-063, ORDER: JURISDICTION, December 30, 1999) and remanded the grievance to the agency.

The agency denied the grievance, and it was appealed to this Board. The OIG reiterated its continuing objection to the Board's assertion of jurisdiction but it did respond to most of the discovery requests. It objected, however, to the release of Reports of Interview or summaries of witness testimony which were not appended to the final Report of Investigation on the grounds of relevancy, deliberative process privilege and/or investigatory files privilege, and the protection of information from agencies outside the State Department.

Summary of Significant Cases for The Annual Report

With respect to the Board's authority to compel the production of appropriate documents, the Board relied on §1108(b) of the FSA which gives it the authority to order the production of *"any agency record . . .* if the Board determines that such record may be relevant and material to the grievance." This authority extends to interview reports not appended to an ROI. An employee who is the subject of an investigation may question its fairness. To do that, the employee has the right to see pertinent documents relating to the investigation, unless they are otherwise protected from disclosure.

The Board ordered that the requested interview reports be made available either to the grievant or to the Board for a determination of whether they should be appropriately released. The agency provided the reports to the Board, and the Board determined which should be released to the grievant. The OIG complied with the Board's direction, and delivered the documents to the grievant. As of December 31, 2000 the grievance was pending.

Board Jurisdiction to Award Attorney Fees

In December 1999, at a time when a number of requests by prevailing grievants for award of attorney fees were pending before the Board, the Department of State filed a motion with the Board requesting that we modify established practice and henceforth limit award of attorney fees to those cases over which the Merit Systems Protection Board (MSPB) would have subject matter jurisdiction. The agency asserted that the statutory fee authority of the Board was limited to cases "arising from an adverse action or prohibited

personnel practice" within MSPB jurisdiction, and did not extend to cases, such as those arising from performance evaluations, that the MSPB may not hear. As the Board does not issue advisory opinions, we addressed the motion in deciding one of the grievances **(FSGB Case No. 98-61)** to which it applied, noting that our decision would provide precedent for other proceedings. In view of the importance of the issue, we invited the views of AFSA, which submitted a response opposing the motion.

In an Order dated March 15, 2000, the Board observed that its broad authority to award attorney fees in grievances stemmed from the following provisions of the Foreign Service Act:

Section 1107(b)(5) [22 USC § 4137(b)(5)]

> (b) If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department--
>
> (5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of Title 5;

Board Jurisdiction to Award Attorney Fees

The Board disagreed with the agency assertion that the phrase, "to the same extent . . . as may be required by the [MSPB]" was a limit on Board jurisdiction. Reviewing the legislation and its history and relevant court cases[1], the Board reaffirmed its earlier opinion in FSGB No. 87-053, June 7, 1988. We held that the empowering introduction of § 1107(b) of the FSA – "If the Board finds the grievance is meritorious, [it] shall have the authority to direct the Department" – unambiguously authorized the Board to exercise the powers enumerated below it in the full range of grievances over which it has jurisdiction. We noted that section 7701(g) of Title 5 U.S.C., referred to in attorney fee subsection (5), authorized the MSPB to require agency payment of reasonable attorney fees incurred, "if the employee . . . is the prevailing party and the [MSPB] determines that payment by the agency is warranted in the interest of justice." The Board held that the conditions stated in sections 1107(b)(5) and 7701(g) were not intended to define the kinds of grievances in which Board fee awards may be made but rather required only that the Board, like the MSPB, be bound by the criteria of section 7701(g) and apply those criteria consistent with their application and interpretation by the MSPB. The Board concluded that it had found no grounds in the position of the Department that would warrant departure from established practice and precedent.

[1] *Costello v. AID*, 843 F.2d 540 (D.C.Cir. 1988)

In FSGB Case No. 2000-11, Grievant asserted that the agency had misinterpreted a published agency education allowance regulation, thereby denying him a financial benefit to which he was entitled. Specifically, he sought reimbursement of kindergarten payment for his 4-year old son, which the agency had denied. The agency argued that the allowance could only be granted for the dependent child's schooling if the child reached age 5 on or before December 31 of the school year and was eligible to enter kindergarten, as was the case for children in the Metropolitan Washington area. The grievant argued that the applicable standardized regulation required that it only be ascertained that a "4-year old children attending kindergarten overseas will be eligible to enter first grade the next year." He also submitted a letter of record indicating that the child would be authorized to attend first grade in the following school year.

After a review of the Standardized Regulations' *[STR 271 (g) and (j)]* definitions for "child" and "kindergarten" then extant, the Board ruled that the agency did not have the right to interpret a regulation in a manner not sustained by the language in the regulation. In this instance, though the Board noted the agency's stated intention to "revise the regulations to eliminate existing ambiguities regarding the age policy," it ruled that the agency had to apply the regulations as written until the proposed change became official agency policy.

Case Statistics 2000

A.	Number of Cases Filed	87
B.	Types of Cases Filed	
	EER	29
	Financial	12
	Disability	0
	Discipline	16
	Separation	15
	Jurisdiction	4
	Assignment	5
	Attorney Fees	2 [2]
	Implementation	4
		87
C.	Disposition of 2000 Cases	
	Affirmed	19
	Reversed	7
	Partially Reversed	2
	Settled	6
	Withdrawn	9
	Dismissed	3
	Pending (as of 12/31/2000)	41

[2] 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.

D.	Oral Hearings	3
	Duration: 1,1 and 5 Days	
E.	Interim Relief	28
F.	All Cases Closed in 2000 (Including Prior Year Cases)	
	Total	115
	Affirmed	60
	Reversed	18
	Partially Reversed	14
	Settled	7
	Withdrawn	10
	Dismissed	6
		115

The average time from filing to resolution was a total of 37.1 weeks. The longest time between filing and resolution was 165 weeks. The shortest was 1 week.

As of December 31, 2000 there were 63 cases pending before the Board