FOREIGN SERVICE GRIEVANCE BOARD

Annual Report

for the Year

2004

FOREIGN SERVICE GRIEVANCE BOARD

Annual Report for the year 2004

Recipients

Committee on Foreign Relations
United States Senate

Committee on International Relations
United States House of Representatives

Director General of the Foreign Service
U.S. Department of State

FOREIGN SERVICE GRIEVANCE BOARD

Annual Report for the year 2004

Message From The Chairman

I am pleased to submit to the Congress the Annual Report of the Foreign Service Grievance Board for calendar year 2004. The most important component of the report is the statistical analysis of the cases decided. That analysis is what is required by law. However, it might well interest the Congress to note, that for 2004, the case input to the Board increased dramatically. For instance, in 2003 some 49 cases were received. For 2004, there was an increase of nearly 50 percent because 71 cases were filed. No particular reason for that increase can be discerned.

Such a dramatic increase caused me to ask the Secretary of State for additional support in staffing so that the Board may keep pace by deciding cases in a timely fashion. Our experience level today is quite limited so I am seeking authorization to recall, on an as-needed basis, former members whose terms recently expired. At this point, my proposal is under consideration by the Department of State.

Workload predictions cannot be made with any reliability. Peaks and valleys are not uncommon. At the same time, the Board is statutorily mandated to process cases promptly while maintaining a fair and effective system for the resolution of grievances that will ensure the fullest measure of due process for members of the Foreign Service. My proposal promises to be helpful in assuring fidelity to that mandated goal.

This calendar year saw a change in the important position of Executive Secretary to the Grievance Board. Don Cooke, who had served so well for four years, was succeeded by Ms. Kay Anske. A consular officer, Ms. Anske, has served in eight overseas posts in her twenty-four year career. These eight posts have been large and small across four geographic regions. Domestic assignments include Assignments

Officer in the Career Development and Assignments Division of the Bureau of Human Resources, a Pearson detail with Senator Edward Kennedy, and included the Senior Seminar. Her broad background promises to serve her well in this assignment to the Board.

In my report for the year 2000, I wrote: "Rarely is compliance with our Orders a problem." In 2004, this question has arisen more pointedly and while a final resolution has not been achieved as of this writing, some thoughts on this question seem in order.

It is clear that this Board has no specific authority to enforce compliance with our orders. That is to say, no law or regulation provides us with specific enforcement authority, even though our regulations provide unmistakably, at 22 CFR § 909.5 that our orders shall be complied with. While the Foreign Service Grievance Board operates in many respects like the Merit Systems Protection Board, the MSPB has specific authority under 5 CFR § 1201.181 -- in this respect we differ. The significance of enforcement authority is very much emphasized by the following statement by the court in Garstkiewicz v. United States Postal Service, 981 F.2d 528 (Fed.Cir. 1992), where it had under consideration a Merit Systems Protection Board matter:

> *The integrity of the Merit Systems administrative process requires that the Board's Orders be respected, and compliance enforced.*

There seems no reason that our process should have less "integrity". The lack of specific compliance authority in the Foreign Service Grievance Board has been confirmed by our outside counsel to whom we turn for legal advice on such board policy matters. I believe that our adjudicatory hand would be strengthened were we to have that specific authority.

Another area of the Board's operations that I consider warrants comment in this Annual Report is that of Interim Relief. The authority of this Board to suspend separation actions, along with the authority to suspend certain other specified

actions, has been known and designated in Board practice as "interim relief". Authority to suspend separations was included in the Board's statutory functions since the first statutory establishment of the Board in 1975. (Pub. L. 94-141, enacted November 29, 1975). However, the suspension of separation authority was deleted by Pub. L. 107-228, an Omnibus Authorization and Appropriations Act, effective on September 30, 2002. (This deletion came without any explanation.)

As a result, Section 1106(8) of the Foreign Service Act of 1980 (22 U.S.C. 4136(8)) currently reads, in part, as follows:

> *(8) If the Board determines that the Department is considering disciplinary action against the grievant or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the date which is one year after such determination or until the Board has ruled upon the grievances whichever comes first . . ..*

The first part of the foregoing sentence, until September 30, 2002, read, as follows:

> *(8) If the Board determines that the Department is considering the involuntary separation of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances . . . .(italics supplied).*

In practice, the Board exercises interim relief authority cautiously. For career candidates, the principal standard is that the grievant has a reasonable prospect of showing that the grievance is meritorious. For tenured officers, the board normally grants a suspension unless the grievance is not meritorious on its face or patently appears to be frivolous or is merely a delaying tactic.

The United States Court of Appeals for the District of Columbia Circuit, in the case of Miller v. Baker, 969 F.2d 1098 (D.C. Cir. 1992) had occasion to comment on the Board's interim relief as follows:

A "no-suspension-of-termination" rule, however, would also have error costs: reinstated employees, though entitled to backpay, would still have suffered significant disruption to their careers.

N2. We note that there is no claim on this record that the Board makes a practice of indiscriminately suspending separations. From the one Board decision cited to us which addresses the subject, it seems the Board requires the grievant to establish "a reasonable prospect of attaining relief that will result in his or her being retained it he Service."

It is not clear why the Congress repealed the authority of the Board to grant interim relief in involuntary separation proceedings especially since there was no reason to doubt that he board was fair and diligent in exercising that authority. There have been instances since that authority was deleted where worthy grievants likely would have been given interim relief had we the authority to do so.

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 continue to strive to issue just, prompt, and fair decisions and to tinker with our process as the need arises.

Sincerely,

Edward J. Reidy
Chairman
March 23, 2005

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 Foreign 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, 2004

Edward J. Reidy was the ***Chairman of the Board***

and he selected

Edward A. Dragon as ***Deputy***.

Kay Anske was ***Executive Secretary***.

Members of the Board for 2004

Edward J. Reidy
(Chairman)

Edward A. Dragon
(Deputy Chairman)

Robert J. Bigart

James E. Blanford

Suzanne R. Butler

Garber A. Davidson

Harriet E. Davidson

Barbara C. Deinhardt

Walter Greenfield

Lois E. Hartman

Theodore Horoschak

Warren R. King

Garvin L. Oliver

Sean J. Rogers

Harlan F. Rosacker

Jeanne L. Schulz

Barry E. Shapiro

As of the date of this report, the Board had two Senior Advisors, Shelley E. Johnson and Joseph J. Pastic. The Support Staff consisted of Conchita M. Spriggs, F. Elena Cahoon, and Carole A. Dolezal.

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 order or the final action of the Secretary. The standards of the Administrative Procedures Act, as set forth in Chapter 7 of Title 5, United States Code, apply to a judicial review of a Board decision. The quality of our decisions influences the treatment given them by the courts, and deference is given to this Board because we have the expertise in Foreign Service matters that courts lack. For informational purposes, I have included summaries of the judicial decisions rendered in 2004.

Summary of Significant Court Decisions During 2004

June O'Connell v. Colin L. Powell
Civil Action No. 00-00926 (HHK), (filed February 20, 2004)

June O'Connell joined the Foreign Service in 1987 and was promoted to the FS-03 level in October 1991. Between 1992 and 1994 she received annual Employee Evaluation Reports (EERs) that rated her exceptional or outstanding. Even though the EER for 1994-95 was positive, her rater did not recommend her for immediate promotion.

O'Connell particularly disagreed with that determination and filed a grievance which was denied by the agency. She then filed an appeal with the FSGB. Her appeal was denied and this court action followed.

The essence of O'Connell's appeal was: (1) her supervisors failed to counsel her that she was not performing at a level warranting promotion; (2) the rater had recommended a male colleague for promotion at the same post although he did not meet the criteria the rater applied to her; and (3) the rater ignored or overlooked the supervisory skills she had exhibited during the rating period.

In our decision, the FSGB found that "O'Connell was counseled in general concerning her performance during the rating period, as is required." We added that there are no requirements to counsel employees on the narrow question of whether specific counseling is needed about the prospects of promotion based upon performance during the year in question. The court upheld the Board's conclusion noting that "no specific requirements about the substance of counseling exists."

Before dealing with the merits of her lawsuit, the Court outlined the legal standard applicable. One holding stands out in particular for the Court explained:

> [The] standard of review is highly deferential, reflecting a judgment that the Board's familiarity with the Foreign Service ought to be respected by the judiciary.

In maintaining that the EER was falsely prejudicial O'Connell raised four identifiable arguments, only one of which was raised before the FSGB. Pointing out that "A plaintiff must exhaust administrative remedies before claims can be heard in this court", the court ruled that "the only argument properly before" it was that raised before the Board. That issue concerned an argument that the rating official omitted from her EER information about her supervisory responsibilities. The court was not sympathetic to that argument.

As to the argument that she had been treated differently than a male colleague, the Board found she was actually raising a sex discrimination claim which was time-barred. Interestingly, the court ruled, "that O'Connell's statements in her grievance could reasonably have been interpreted as bringing a sex discrimination claim"; and therefore it "was not arbitrary and capricious for the Board to construe O'Connell's claim as a discrimination claim and find that it was time-barred."

Robert J. Marro v. United States, et al.
Civil Action No. 99-0789 (WBB), (D.D.C. filed January 12, 2004)

Robert J. Marro was a Senior Foreign Service officer who was involuntarily removed from service on July 31, 2000 due to expiration of time-in-class. Although he enjoyed a very successful career, as indicated by his rapid promotion through the ranks, he complained that his continued success was impeded by two annual performance appraisals ("PAs") that allegedly had a falsely prejudicial effect on his eligibility for promotion. The first PA was for 1993-94 and evaluated Plaintiff's performance while he served as the Senior Commercial Officer in Ottawa,

Canada. The second was for 1995-96 and reviewed Plaintiff's performance in a non-supervisory position in St. Louis, Missouri.

During the early years of his assignment in Ottawa, Marro's performance was exemplary, and, he was highly ranked. Marro's 1993-94 PA, however, noted several deficiencies in his management skills and included lower adjective ratings in each of the critical elements comprising his position. Marro claims that the comparatively poor 1993-94 PA is attributable solely to bias against him on the part of the reviewing official. However, the Ambassador and other senior management officials were sufficiently dissatisfied with his performance that it appeared likely his assignment to Canada would be cut short. To avoid such a stigma, Marro requested a voluntary transfer to domestic service, leading to his assignment to a newly created, non-supervisory position in St. Louis.

Upon his subsequent transfer to St. Louis, Marro earned the highest recommendation for promotion on his 1994-95 PA. In 1995, a new supervisor prepared grievant's 1995-96 PA. It was exceedingly laudatory and gave him the highest possible recommendation for promotion. In like manner, the comments of the reviewing official were very complimentary.

His grievance to the agency resulted in modest relief. Dissatisfied, Marro appealed to the Grievance Board in July 1997. The Board denied his grievance in its entirety in October 1998. Marro then filed the instant Complaint in March 1999 seeking judicial review and the Court affirmed our decision.

In denying his grievance this Board found the agency position more credible, and stated that Marro contributed to the difficulties described in the 1993-94 PA. We added that, unlike the agency, the employee failed to present supporting statements from high ranking officials and concluded that that was a significant factor in arriving at our conclusion. We noted Marro had submitted numerous supporting statements from personnel stationed in both Ottawa and Montreal but emphasized that, none of those individuals acted as managers or as his supervisor. Importantly, we believe, the Court then made a significant finding: "it is not unreasonable for the FSGB to place greater weight on the judgment of persons holding high ranking positions who no doubt have a better perspective from which to evaluate Plaintiff's management skills."

Marro also pointed out that the less than stellar evaluation of 1993-94 was sandwiched between outstanding evaluations, all the while insisting that his performance could not possibly have changed so dramatically in one year. Here again the Court made a finding important to the handling of grievances by the Grievance Board when it held "[Marro's] argument fails to account for the fact that circumstances invariably change and evolve over the course of a year hence the necessity of yearly performance appraisals. In other words, simply because [he] performed well prior to 1993-94 does not mean that he will continue to perform well in perpetuity."

David A. Ackerman v. United States, et al.
Civil Action No. 01-01901 (HHK), (D.D.C. filed July 19, 2004)

David A. Ackerman was separated from the Foreign Service based upon the finding of a Performance Standards Board that he was not meeting the performance standards of his class. The agency denied his grievance and, on appeal, the FSGB affirmed the agency action.

In his appeal to the Federal District Court, Ackerman raised two general arguments, challenging our decision as arbitrary and capricious. First, he claimed that the Board placed put too much weight on certain unfavorable EERs and not enough emphasis on other EERs which were more favorable. Second, Ackerman maintained that the Board failed to consider that had he been properly counseled, none of the conduct criticized in the EER that led to his selection out would even have occurred.

As to the first allegation, the court -- in a reprise of the previously mentioned O'Connell case -- explained that "under the highly deferential administrative review standard, the decision to weigh different events in a foreign service officer's employment history is within the expertise of the FSGB and must receive deference." In rejecting his argument the Court made the additional comment that "it cannot second guess" the decision of the FSGB to ascribe more importance to some EERs than others.

Helpful as that ruling was, it was not unexpected. Of greater import was the treatment of the issue of counseling. Although there is a regulatory requirement that a rated employee be counseled periodically, the Board held that the failure to provide counseling did not here prejudice Ackerman because his low ranking derived from his conduct and behavior in dealing with a subordinate, not from his "management style". What concerned the Board was Ackerman's inability to control his temper, with both subordinates and supervisors.

While the Board places great importance on the requirement of counseling, this case demonstrates that there are circumstances where the failure to counsel does not, per se, constitute reversible error. The Court sustained the Board.

Sally M. Walker v. U.S. Department of State, et al.
Civil Action No. 03-718 (CKK), (D.D.C. filed February 23, 2004)

Sally M. Walker, a career Foreign Service Officer, challenged the disciplinary action taken against her based upon a variety of security violations which occurred in 1998 while she was posted abroad. She was cited for failure to safeguard classified documents by leaving them unsecured outside the Controlled Access Area. In bringing this charge, the Department considered the fact that Walker's Incidents Tracking Report indicated she had been involved in many security incidents previously. The Grievance Board held an oral hearing in this proceeding where important credibility issues were presented.

Anytime a security violation is discovered the standard practice is to give the individual thought to be responsible an opportunity to review the documented violation and an opportunity to admit or deny knowledge of the incident. The evidence here was that Walker had refused to review the documents or sign forms acknowledging the violations.

Although not all specifications were sustained at the agency level, the Department imposed a 10-day suspension on Walker. In arriving at that penalty, the deciding official noted that Walker had been disciplined several times in the past for previous violations.

In its decision, the Grievance Board sustained most, but not all, of the remaining specifications. At the same time, it remanded the appeal to the Department on the grounds that the agency had not adequately explained the reasons for its penalty determination, and for the added reason that the agency had not had the opportunity to review the appropriateness of the penalty in the light of the Board decision to not sustain all the specifications. On remand the 10-day suspension was upheld by the Department which placed great emphasis on her poor security record.

In her complaint before the Court, Walker insisted the action by the FSGB was arbitrary and capricious because:

(1) it ignored the fact that the security official who prompted the charges being brought had a reputation showing a gross lack of professional competence, credibility and integrity;

(2) by not allowing Walker the opportunity to see the documents outlining the violations when discovered deprived her of the right to defend herself, and

(3) it was inappropriate to allow the agency to consider the factors relating to the penalty after imposition of disciplinary action rather than prior to.

In its decision the Court set forth in some detail the universally recognized legal standards applicable to this action. It explained that its role was "only to determine that there is in the record such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Add to that the holding by the court that it would defer to our credibility findings unless patently unsupportable and the importance of this decision is further manifest. The Court emphasized the both the primary witness against Walker and grievant both testified at the hearing thereby affording the Board the chance to observe their demeanor.

The primary witness against Walker was a security official, whose competence and integrity was in serious doubt. For instance, one witness had little faith in him and suggested any security incidents he cited should be considered "suspect at best." As to the assertion that the official was prompted to falsify the security violations in retaliation for Walker's role in denying him a motor pool vehicle which he dearly sought, the Grievance Board found -- and the Court accepted -- that no evidence supports the conclusion that he has ever committed or would ever commit, fraud by planting security violations for any reasons -- including retaliation because he disliked an individual.

The Court emphasized that both the official and Walker testified at the oral hearing, thereby affording the Board the chance to observe their demeanor. With respect to the contention that Walker was deprived of the opportunity to see the documents describing the security violations, the Court was not sympathetic. It agreed with the Board that Walker should have taken the steps necessary to arrange for access to the documents if she wished to review them. It accepted the Board's finding it was more likely than not that Walker failed to pursue the matter than the security official prevented her from reviewing the documents.

The argument that it was inappropriate for the Board to allow the agency to consider the *Douglas* factors only after imposition of the penalty rather than before was dealt with extensively and found unconvincing. The Court cited with approval the comment by the Board that the agency, not the Grievance Board, was charged with safeguarding classified materials and it was not inclined to second-guess the judgment of the agency in assessing a suitable penalty.

Foreign Service Grievance Board Cases

As has been my practice in the past, I will highlight in this section some of the important issues the Grievance Board itself was called upon to decide this calendar year.

One area where the Board has not been previously presented with grievances deals with annuity overpayment issues. Typically in these cases the agency seeks to recoup money erroneously paid to a retiree. Regulations allow an annuitant to seek a waiver of recoupment and Board policy is now developing.

Another area where the law is developing in the Foreign Service Grievance Board concerns the penalty question where misconduct has been established. Once the agency has properly established the wrongdoing, it also has the responsibility to determine the appropriate penalty. Assessment of a penalty is not a factual finding but rather is an exercise of the wide managerial discretion that an agency has in matters of discipline. In addition, this Board gives deference to the agency's judgment in selecting a penalty. At the same time, precedent requires that we do set markers when an agency is considering a penalty.

Sometimes a question of the appropriateness of a penalty arises when the Board does not sustain all of the charges. In these instances, Board policy has been to remand the penalty question to the agency to reassess the extent of the penalty in light of the changed circumstances. This policy as to Foreign Service members harmonizes with court decisions dealing with misconduct by civil servants.

FSGB Case No. 2002-034 (February 24, 2004)

The grievant was a Contracting Officer charged with Conduct Unbecoming an Officer for violating conflict of interest rules. Specifically, he was alleged to have amended a provision in a letter to a contractor regarding an audit agency's recommendation to seek

reimbursement of fees that resulted in a financial benefit to a subcontracting firm in which his wife was a partner. As a penalty, he was suspended for 14 business days and a letter of discipline was to be inserted in his Official Performance Folder.

The agency justified its disciplinary action by asserting that the grievant's unilateral decision to amend this letter without consulting any responsible official on the propriety of doing so, resulted in a direct benefit to his wife's firm of some $11,000. It dismissed grievant's claim that the responsible officials failed to advise him properly, noting it was grievant's obligation to perform his duties in conformance with an objective standard of conduct.

Before the Grievance Board, the officer argued that: (1) the agency did not consider all mitigating factors; (2) the responsible officials at post did not properly advise him on the potential conflict of interest; (3) the agency's subsequent decision not to seek recoupment justified his actions; and (4) the penalty was disproportionate, especially in relation to the penalties in the "like offenses" cited by the agency.

The Board found that, grievant, an experienced senior officer, abused his office and violated the conflict of interest provisions. Regarding penalty, the Board found that, while the agency's examples of "like offenses" were unpersuasive, our precedents require that agency penalties not be disturbed unless they are "outrageously disproportionate" to the offense. In view of the serious nature of the misconduct, the Board upheld the 14-day suspension and affirmed the statutory requirement that the letter of discipline be retained in grievant's file until he is next promoted. We emphasized that the determination of an appropriate penalty in misconduct proceedings is a matter peculiarly and necessarily within the discretion of the agency.

One panel member dissented on the issue of penalty, contending that the agency did not properly assess aggravating and mitigating factors, and that the penalty assessed was disproportionate to those cited by the agency as like offenses.

FSGB Case No. 2002-042 (August 10, 2004)

Grievant, an FO-02 Foreign Service Officer with the Department of State, was low ranked by the Selection Board (SB) and referred to the Performance Standards Board (PSB) which recommended that she be selected out of the Service. Her grievance to the Department contested a number of the evaluation reports cited by the PSB, asserting that the reports were inaccurate, falsely prejudicial and based on prohibited

discrimination. The Department denied the grievance in part, but determined that grievant's 1999-2000 EER was procedurally defective. As relief, it ordered the EER expunged from her performance file, rescinded the referral to the PSB and the selection out decision, non-ranked her for that year and extended her time in class by one year. It also directed that she be designated as mid-ranked for 2001 and her file be reviewed by the 2002 SB. In August 2002, grievant appealed to this Board, contesting the failure of the Department to sustain her grievance with respect to ratings in her file between 1987 and 1999, and questioning the adequacy of the relief granted by the Department.

In January 2003, grievant discovered that the 2002 SB, which low ranked her and referred her file to the PSB, had access to her 1999-2000 EER, which should have been removed from her file. The Department acknowledged this administrative error, and as remedy rescinded the 2002 low ranking and PSB referral, and designated her 2002 rating as mid-ranked. Grievant subsequently expanded her appeal, claiming that as a result of the Department's inappropriate referral of her file to the 2002 PSB, she had been unable to participate in the normal assignment process, and had a gap in her performance file. She also requested that her 2000-2001 EER be removed from her file, alleging that it was incomplete, erroneous and falsely prejudicial. Later, grievant noted that she was not promoted by the 2003 SB and that the 2000 EER which had been ordered to be expunged from her file was still in her file. The Department acknowledged that this rating was in the file but disavowed knowledge of why it remained in the file or responsibility for this error.

The Board carefully analyzed each of the ratings cited by grievant for the period 1987-1999 and determined that grievant had failed to meet the burden of proving that the ratings contained erroneous, incomplete, or falsely prejudicial information or were the product of unlawful discrimination. With respect to the 2000-2001 EER, which the Department claimed was time barred, the Board reached no conclusion but noted that grievant had been low ranked in 2003, which could be a factor in determining the timeliness of the claim. The Board dismissed grievant's challenge to this EER without prejudice, noting that she may pursue a claim about this rating with the Department.

The Board found that the relief afforded by the Department when it invalidated her 1999-2000 rating -- the rescission of the LRS and PSB referral for that year, and the subsequent extension of her TIC -- was proper compensation for the procedural error with respect to the 2000 rating. The Board also determined that the additional, and erroneous, presence of this rating in her file in subsequent years was not a substantial factor in her failure to be promoted in the post-2000 years.

With respect to grievant's assignment and evaluation history during the 2001-2003 period, the Board noted that grievant's performance file for this period reflected significant gaps in her assignments and record of evaluated performance. The Board determined that the improper selection out decision, as a result of the invalid 1999-2000 EER, placed grievant on a path that prevented her thereafter from demonstrating whether or not she had the potential for higher-level duties and promotion; the minimal relief granted by the Department in the form of non-ranking in 2000 and a one-year extension of TIC undercut the value of the more significant rescission of the selection out decision. As a result, grievant's assignments were irregular and out-of-cone, and her EER history erratic and incomplete.

The Board found that as a result of Department errors, grievant was denied proper SB reviews in the years 2000-2003 and starting in 2001, positive assignment possibilities. To compensate for those lost opportunities to demonstrate performance that might lead to promotion, the Board directed that the Department extend her TIC by three years or longer in order to provide the opportunity for SB review of two years evaluated performance in a regular in-cone position, at or above her personal rank. During this period, grievant will be subject to review and low-ranking by SBs, but will be immune from referral to PSBs or selection-out based on relative performance.

FSGB Case No. 2002-043 (January 2, 2004)

In this case, grievant contests his retirement based on relative performance. He alleges that the Performance Standards Board (PSB) based its recommendation on two principal criticisms, namely, (1) that he repeatedly ignored sage advice to broaden his perspective beyond labor issues, and (2) that he was counseled repeatedly throughout his career to be more dispassionate in expressing his opinions and to give weight to the views of others. Calling the PSB action personally distressing, grievant stated that he welcomed the opportunity to comment on a policy question concerning the role of global views in United States diplomacy. He contended that the agency's personnel system misapplied the Department's policy of recognizing global labor issues, and, by extension, labor officers. He argued further that the personnel system incorrectly views labor work as a narrow specialization, divorced from the mainstream of American foreign policy concerns.

The Department maintained that grievant's issues did not meet the legal definition of a grievance. Although the grievant alleged the misapplication by the personnel system of Department policy, he failed to articulate what the misapplication was. The Department argued further that that the grievance failed because a grievance does not include the content of published policy which is not contrary to law, regulation, or collective bargaining agreement.

After pointing out that it was the grievant's burden to establish that this Board had jurisdiction in the case, the Board stated that grievant did not allege that the PSB criticisms were based on errors, omissions, or falsely prejudicial, but rather insisted that the Departmental personnel system misapplied Department policy. In this context, the Board found that grievant was challenging the judgment of the PSB which was not a basis for a grievance.

The Board held that its jurisdiction did not extend to evaluating Department policy. Rather, it encompasses complaints that some rule, law, or regulation was violated causing harm to an employee. The Board dismissed the grievance on the grounds that grievant failed to establish that the Board had jurisdiction over his complaint.

Grievant has appealed to the federal district court.

FSGB Case No. 2002-055 (May 4, 2004)

The charged employee appealed the agency's decision to suspend her for 30 days, based on a security incident for which she had been issued a violation, allegedly in contravention of 12 FAM Sections 534.1 and 561. The agency later withdrew charges related to alleged violation of 12 FAM 561.

Grievant was the self-designated move coordinator for a relocation of her unit's office within the same building. In the course of the move a desk went missing. Six months later another agency office at a different location reported the discovery of classified material in a desk it received as excess property; this was the desk that had gone missing during the move. Following an investigation the agency determined that grievant had negligently disregarded security procedures, in violation of 12 FAM 534.1 and 561, and proposed disciplining her. A suspension of 30 days was imposed. When the agency did not act on grievant's agency-level grievance within 90 days, grievant appealed to this Board.

After the parties engaged in discovery, grievant filed a motion to dismiss, asserting that the actions with which she was charged did not fall within the scope of 12 FAM 534.1, the regulation cited by the agency. The agency opposed the motion, and also took the opportunity to issue a final decision on the agency-level grievance. The decision sustained the discipline, but reduced the suspension to 10 days.

The Board found that the material facts were not in dispute. Grievant was the self-designated move coordinator for the office. She issued instructions to affected employees concerning the move, including the reminder that all classified materials were to be secured and labeled. She did not herself inspect the contents of the desk at issue here, nor did she take any steps to ensure that those contents were properly secured and labeled. The Board found that the agency had not established that grievant knew or should have known that these acts of omission violated 12 FAM 534.1a, the only written policy the agency's notice of discipline asserted she violated. The Board noted that this section -- "Employees using classified material are responsible for its custody and must take every precaution to prevent deliberate or casual access to it by unauthorized persons" -- is not a general requirement that employees of the agency are at all times responsible for the protection of any and all classified materials. Rather, the language of this section makes "Employees using classified material . . .responsible for its custody", and requires that these employees "take every precaution" to protect it (emphasis supplied). The agency made no claim, nor did it present any evidence, that grievant ever came into possession of the classified material contained in the desk at issue because she was using this material in the course of her work. Accordingly, she cannot have had responsibility for protection of material that, by the language of the section, falls on such an employee.

The agency's claim that grievant inherited custody (within the meaning of 12 FAM 534.1a of the classified material in the desk, and thereby the responsibility for ensuring its protection, by virtue of her designation as move coordinator, likewise was not sustained by the Board. There was no documentation in the record as to the responsibilities or obligations of move coordinators -- neither written policies nor a description of commonly understood practices or procedures -- that would show grievant should reasonably have known that she incurred this responsibility by inheritance. She was not responsible herself for packing and labeling of the classified material in question, nor was she responsible for the physical movement of the furniture in the vault, including the desk.

The Board concluded that the agency's decision to suspend grievant for 10 days was not justified, and sustained the grievance appeal. Since both the disciplinary action and the underlying charge that grievant caused the security violation were based on the same facts, both were ordered overturned. In addition, we directed expunction of all references to the security violation and the disciplinary action from grievant's records and files; expeditious processing of grievant's promotion in accordance with 3 FAM 2328(2)(a); and we held grievant to be the prevailing party for the purpose of attorney fees. We denied all other requested remedies as moot (career-enhancing assignment; extension of SFS window) or outside the Board's authority (performance award).

On November 10, 2004, the Board denied the agency's Motion for Reconsideration. The agency had agreed that the Board lacks authority to decide a challenge to a violation of a security clearance but we held that we were not usurping the recognized authority of the agency alone to make security clearance determination. However, we held that grievant could not be punished for violating security rules when no violation was established.

FSGB Case No. 2003-003 (January 20, 2004)

Grievant, upon his promotion from FS-01 to the Senior Foreign Service, had his pay fixed at the FE-2 rate. As the annual rate for FE-2 was $3,300 less than his existing annual rate of pay at FS-01, he grieved the agency's alleged failure to apply the rule set out in 3 FAH-1 H-2325, which provides that an officer promoted to the SFS will receive the lowest FE rate that exceeds his scheduled rate of pay by two steps or six percent. The agency denied the grievance.

The Board found that grievant's actual annual pay consisted of the scheduled rate of pay for his class and step, plus Law Enforcement Availability Pay (LEAP) (with the combined amount limited by statute to the rate for Level V of the Executive Schedule). Under agency regulations, the "scheduled rate of pay" is the rate for the officer's class and step, exclusive of additional pay of any kind. Therefore, the Board found, the agency correctly applied the two-step/six percent rule to the scheduled rate for grievant's class and step, which produced a rate that fell between the rates for FE-1 and FE-2, and set grievant's SFS rate at FE-2.

The Board expressed empathy for grievant's understandable consternation that his promotion to the SFS resulted in a reduction in pay, an anomalous outcome that it was powerless to alter. The Grievance Board denied the appeal.

FSGB Case No. 2003-012 (August 27, 2004)

The charged employee appealed the agency's decision to suspend him for six days on charges of violating the agency's regulations concerning the submission of travel vouchers; insubordination; disruptive behavior; and violating post policy/host country procedures regarding the disposition of personal motor vehicles.

In June 2001, he was reassigned from the American Consulate General Johannesburg to Washington, DC. Scheduled to depart Johannesburg on August 6, 2001 for home leave and transfer, post policy did not permit employees to depart until they had submitted all outstanding travel vouchers and either sold or shipped their imported vehicle. Although by all accounts a superior performer, the employee had a number of overdue vouchers and had not initiated the paperwork to sell his vehicle. Rather than complete the administrative requirements and depart, he took annual leave from August 8 - 17 to visit his daughter in the U.S. His daughter was the subject of an ongoing custody dispute with his ex-wife. The employee felt resentment against the agency because he believed the agency did not support him in the dispute. On his return to post, grievant refused to accept offers of post assistance with his vouchers or the sale of his car.

By the end of August, grievant had submitted most of his vouchers and sold his car. The post obtained approval for grievant to defer home leave and travel directly to his new office, which expected him to arrive on September 4. The post made numerous reservations and prepared tickets for grievant, but he refused to use them. Grievant claimed he was under stress and needed medical help, but refused to use the services of the embassy's regional medical personnel or seek help from a local doctor. On August 31, the post administrative officer presented grievant with tickets for a flight that night and a direct order from the Consul General to depart. Grievant refused. Thereafter, on the advice of agency Human Resources and Medical personnel, the post simply waited for grievant to decide to depart, which he did on September 6.

Grievant argued that the agency failed to demonstrate by a preponderance of the evidence that he committed any acts of misconduct, that the disciplinary action was meritorious, or that the disciplinary action was proportionate to the alleged acts of misconduct. He argued also that the agency based its charges on hearsay evidence that did not meet the test of preponderant evidence established in Bornikoff v. Department of Justice, 5 MSPB 77 (1981), that grievant's acts were not willful and intentional because he gave his Post Administrative Officer duties priority and because he was under severe temporary stress at the end of his tour, and that grievant's actions did not have an adverse impact on the agency's mission.

The Board found that the agency had shown by a preponderance of the evidence that grievant committed the misconduct with which he was charged. The preponderance of the evidence showed his actions were not due primarily to emotional distress but were in fact retaliation against the agency for perceived lack of agency support in his dispute with his wife. The Board found that grievant knew, or reasonably should have known, that those acts were impermissible and could lead to discipline; that his behavior imposed a considerable burden on both the gaining and losing organizations; and that the six-day suspension fell within the zone of reasonableness.

FSGB Case No. 2003-015 (January 21, 2004)

In this case, the grievant contests the assignment of a civil service analyst to an Economic Officer position for which he had been paneled. The grievance consisted of two separate and distinct claims:

> The agency violated its own regulations when it assigned another individual to the position for which he had been paneled; and
>
> Post management failed to task him with responsibilities that were commensurate with his rank and experience.

The agency denied the grievance on three grounds, one of the grounds being that it was not submitted within the time limits for grievance filings specified in the Foreign Service Act. In its acknowledgement letter, the Board requested submissions from both parties on the issue of whether the original grievance was timely filed. This Order addresses that issue.

A November 29, 1999 amendment to Section 1104(a) of the Foreign Service Act provided, in part, as follows:

A grievance is forever barred under this chapter . . .unless it is filed with the Department not later than two years after the occurrence giving rise to the grievance . . .. The amendments made by this section . . .shall take effect 180 days after the date of enactment of this Act and shall apply to grievances which arise on or after such effective date.

The impact of this amendment is, for matters occurring after May 30, 2000, that the limitation period for filing a grievance is two years. For matters occurring prior to that date, a three-year limitations period is applicable. Using this as our framework, the Board found grievant's claim that post management failed to task him with responsibilities commensurate with his rank and experience was time barred as the occurrence happened after May 30, 2000.

As to the second claim, that the Department violated regulations in assigning another person to the Economic Section of the mission, we found that as this occurrence happened prior to May 30, 2000, the three-year limitation for grievances was applicable and that the grievance was timely filed.

Citing the authority set forth at 22 CFR Section 904.2 to make a preliminary determination on any issue in a grievance appeal whose resolution might avoid the necessity of further proceedings, the Board requested the parties to submit briefs on the question of whether it should make a determination that grievant has failed to set forth a prima facie case on which relief can be granted.

The Board held that grievant had failed to meet his burden to set forth a prima facie case upon which relief can be granted. Specifically, grievant had provided no evidence that the agency had violated law or regulation in assigning the non-Foreign Service employee to the Economic Section of the Embassy.

FSGB Case No. 2003-016 (July 8, 2004) (Corrected July 12, 2004)

Grievant appealed to the Board the agency's decision to suspend him for a total of three workdays on a charge of violating the agency's workplace violence policy.

In May 2002, grievant was temporarily assigned to work in a section of the agency's classified communications facility in Washington, DC. The Civil Service facility supervisor noticed grievant and asked what work he was doing. Instead of replying directly, grievant told the supervisor to ask the person who assigned grievant. As the supervisor continued to question in what grievant thought was a bullying manner, grievant advanced several feet toward the supervisor until his face was three inches from the supervisor's face in what grievant claimed was an effort to stand up to a bully. The supervisor, alleging he felt threatened by grievant's approach, struck grievant in the face with his fist, and the two tussled briefly. Each employee accused the other of provoking the incident.

Diplomatic Security conducted an investigation where grievant admitted walking voluntarily to within three inches of the supervisor. The supervisor admitted striking grievant. The agency determined that both employees had violated the agency's workplace violence policy. The agency proposed a five-day suspension for grievant, but mitigated it to three days in view of grievant's good work history.

Grievant argued that he was not the aggressor, having been struck first by the supervisor; that he did not intend to violate the agency's workplace violence policy; that the supervisor had a reputation for unduly authoritative behavior; and the penalty was unjustified because a three-day suspension would impact a Foreign Service employee more severely than a Civil Service employee. The agency countered that grievant had every opportunity to walk away to avoid conflict but chose to aggravate the situation instead, and that both employees were penalized equally for essentially the same acts of misconduct.

After obtaining a scaled floor plan of the room and touring the area where the incident occurred, a hearing was held where sworn testimony subject to cross-examination was taken. The Board determined that grievant clearly violated the agency's workplace violence policy by unnecessarily advancing so close to the supervisor that a reasonable person would interpret his behavior as threatening. The Board rejected grievant's argument that he should be penalized differently from a Civil Service employee and concluded that the three-day suspension fell within the zone of reasonableness.

FSGB Case No. 2003-030 (corrected September 9, 2004)

In this case, the Board held it was entirely appropriate for the agency to terminate the candidacy of an applicant to become a Diplomatic Security Special Agent when the grievant had failed to obtain a minimum passing grade at the Basic Special Agent Course. Here, the training center had initially ruled, albeit erroneously, that grievant had passed the course. A recount found he failed by a single point to pass one portion of the course.

FSGB Case No. 2003-032 (February 23, 2004)

Here the Department of Agriculture, proposed to reprimand grievant for refusal to follow instructions, arising from grievant's action in preparing a briefing memorandum for the United States Ambassador. The memorandum concerned a decision by her superior to change the basis for payment of per diem for department personnel conducting inspections of products of the mango industry before they are exported to the United States. The change was seen by the mango industry as having an adverse impact, and industry representatives sought to meet with the Ambassador on the matter. On instructions from the embassy, she prepared the briefing memorandum in which she included as recommendations that the Ambassador meet with the industry representatives and that a prior per diem basis be retained and a review be conducted of per diem rates. The agency charged that this action, together with a comment by grievant in a meeting, constituted a refusal to follow instructions.

The Board found that grievant had informed her superiors of the matter and had followed their instructions to prepare the memorandum. There was no evidence that she received guidance on its content or that she was required to submit the memorandum for clearance by her superiors. The Board did not accept the agency's view that she should have known that divergent views should be kept "in-house", since this would seem to countenance the proposition that the Ambassador, who has authority over all U. S. agencies in his country of assignment, should not be considered "in-house". The Board also found that the agency provided no evidence of any nexus of the charged offense to its mission, in that it was not shown that the memorandum even reached the Ambassador or that it had any other consequence. The Board sustained the grievance appeal and directed that all records of the disciplinary action be expunged from agency files.

FSGB Case No. 2003-033 (March 4, 2004)

In July 1999, grievant contended that his 1997-98 EER was incomplete and falsely prejudicial. In August the agency advised grievant that the grievance as filed was incomplete and unacceptable, that the filing would be held in abeyance pending receipt of additional information, and that, absent additional documentation, the grievance "will be administratively closed." No further exchanges took place until May 2003 when grievant wrote the agency referring to the 1999 grievance, provided documentation and additional information and argument, and repeated and expanded his requests for relief. In July the agency responded, noting that, as he had been forewarned, his 1999 grievance had been administratively closed because of his failure to provide additional information. The agency ruled that the May 2003 filing contesting his 1998 low-ranking was beyond the two-year filing period specified in 3 FAM 4427a, and thus was untimely.

Grievant appealed to the Board, pointing out that the agency had issued no final decision in his 1999 grievance and had set no time limit for him to supplement it. He noted that his 2003 filing was within five years of the issuance of the 1997-98 EER and that 3 FAM 4427b(2) expands the grievance filing period from two to five years for material used as the basis for low ranking. He maintained that his grievance remained timely. The agency countered that, after such a long period of inaction, the 1999 grievance should be deemed to be closed, and that, if its earlier action was not considered a final decision, grievant's appeal was barred by 3 FAM 4451, which limits the time for appeal in the absence of an agency decision to 150 days from the initial filing date unless good cause is shown for waiving the time limit.

The Board held that the agency had not complied with 3 FAM 4434.4, which provides that an agency grievance decision will inform the grievant in writing of its findings and advise the grievant of appeal time limits and procedures. The agency letter of August 1999 was an interim response and did not meet these requirements. While the agency may have considered the case closed after such a long period, the Board had to assure that agency failure to meet its regulatory duties regarding decision and notice had not disadvantaged grievant.

The Board dismissed the agency claim that the appeal was time barred by the 150-day limit, citing prior Board decisions permitting appeals at any time once an agency decision is issued, if filed within 60 days of that decision. Grievant had filed a timely appeal from the agency's July 2003 decision. The Board found that the issue of time limit waiver for good cause under 3 FAM 4451 was not operative here, since grievant's appeal was timely. The Board has excused even substantial delay in appealing when caused by lack of agency notice of appeal time limits, and found the

present situation -- agency failure to set a date for supplemental submission or to advise grievant of closure and appeal rights -- to be analogous and material.

The Board commented that, had the agency failed to accept grievant's supplemental filing some weeks or perhaps months after its August 1999 letter, we would have excused the delay as attributable to agency error. Here, however, grievant had taken no action for more than three years. The Board noted that the standard set forth in the Foreign Service Act (Section 1104) and implementing regulations (3 FAM 4427a(4)) for excusing failure to file grievances within governing time limits was the exercise of "reasonable diligence," which we have defined as "the degree of care and prudence which should reasonably be expected of anyone in grievant's circumstances." The Board held that it was not reasonably diligent for grievant to have waited three and one-half years to complete his grievance, particularly when he had been put on notice that the agency might close his case at any time for failure to follow up. Moreover, grievant, like all employees, was charged with knowledge of the regulations governing his employment and had had ample opportunity to follow up.

Although the Board agreed with the agency that grievant's May 2003 filing should be treated as a new grievance, it held that his renewed challenge to the 1997-98 EER was itself within the five-year regulatory time limit, and it remanded that issue to the agency for a decision on its merits.

FSGB Case No. 2003-040 (March 12, 2004)

Here the Board found, as had the Department, that a procedural error occurred when a Group Meritorious Honor Award was omitted from grievant's Official Performance File when she was being reviewed for possible promotion by the 2002 Selection Board. Nevertheless, the error was not found of sufficient significance to warrant a reconstituted Board because her overall performance was mediocre and there was not a reasonable likelihood of her being promoted. Thus, the allegation that she was prejudiced by procedural errors was found not to be meritorious.

FSGB Case No. 2003-045 (March 9, 2004)

Grievant engaged in extra-marital sexual relations during his assignments overseas in the period from 1997-2002. His partners were employees in his chain of command as well as foreign nationals. He was charged with, among other things, poor judgment, and the appearance of a violation of ethical standards.

Even though grievant had argued that the disciplinary action was not warranted because there was no evidence that his off-duty conduct in any way impacted negatively or otherwise on the functioning of the embassies he served in, a proposed 3-day suspension was sustained. His sexual relations with the foreign nationals were found to demonstrate poor judgment because they had the potential of creating embarrassment to the United States if made public. Thus a nexus between his conduct and the operations of the agency was established.

Case Statistics 2004

***A.* Number of Cases Filed** 71

***B.* Types of Cases Filed**

EER	35
Financial	16
Disability	0
Discipline	8
Separation	9
Jurisdiction	0
Assignment	2
Implementation	0
Other	1

***C.* Disposition of 2004 Cases**

Affirmed	7
Reversed	1
Partially Reversed	0
Settled	5
Withdrawn	3
Dismissed	1
Pending (as of 12/31/2004)	54

***D.* Oral Hearings** 2

***E.* Interim Relief** 4

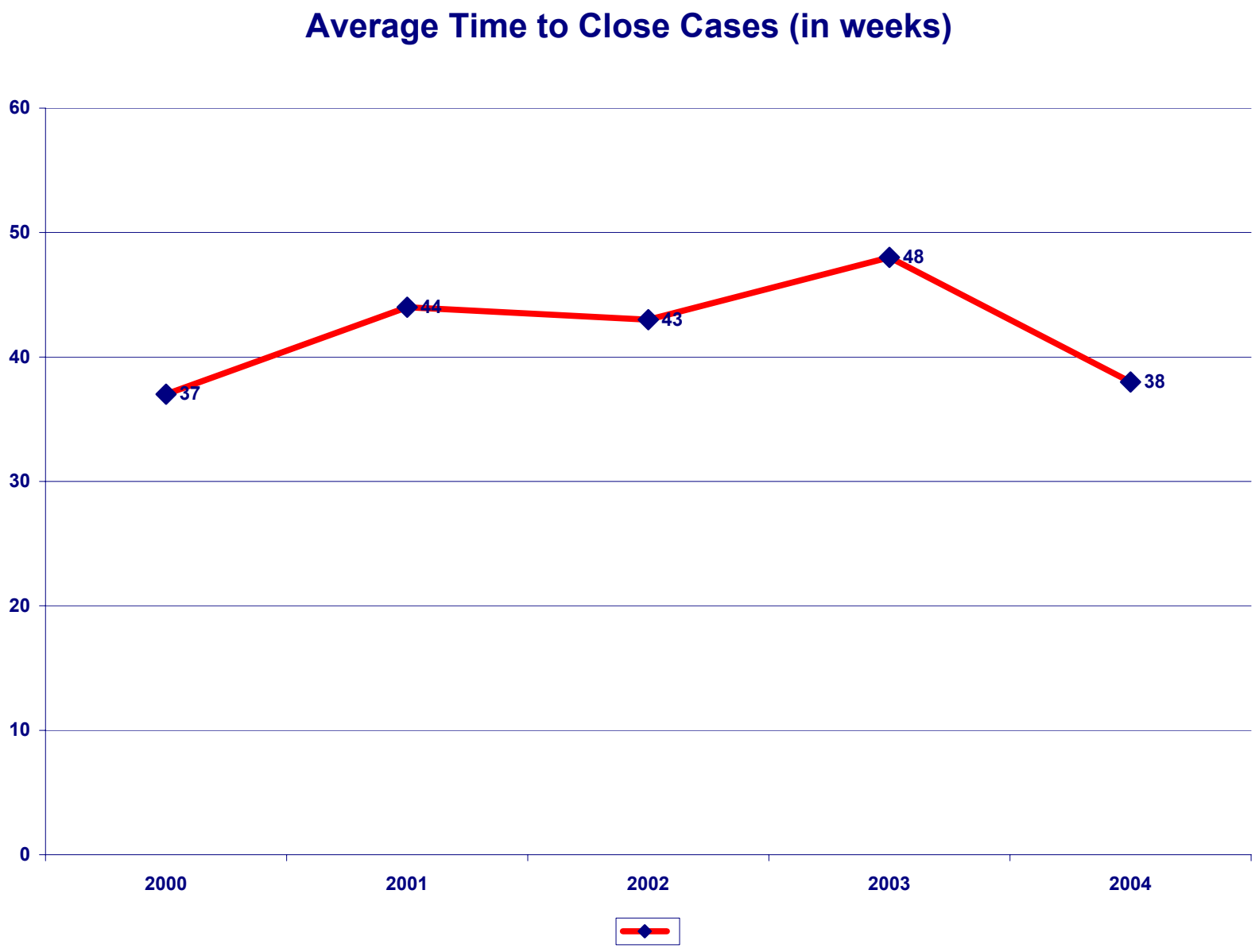
Case Statistics 2004

F. All Cases Closed in 2004
(Including Prior Year Cases)

Total	44
Affirmed	22
Reversed	9
Partially Reversed	1
Settled	7
Withdrawn	3
Dismissed	2

The average time for all cases closed in 2004 from filing to resolution was a total of 38 weeks, a decrease from the 48 week average in 2003. The longest time between filing and resolution was 110 weeks, significantly less than the 338 weeks in 2003. The shortest was 1 week. The average time for 2004 cases from filing to resolution was a total of 14 weeks.

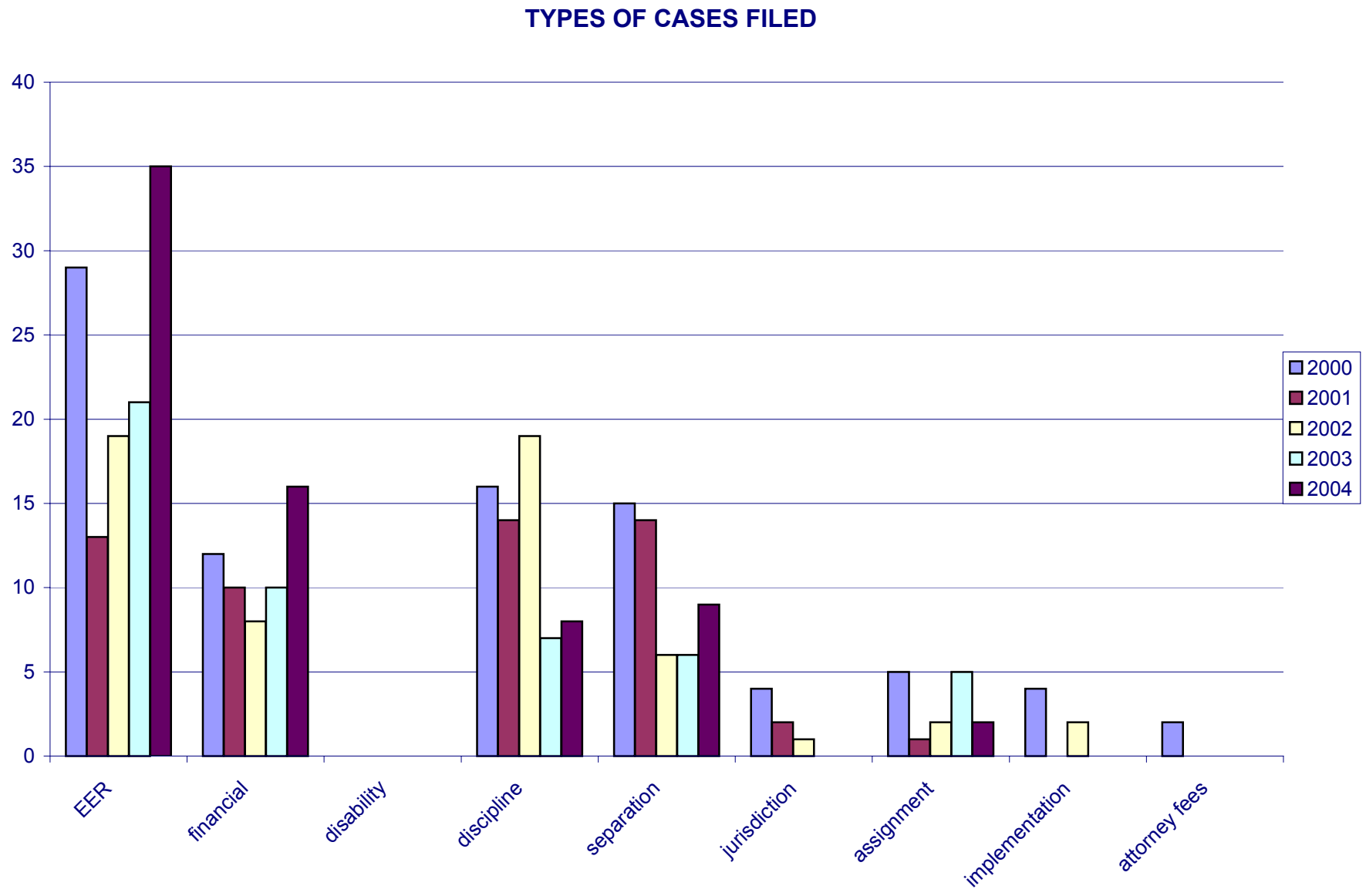
As of December 31, 2004, there were 54 cases pending before the Board. The oldest undecided case was pending 117 weeks as of December 31, 2004.



This is an average time for all cases closed in 2004, which includes cases filed in previous years.

TYPES OF CASES FILED

	2000	2001	2002	2003	2004
EER	29	13	19	21	35
financial	12	10	8	10	16
disability	0	0	0	0	0
discipline	16	14	19	7	8
separation	15	14	6	6	9
jurisdiction	4	2	1	0	0
assignment	5	1	2	5	2
implementation	4	0	2	0	0
attorney fees	2	0	0	0	0
other	0	0	0	0	1


TYPES OF CASES FILED
40
35
30
25
20
15
10
5
0
EER
financial
disability
discipline
separation
jurisdiction
assignment
implementation
attorney fees
2000
2001
2002
2003
2004