

§ 4136. Foreign Service Grievance Board procedures

The Board may adopt regulations concerning its organization and procedures. Such regulations shall include provision for the following:

- (1) The Board shall conduct a hearing at the request of a grievant in any case which involves—
 - (A) disciplinary action or the retirement of a grievant from the Service under section 4007 or 4008 of this title, or
 - (B) issues which, in the judgment of the Board, can best be resolved by a hearing or presentation of oral argument.
- (2) The grievant, the representatives of the grievant, the exclusive representative (if the grievant is a member of the bargaining unit represented by the exclusive representative), and the representatives of the Department are entitled to be present at the hearing. The Board may, after considering the views of the parties and any other individuals connected with the grievance, decide that a hearing should be open to others. Testimony at a hearing shall be given under oath, which any Board member or individual designated by the Board shall have authority to administer.
- (3) Each party (including an exclusive representative appearing in the proceedings) shall be entitled to examine and cross-examine witnesses at the hearing or by deposition and to serve interrogatories upon another party and have such interrogatories answered by the other party unless the Board finds such interrogatory irrelevant, immaterial, or unduly repetitive. Upon request of the Board, or upon a request of the grievant deemed relevant and material by the Board, an agency shall promptly make available at the hearing or by deposition any witness under its control, supervision, or responsibility, except that if the Board determines that the presence of such witness at the hearing is required for just resolution of the grievance, then the witness shall be made available at the hearing, with necessary costs and travel expenses paid by the Department.
- (4) During any hearing held by the Board, any oral or documentary evidence may be received, but the Board shall exclude any irrelevant, immaterial, or unduly repetitious evidence, as determined under section 556 of title 5.
- (5) A verbatim transcript shall be made of any hearing and shall be part of the record of proceedings.
- (6) In those grievances in which the Board does not hold a hearing, the Board shall afford to each party the opportunity to review and to supplement, by written submissions, the record of proceedings prior to the decision by the Board. The decision of the Board shall be based exclusively on the record of proceedings.
- (7) The Board may act by or through panels or individual members designated by the Chairperson, except that hearings within the continental United States shall be held by panels of at least three members unless the parties agree otherwise. References in this subchapter to the Board shall be considered to

be references to a panel or member of the Board where appropriate. All members of the Board shall act as impartial individuals in considering grievances.

(8) If the Board determines that the Department is considering the involuntary separation of the grievant (other than an involuntary separation for cause under section 4010(a) of this title), 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 grievance, whichever comes first. The Board shall extend the one-year limitation under the preceding sentence and the Department shall continue to suspend such action, if the Board determines that the agency or the Board is responsible for the delay in the resolution of the grievance. The Board may also extend the 1-year limit if it determines that the delay is due to the complexity of the case, the unavailability of witnesses or to circumstances beyond the control of the agency, the Board or the grievant. Notwithstanding such suspension of action, the head of the agency concerned or a chief of mission or principal officer may exclude the grievant from official premises or from the performance of specified functions when such exclusion is determined in writing to be essential to the functioning of the post or office to which the grievant is assigned.

(9) The Board may reconsider any decision upon presentation of newly discovered or previously unavailable material evidence.

(Pub. L. 96-465, title I, §1106, Oct. 17, 1980, 94 Stat. 2145; Pub. L. 101-167, title V, §586(a), Nov. 21, 1989, 103 Stat. 1252; Pub. L. 102-138, title I, §143(b), Oct. 28, 1991, 105 Stat. 668; Pub. L. 103-236, title I, §§177(a), 181(a)(4)(B), Apr. 30, 1994, 108 Stat. 414, 417; Pub. L. 107-228, div. A, title III, §314(b), Sept. 30, 2002, 116 Stat. 1379; Pub. L. 109-140, §5, Dec. 22, 2005, 119 Stat. 2652.)

AMENDMENTS

2005—Par. (8). Pub. L. 109-140 inserted “the involuntary separation of the grievant (other than an involuntary separation for cause under section 4010(a) of this title),” after “considering” and substituted “the grievant, or” for “the grievant or”.

2002—Par. (8). Pub. L. 107-228, in first sentence, struck out “the involuntary separation of the grievant,” before “disciplinary action” and substituted “grievant or” for “grievant, or”, and struck out last sentence which read as follows: “Notwithstanding the first sentence of this paragraph, the Board’s authority to suspend such action shall not extend to instances where the Secretary, or his designee, has exercised his authority under subsection (a)(3) of section 4010 of this title or with respect to any action which would delay the separation of an employee pursuant to a reduction in force conducted under section 4010a of this title.”

1994—Par. (8). Pub. L. 103-236, §181(a)(4)(B), inserted before period at end “or with respect to any action which would delay the separation of an employee pursuant to a reduction in force conducted under section 4010a of this title”.

Pub. L. 103-236, §177(a), substituted “until the date which is one year after such determination or until the

Board has ruled upon the grievance, whichever comes first. The Board shall extend the one-year limitation under the preceding sentence and the Department shall continue to suspend such action, if the Board determines that the agency or the Board is responsible for the delay in the resolution of the grievance. The Board may also extend the 1-year limit if it determines that the delay is due to the complexity of the case, the unavailability of witnesses or to circumstances beyond the control of the agency, the Board or the grievant." for "until the Board has ruled upon the grievance."

1991—Par. (8). Pub. L. 102-138 substituted "exercised his authority under subsection (a)(3) of section 4010 of this title" for "determined that there is reasonable cause to believe that a grievant has committed a job-related crime for which a sentence of imprisonment may be imposed and has taken action to suspend the grievant without pay pending a final resolution of the underlying matter".

1989—Par. (8). Pub. L. 101-167 inserted at end "Notwithstanding the first sentence of this paragraph, the Board's authority to suspend such action shall not extend to instances where the Secretary, or his designee, has determined that there is reasonable cause to believe that a grievant has committed a job-related crime for which a sentence of imprisonment may be imposed and has taken action to suspend the grievant without pay pending a final resolution of the underlying matter."

§ 4137. Foreign Service Grievance Board decisions

(a) Record; findings of fact and statement of reasons

Upon completion of its proceedings, the Board shall expeditiously decide the grievance on the basis of the record of proceedings. In each case the decision of the Board shall be in writing, and shall include findings of fact and a statement of the reasons for the decision of the Board.

(b) Authority of Department upon finding of meritorious grievance

If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department—

(1) to correct any official personnel record relating to the grievant which the Board finds to be inaccurate or erroneous, to have an omission, or to contain information of a falsely prejudicial character;

(2) to reverse a decision denying the grievant compensation or any other perquisite of employment authorized by laws or regulations when the Board finds that such decision was arbitrary, capricious, or contrary to laws or regulations;

(3) to retain in the Service a member whose separation would be in consequence of the matter by which the member is aggrieved;

(4) to reinstate the grievant, and to grant the grievant back pay in accordance with section 5596(b)(1) of title 5;

(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; and

(6) to take such other remedial action as may be appropriate under procedures agreed to by the Department and the exclusive representative (if any).

(c) Finality of decisions; judicial review

Except as provided in subsection (d), decisions of the Board under this subchapter shall be

final, subject only to judicial review as provided in section 4140 of this title.

(d) Recommendations

(1) If the Board finds that the grievance is meritorious and that remedial action should be taken that relates directly to promotion, tenure or assignment of the grievant or to other remedial action not otherwise provided for in this section, or if the Board finds that the evidence before it warrants disciplinary action against any employee of the Department or member of the Service, it shall make an appropriate recommendation to the Secretary. The Secretary shall make a written decision on the recommendation of the Board within 30 days after receiving the recommendation. The Secretary shall implement the recommendation of the Board except to the extent that, in a decision made within that 30-day period, the Secretary rejects the recommendation in whole or in part on the basis of a determination that implementation of the recommendation would be contrary to law or would adversely affect the foreign policy or national security of the United States. If the Secretary rejects the recommendation in whole or in part, the decision shall specify the reasons for such action. Pending the decision of the Secretary, there shall be no ex parte communication concerning the grievance between the Secretary and any person involved in the proceedings of the Board. The Secretary shall, however, have access to the entire record of the proceedings of the Board.

(2) A recommendation under paragraph (1) shall, for purposes of section 4140 of this title, be considered a final action upon the expiration of the 30-day period referred to in such paragraph, except to the extent that it is rejected by the Secretary by an appropriate written decision.

(3)(A) If the Secretary makes a written decision under paragraph (1) rejecting a recommendation in whole or in part on the basis of a determination that implementing such recommendation would be contrary to law, the Secretary shall, within the 30-day period referred to in such paragraph—

(i) submit a copy of such decision to the Board; and

(ii) request that the Board reconsider its recommendation or, if less than the entirety is rejected, that the Board reconsider the portion rejected.

(B)(i) Within 30 days after receiving a request under subparagraph (A), the Board shall, after reviewing the Secretary's decision, make a recommendation to the Secretary either confirming, modifying, or vacating its original recommendation or, if less than the entirety was rejected, the portion involved.

(ii) Reconsideration under this subparagraph shall be limited to the question of whether implementing the Board's original recommendation, either in whole or in part, as applicable, would be contrary to law.

(C) A recommendation made under subparagraph (B) shall be considered a final action for purposes of section 4140 of this title, and shall be implemented by the Secretary.