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## DISCLOSURE OF LOBBYING ACTIVITIES
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# CHAPTER IX—FOREIGN SERVICE GRIEVANCE BOARD REGULATIONS


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# PART 901—GENERAL

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AUTHORITY: Secs. 610, 1101, 1102, 1105, and 1106 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4131, 4132, 4135, and 4136), as amended.

SOURCE: 50 FR 31353, Aug. 2, 1985, unless otherwise noted.

## Subpart A—Purpose and Scope

### § 901.1 Purpose and scope.

The regulations contained in this chapter establish the internal organization of the Foreign Service Grievance Board and prescribe its procedures in:

(a) Determining its jurisdiction in cases involving grievances and separation for cause proceedings;

(b) Compiling a record in such cases;

(c) Conducting hearings in such cases, when required or deemed necessary; and

(d) Deciding such cases, or otherwise disposing of them, so as to ensure the fullest measure of due process for the members of the Foreign Service.

## Subpart B—Meanings of Terms As Used in This Chapter

### § 901.10 Act.

*Act* means the Foreign Service Act of 1980 (Pub. L. 96–465, October 17, 1980), as amended.

[56 FR 55458, Oct. 28, 1991]

### § 901.11 Agency.

*Agency* means the Department of State, the Agency for International Development, the U.S. Information Agency, the Department of Agriculture, or the Department of Commerce, if the Agency employs the individual appearing in a case before the Board and/or has control over the act, omission, or condition forming the subject matter of such case.

### § 901.12 Board.

*Board* means the Foreign Service Grievance Board, including any designated panel or member thereof.

### § 901.13 Executive secretary.

*Executive secretary* means the executive secretary of the Board or his or her designee.

### § 901.14 Service.

*Service* means the Foreign Service of the United States.

### § 901.15 Exclusive representative.

*Exclusive representative* means any labor organization which is certified as the exclusive representative of the bargaining unit of which the grievant or charged employee is a member.

### § 901.16 Grievant.

*Grievant* means anyone who has filed a grievance and who is a member of the Service and is a citizen of the United States, or for the purposes of § 901.18(a)(7) a former member of the Service, or in the case of death of the member, the surviving spouse or, if none, another member of the family.

### § 901.17 Charged employee.

*Charged employee* means a member of the Senior Foreign Service or a member of the Service assigned to a salary class who has been proposed for separation for cause under section 610(a)(2) of the Act.

### § 901.18 Grievance.

(a) *Grievance* means any act, omission, or condition subject to the control of an Agency which is alleged to deprive a member of the Service who is a citizen of the United States of a right

or benefit authorized by law or regulation or is otherwise a source of concern or dissatisfaction to the member, including but not limited to:

(1) Complaints against separation of a member allegedly contrary to law or regulation or predicated upon alleged inaccuracy, omission, error or falsely prejudicial character of information in any part of the official personnel record of the member;

(2) Other alleged violation, misinterpretation or misapplication of applicable law, regulation, collective bargaining agreement or published post or agency policy affecting the terms and conditions of the employment or career status of the member;

(3) Allegedly wrongful disciplinary action against the member;

(4) Dissatisfaction with respect to the working environment of the member;

(5) Alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial to the member;

(6) Action alleged to be in the nature of reprisal or other interference with freedom of action in connection with participation by a member in a grievance; and

(7) Alleged denial of an allowance, premium pay or other financial benefit to which the member claims entitlement under applicable laws or regulations.

(b) The scope of grievances described above may be modified by written agreement between an Agency and its exclusive representative.

(c) The term *grievance* does not include:

(1) Complaints against an individual assignment of a member under chapter 5 of the Act, other than an assignment which is alleged to be contrary to law or regulation;

(2) The judgment of a selection board (established under section 602 of the Act) or a tenure board (established under section 306(b) of the Act) or any other equivalent body established by laws or regulations which similarly evaluates the performance of members of the Service on a comparative basis, including a merit promotion selecting official, except that alleged procedural violations of law, regulation or collective bargaining agreement or prohibited personnel practice(s) arising under these procedures are grievable;

(3) The expiration of a limited appointment, termination of a limited appointment under section 611 of the Act, or the denial of a limited career extension or denial of a renewal of a limited career extension under section 607(b) of the Act; or

(4) Pursuant to section 1109 of the Act, any complaint or appeal where a specific statutory hearing procedure exists other than procedures for considering prohibited personnel practice charges before the Merit Systems Protection Board or Special Counsel (5 U.S.C. 1206).

(5) Non-adoption of a member suggestion or disapproval of a quality salary increase, performance award, or any other kind of honorary discretionary award, except where such action is alleged to be contrary to law, regulation or collective bargaining agreement; and

(6) The content of published agency policy which is not contrary to law, regulation or collective bargaining agreement.

(d) For the purposes of these regulations, the written complaint concerning any act, omission, or condition specified above may be referred to as the ''grievance''.

[50 FR 31353, Aug. 2, 1985, as amended at 56 FR 55458, Oct. 28, 1991]

### §901.19 Labor organization.

*Labor organization* means any employee organization accorded recognition as the exclusive employee representative under section 1002(11) of the Act. For the Department of State and the Agency for International Development (AID), the exclusive employee representative is the American Foreign Service Association; for the U.S. Information Agency (USIA), the exclusive employee representative is the American Federation of Government Employees, Local 1812 (AFL–CIO).

### §901.20 Party.

*Party* means—

(a) The grievant/charged employee;

(b) The Agency or Agencies employing the grievant/charged employee and/

or having control over the act, omission, or condition leading to appearance before the Board; or

(c) The exclusive representative if it has achieved party status under § 903.4.

A Party may act through its duly designated representative.

[50 FR 31353, Aug. 2, 1985, as amended at 56 FR 55458, Oct. 28, 1991]

### § 901.21 Record of proceedings.

*Record of proceedings* means the case file maintained by the Board on each grievance case, or separation for cause proceeding.

### § 901.22 Representative.

*Representative* means the person(s) identified in writing to the Board as assisting the party or parties in the presentation of the case.

## PART 902—ORGANIZATION

Sec.
902.1 Chairperson and deputy chairperson.
902.2 Board operations.
902.3 Board staff.

AUTHORITY: Secs. 1105 and 1106 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4135 and 4136), as amended.

### § 902.1 Chairperson and deputy chairperson.

The chairperson presides over meetings of the Board. The chairperson shall select one of the Board members as deputy. In the absence of the chairperson, the deputy chairperson, or in his or her absence, another member designated by the chairperson, may act for him or her.

[50 FR 31354, Aug. 2, 1985]

### § 902.2 Board operations.

(a) The Board may operate either as a whole, or through panels or individual members designated by the chairperson.

(b) When operating as a whole, the Board may not act in the absence of a quorum. A majority of the members shall constitute a quorum. The Board will act by a majority vote of those present. Amendments to these regulations and Board policies adopted pursuant to § 910.3 shall be adopted by the Board operating as a whole.

(c) Board panels and presiding members of panels shall be designated by the chairperson subject only to the provisions of § 906.4.

[50 FR 31354, Aug. 2, 1985, as amended at 56 FR 55459, Oct. 28, 1991]

### § 902.3 Board staff.

The chairperson shall select the Board's executive secretary and other staff provided for in the Act. The executive secretary and staff shall be responsible only to the Board through the chairperson.

[50 FR 31354, Aug. 2, 1985]

## PART 903—INITIATION AND DOCUMENTATION OF CASES

Sec.
903.1 Initiation of cases.
903.2 Record of proceedings.
903.3 Rulings on materials.
903.4 Participation of exclusive representative.
903.5 Service of documents.
903.6 Interrogatories.
903.7 Acknowledgment.
903.8 Withdrawal.
903.9 Access to records.
903.10 Access to witnesses.

AUTHORITY: Secs. 610, 1104, and 1106–1109 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4010, 4134, and 4136–4139), as amended.

SOURCE: 50 FR 31354, Aug. 2, 1985, unless otherwise noted.

### § 903.1 Initiation of cases.

(a) Grievances submitted to the Board shall be in writing, and shall explain the nature of the grievance, and the remedy sought; shall contain all the documentation furnished to the Agency and the Agency's final review; and shall be timely filed in accordance with applicable regulations.

(b) A member whose grievance is not resolved satisfactorily under Agency procedures, the representative of the grievant, or the exclusive representative (on behalf of a grievant who is a member of the bargaining unit), shall be entitled to file a grievance with the Board no later than 60 days after receiving the Agency decision. In the event that an Agency has not provided its decision within 90 days of filing

with the Agency, the grievant, the representative of the grievant, or the exclusive representative (on the grievant's behalf) shall be entitled to file a grievance with the Board no later than 150 days after the date of filing with the Agency. The Board may extend or waive for good cause shown the time limits stated in this section, and may permit or request the views of the parties with respect to whether good cause has been shown for such an extension.

(c) Separation for cause proceedings against a charged employee shall be initiated before the Board by submission of a statement of the acts or behavior considered by the Agency to warrant separation.

### §903.2 Record of proceedings.

Upon receipt of initial documents relating to a case, a record of proceedings shall be established, and all material received or obtained by the Board in connection with the case shall be placed in it unless the Board excludes such material under §903.3. The parties and the exclusive representative, if any, shall have access to the record of proceedings. Classified portions of the record of proceedings may be reviewed by the parties and the exclusive representative, if any, under conditions prescribed by the Board to ensure appropriate security.

### §903.3 Rulings on materials.

The Board may at any stage of the proceedings exclude materials from the record of proceedings at the request of a party or on its own initiative, on the grounds that such materials are irrelevant, immaterial or unduly repetitive.

### §903.4 Participation of exclusive representative.

(a) Upon the initiation of a case, the executive secretary shall ascertain from the Agency, the grievant/charged employee and any labor organization which has been certified as the exclusive representative of employees of the Agency, whether the relevant position occupied by the grievant/charged employee is part of the bargaining unit for which the labor organization is the exclusive representative. If a substantial dispute exists as to whether that position is part of the bargaining unit, and if the Board determines that resolution of that dispute is necessary for determining the status of the labor organization in a case, the Board shall notify the parties and the labor organization, who may request the Foreign Service Labor Relations Board to make a final determination of that dispute. If the Foreign Service Labor Relations Board determines that the grievant or charged employee is a member of a bargaining unit represented by an exclusive representative, the executive secretary shall promptly send a copy of the papers filed with the Board to the exclusive representative.

(b) The exclusive representative has the right to intervene as a party to the case if such exclusive representative gives timely notice to the Board in writing of its decision to intervene as a party. Notice shall be considered to be timely if given prior to or at the prehearing conference, or, in a case to be decided under part 907 of this chapter, if given within 10 days of receipt of a notice from the Board of the Board's intent to close the record of proceedings.

(c) An exclusive representative which has not intervened under paragraph (b) of this section may be permitted to intervene as a party upon written application. In ruling upon the application, the Board shall consider whether granting the application will unduly delay or prejudice the adjudication of the rights of the original parties, and may place conditions on the exclusive representative's participation to avoid such delay or prejudice.

### §903.5 Service of documents.

Any party submitting documents to the Board in connection with a case shall send a copy to the other parties and to the exclusive representative, if any. The Board shall send copies of its correspondence concerning the case to the parties and the exclusive representative, if any.

### §903.6 Interrogatories.

Each party shall be entitled to serve interrogatories upon another party, and have such interrogatories answered by the other party unless the Board finds such interrogatories irrelevant,

immaterial, or unduly repetitive. Parties shall follow procedures established by the Board concerning the use of interrogatories.

### § 903.7 Acknowledgment.

Each case received shall be acknowledged in writing by the executive secretary of the Board. If in the judgment of the executive secretary additional documentation or information is needed, he or she may request such materials.

### § 903.8 Withdrawal.

A case may be withdrawn at any time by written notification to the Board from the party initiating the case. A case may be determined by the Board to have lapsed when the grievant fails to respond in writing to two successive written Board inquiries within any deadline fixed for such response. The Board may permit the reopening of lapsed cases upon a showing of good cause and may permit or request the views of the parties as to whether good cause has been shown.

### § 903.9 Access to records.

(a) If a party is denied access to any Agency record prior to or during the consideration of a case by the Agency, the party may protest such denial before the Board in connection with the case.

(b) In considering a case, the Board shall have access to any Agency record as follows:

(1) the Board shall request access to any Agency record which the grievant/charged employee requests to substantiate his or her grievance or defense to a charge if the Board determines that such record may be relevant and material to the case.

(2) the Board may request access to any other Agency record which the Board determines may be relevant and material to the case.

(3) An Agency shall make available to the Board any Agency record requested under paragraphs (b)(1) and (2) of this section unless the head or deputy head or such Agency personally certifies in writing to the Board that disclosure of the record to the Board and the parties would adversely affect the foreign policy or national security of the United States or that such disclosure is prohibited by law. If such a certification is made with respect to any record, the Agency shall supply to the Board a summary or extract of such record unless the reasons specified in the preceding sentence preclude such a summary or extract.

(c) If the Board determines that an Agency record, or a summary or extract of a record, made available to the Board under paragraph (b) of this section is relevant and material to the case, the Agency concerned shall make such record, summary, or extract, as the case may be, available to the parties.

(d) In considering a case, the Board may take into account the fact that the parties or the Board were denied access to any Agency record which the Board determines is or may be relevant and material to the case.

(e) The parties in any case decided by the Board shall have access to the record of proceedings and the decision of the Board.

### § 903.10 Access to witnesses.

The grievant or grievant's representative, or charged employee or his representative, shall be given access to witnesses employed by the foreign affairs agencies. In the event that the agency of the grievant determines that the requests for access are excessive, it may so notify the Board, which shall rule on the relevance and materiality of the potential testimony and may order that access be granted to any or all of the potential witnesses. It shall be the responsibility of the grievant to advise the agency of the agency witnesses to be interviewed and to request administrative leave.

## PART 904—JURISDICTION AND PRELIMINARY DETERMINATIONS

Sec.
904.1 General.
904.2 Preliminary determinations.
904.3 Relationship to other remedies.
904.4 Suspension of agency actions.

AUTHORITY: Secs. 1101, 1104, 1108, and 1109 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4131, 4134, 4138, and 4139), as amended.

### §904.1 General.

The Board's jurisdiction extends to any grievance, and to any separation for cause proceeding initiated pursuant to section 610(a)(2) of the Act.

[50 FR 31355, Aug. 2, 1985]

### §904.2 Preliminary determinations.

(a) If an Agency, in its final review, has questioned whether a complaint constitutes a grievance, the Board will make a preliminary determination of its jurisdiction unless the Board concludes that resolution of the question of jurisdiction should be deferred until the Board has compiled a record of proceedings or held a hearing on the merits of the case.

(b) The Board may also make a preliminary determination on any question raised by a Party concerning the timeliness of a grievance, the election of other remedies under §904.3, or any other issue whose resolution might avoid the necessity of further proceedings.

(c) Before making a preliminary determination under this section, the Board shall obtain the views of the other parties and transmit those views to all parties.

(d) Where an issue presented for preliminary determination under this section is contested by a party or would result in the termination of a case, a panel of three members of the Board shall decide the issue.

[50 FR 31355, Aug. 2, 1985, as amended at 56 FR 55459, Oct. 28, 1991]

### §904.3 Relationship to other remedies.

(a) A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief provided under another provision of law, regulation, or executive order, and the matter has been carried to final decision under such provision on its merits or is still under consideration. This provision shall not apply to grievants who have filed a prohibited personnel practice charge before the Special Counsel for the Merit Systems Protection Board.

(b) If a grievant is not prohibited from filing a grievance under paragraph (a) of this section, the grievant may file with the Board a grievance which is also eligible for consideration, resolution, and relief as a prohibited personnel practice complaint under the provisions of law relating to the Merit Systems Protection Board or Special Counsel, or under a regulation or executive order. An election of remedies under this section shall be final upon the acceptance of jurisdiction by the Board.

[50 FR 31355, Aug. 2, 1985]

### §904.4 Suspension of agency actions.

(a) If the Board determines that the agency is considering involuntary separation of the Grievant, 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 agency shall suspend such action until the Board has ruled on the grievance. 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.

(b) Notwithstanding paragraph (a) of this section, the Board shall not determine that action to suspend without pay a Grievant shall be suspended if the head of an agency 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. For this purpose, reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed shall be defined as a member of the Service having been convicted of, and sentence of imprisonment having been imposed for a job-related crime.

(c) The Board shall expedite its decisions on requested suspensions of proposed Agency actions. The Board may permit or require argument with respect to such requests by the Parties and Exclusive Representative, if any.

[56 FR 55459, Oct. 28, 1991]

## PART 905—BURDEN OF PROOF

Sec.
905.1 Grievances other than disciplinary actions.
905.2 Disciplinary grievances.
905.3 Separation for cause.

AUTHORITY: Secs. 610 and 1106 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4010 and 4136), as amended.

### § 905.1 Grievances other than disciplinary actions.

(a) In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.

(b) Where a grievant establishes that an evaluation contained falsely prejudicial material which may have been a substantial factor in an agency action, and the question is presented whether the agency would have taken the same action had the evaluation not contained that material, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

(c) Where a grievant establishes that a procedural error occurred which is of such a nature that it may have been a substantial factor in an agency action with respect to the grievant, and the question is presented whether the agency would have taken the same action had the procedural error not occurred, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

[50 FR 31356, Aug. 2, 1985]

### § 905.2 Disciplinary grievances.

In grievances over disciplinary actions, the agency has the burden of establishing by a preponderance of the evidence that the disciplinary action was justified, provided, however, that in a grievance concerning suspension without pay pursuant to section 610(a)(3) of the Act, the Board's determination of the grievance shall be limited to:

(a) Whether the required procedures have been followed; and

(b) Whether there exists reasonable cause to believe a crime has been committed for which a sentence of imprisonment may be imposed and there is a nexus between the conduct and the efficiency of the Service.

For this purpose, reasonable cause to believe that a member has committed a crime for which a sentence of imprisonment may be imposed shall be defined as a member of the Service having been convicted of, and sentence of imprisonment having been imposed for, a job-related crime.

[56 FR 55459, Oct. 28, 1991]

### § 905.3 Separation for cause.

In separation for cause cases, the agency has the burden of establishing, by a preponderance of the evidence, that the proposed separation is for such cause as will promote the efficiency of the service.

[50 FR 31356, Aug. 2, 1985]

## PART 906—HEARINGS

Sec.
906.1 Decision whether to hold a hearing.
906.2 Mandatory hearing.
906.3 Notification.
906.4 Hearing panels and members.
906.5 Prehearing conferences.
906.6 Powers of presiding member.
906.7 Conduct of hearing.
906.8 Witnesses.
906.9 Failure of party to appear.

AUTHORITY: Secs. 610 and 1106 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4010 and 4136), as amended.

SOURCE: 50 FR 31356, Aug. 2, 1985, unless otherwise noted.

### § 906.1 Decision whether to hold a hearing.

After deciding either to accept jurisdiction over a grievance or to postpone decision of that question under § 904.2(a) of this chapter, the Board will make an initial determination of whether a hearing shall be held in accordance with part 906 of this chapter,

or whether the grievance shall be resolved without a hearing in accordance with part 907 of this chapter. The Board may reconsider its decision as to holding a hearing upon the written request of any party or on its own initiative.

**§906.2 Mandatory hearing.**

The Board shall conduct a hearing—(a) At the request of the grievant in any case which involves disciplinary action or a grievant's retirement from the Service for expiration of time-in-class or based on relative performance, or (b) In any case which in the judgment of the Board can best be resolved by a hearing or presentation of oral argument. The Board shall also conduct a hearing in separation for cause proceedings unless the charged employee waives in writing his or her right to such hearing.

**§906.3 Notification.**

When the Board orders a hearing, the executive secretary shall so notify the parties in writing. The parties shall be given reasonable notice of the date and place selected by the Board for the hearing.

**§906.4 Hearing panels and members.**

Unless the Board and the parties agree otherwise, all hearings shall be held before a panel of at least three members.

**§906.5 Prehearing conferences.**

(a) The Board may in its discretion order a prehearing conference of the parties (which may be presided over by any member) for the purpose of considering:

(1) Simplification or clarification of the issues;

(2) Serving of interrogatories;

(3) Stipulations, admissions, agreements on documents, matters already on record, or similar agreements which will avoid the necessity of proving facts or issues not in dispute;

(4) Identification of witnesses the parties may wish to call and the intended scope of their testimony; limitation on the number of witnesses; and arrangement for the appearance of witnesses;

(5) Avoidance of irrelevant, immaterial, or unduly repetitive testimony;

(6) The possibility of disposition of the case through agreement;

(7) The order of presentation at the hearing and the allocation of the burden of proof; and

(8) Such other matters as may aid in the disposition of the case.

(b) The parties authorized to attend the hearing may attend the prehearing conference.

(c) The results of the conference shall be summarized in writing by the Board and made a part of the record of proceedings. Copies of the summary shall be sent to the parties. The parties may submit comments or corrections on the summary.

**§906.6 Powers of presiding member.**

In connection with the hearing, the presiding member shall, as appropriate:

(a) Fix the time and place of the hearing;

(b) Order further conferences;

(c) Regulate the course of the hearing;

(d) Administer oaths and affirmations;

(e) Dispose of procedural requests and similar matters;

(f) Rule on admissibility of testimony and exhibits;

(g) Exclude any person from the hearing for behavior that obstructs the hearing;

(h) Authorize and set the time for the filing of briefs or other documents;

(i) Grant continuances and extensions of time;

(j) Reopen the record;

(k) Take any other action in the course of the proceedings consistent with the purpose of this part.

**§906.7 Conduct of hearing.**

(a) *Authorized attendance.* The parties and, as determined by the Board, a reasonable number of representatives of the parties are entitled to be present at the hearing. The Board may, after considering the views of the parties and of any other individuals connected with the grievance, decide that a hearing should be open to others. No person shall be permitted to attend the hearing when classified material is being discussed unless that person possesses the appropriate security clearance.

(b) *Procedure.* Hearings shall be conducted by the presiding member so as to assure a full and fair proceeding. The Board shall not be limited by the legal rules of evidence. However, the presiding member shall exclude irrelevant, immaterial, or unduly repetitive evidence. The Board may require the parties to designate one of their representatives as principal spokesperson.

(c) *Order of presentation.* In cases involving disciplinary action, including separation for cause cases, the Agency will ordinarily present its case first and will retain that order of precedence throughout the hearing. In other cases the grievant will ordinarily present his or her case first and will retain that order of precedence throughout the hearing.

(d) *Evidence.* Subject to the presiding member's rulings on the relevancy, materiality, and repetitious nature of evidence, the parties may offer such evidence, including interrogatories, depositions and Agency records as they desire. The shall produce such additional evidence as the presiding member shall consider relevant and material. Where deemed appropriate by the Board, the parties may be supplied only with a summary or extract of classified material (also see § 903.9 of this chapter).

(e) *Testimony.* Testimony at a hearing shall be given under oath or affirmation.

(f) *Transcript.* A verbatim transcript shall be made of any hearing and shall be part of the record of proceedings.

### § 906.8 Witnesses.

(a) *General.* Each party shall be entitled to examine and cross-examine witnesses at the hearing or by deposition. A party wishing to take the deposition of a witness shall give the other parties reasonable notice of the time and place of the deposition and of the identity of the witness.

(b) *Availability.* Upon request of the Board or upon request of the grievant/charged employee 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. If the Board determines that the actual presence of such witness at the hearing is required for just resolution of the case, the witness shall be made available at the hearing, with necessary costs and travel expenses paid by the Agency which is a party to the hearing.

(c) *Notice.* The parties are responsible for notifying their witnesses and for arranging for their appearance at the time and place set for the hearing. The Board may preclude a witness from testifying because of the failure of the party responsible for witness' appearance to comply with this section.

### § 906.9 Failure of party to appear.

The hearing may proceed in the absence of any party who, after due notice and without good cause, fails to be present or obtain an adjournment.

## PART 907—PROCEDURE WHEN HEARING IS NOT HELD

AUTHORITY: Sec. 1106 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4136), as amended.

### § 907.1 General.

(a) In a case in which a hearing is not required under § 906.1 of this chapter, the Board may request in writing that specified documents or other evidence be furnished to it and/or may authorize the executive secretary to obtain such additional documents or other evidence as may be necessary to understand and decide the case.

(b) Each party will be offered the opportunity to review and to supplement, by written submissions, the record of proceedings, prior to the date fixed by the Board for closing of the Record. The Board shall then consider the case and make a decision based on that Record. This may include the ordering of a hearing in accordance with part 906.

[50 FR 31357, Aug. 2, 1985]

## PART 908—REMEDIES

Sec.
908.1 Board orders.
908.2 Attorney fees.
908.3 Board recommendations.

AUTHORITY: Secs. 1106 and 1107 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 610, 4010, 4136, and 4137).

**§908.1 Board orders.**

If the Board finds that a grievance is meritorious, the Board shall have the authority to direct the Agency:

(a) 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;

(b) 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;

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

(d) To reinstate the grievant, and to grant the grievant back pay, where it is established that the separation or suspension without pay of the employee was unjustified or unwarranted under the Back Pay Act (5 U.S.C. 5596(b)(1));

(e) To take any corrective action deemed appropriate by the Board provided it is not contrary to law or collective bargaining agreement.

[50 FR 31357, Aug. 2, 1985, as amended at 56 FR 55459, Oct. 28, 1991]

**§908.2 Attorney fees.**

(a) If the Board finds that a grievance is meritorious or that an Agency has not established the cause for separation of a charged employee in a hearing before the Board pursuant to section 610 of the Act, the Board shall have the authority to direct the Agency to pay reasonable attorney fees to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under 5 U.S.C. 7701(g).

(b) Requests for attorney fees, accompanied by supporting documentation, must be filed with the Board within thirty (30) days of the date of the Board's decision.

[56 FR 55459, Oct. 28, 1991]

**§908.3 Board recommendations.**

(a) 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 in a grievance proceeding warrants disciplinary action against any employee of an Agency, it shall make an appropriate recommendation to the head of the concerned Agency.

(b) The head of the Agency shall make a written decision on the recommendation of the Board within 30 days after receiving the recommendation and shall implement the recommendation of the Board except to the extent that the head of the Agency 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 head of the Agency rejects the recommendation in whole or in part, the decision shall specify the reasons for such action. Copies of the decision shall be served on the other parties. Pending the decision of the head of the Agency, there shall be no ex parte communication concerning the grievance between the head of the Agency and any person involved in the proceedings of the Board. The head of the Agency shall, however, have access to the entire Record of the Proceedings of the Board.

(c) A recommendation under this section shall, for the purposes of section 1110 of the Act, be considered a final action upon the expiration of a 30-day period referred to in paragraph (b) of this section, except to the extent that it is rejected by the head of the Agency by an appropriate written decision.

(d)(1) If the head of the Agency makes a written decision under paragraph (b) of this section rejecting a recommendation in whole or in part on the basis of a determination that implementing such recommendation would be contrary to law, the head of the Agency shall, within the 30-day period referred to in paragraph (b) of this section:

(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.

(2) Within 30 days after receiving such a request, the Board shall, after reviewing the head of the Agency's decision, make a recommendation to the head of the agency confirming, modifying, or vacating its original recommendation or, if less than the entirety was rejected, the portion involved. Reconsideration 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.

(e) A Board recommendation made under the preceding paragraph (d)(2) of this section shall be considered a final action for the purpose of section 1110 of the Act, and shall be implemented by the head of the Agency.

(f) The provisions of paragraphs (c), (d), and (e) of this section shall not apply with respect to any grievance in which the Board has issued a final decision pursuant to section 1107 of the Act before December 22, 1987.

[50 FR 31357, Aug. 2, 1985. Redesignated and amended at 56 FR 55459, Oct. 28, 1991]

## PART 909—DECISIONMAKING

Sec.
909.1 Basis.
909.2 Board order.
909.3 Board recommendation.
909.4 Other decision.
909.5 Time limits for compliance.
909.6 Summaries of Board decisions.

AUTHORITY: Secs. 1106 and 1107, Foreign Service Act of 1980 (Pub. L. 96–465; 22 U.S.C. 4136 and 4137).

SOURCE: 50 FR 31358, Aug. 2, 1985, unless otherwise noted.

### § 909.1 Basis.

Decisions of the Board shall be based upon the record of proceedings, shall be in writing, shall include findings of fact, and shall include a statement of the reasons for the decision.

### § 909.2 Board order.

Where the Board's decision imposes action on an Agency the decision shall be in the form of a remedial order addressed to the designated official of the Agency. A copy of the decision shall be supplied to each party.

### § 909.3 Board recommendation.

Where the Board's decision is a recommendation, it shall be directed to the head of the Agency. A copy of the decision shall be supplied to each party.

### § 909.4 Other decision.

Where the Board's decision requires no action by an Agency, the decision shall be forwarded to the grievant. A copy of the decision shall be supplied to each party.

### § 909.5 Time limits for compliance.

Orders of the Board and recommendations which are not rejected in accordance with § 908.2 of this chapter shall be complied with within any time limits for compliance established by the Board's decision, unless the Board extends the time limit on a showing of good cause.

### § 909.6 Summaries of Board decisions.

The Board may, from time to time, issue such summaries and expurgated versions of its decisions as it may consider necessary to permit the Agencies, the exclusive representative organization(s), and the members of the Service to become aware of the general nature of the cases it has received and their manner of disposition, without invading the privacy of the grievants.

## PART 910—MISCELLANEOUS

Sec.
910.1 Requests to reopen cases.
910.2 Ex parte communications.
910.3 Board policy statements.
910.4 Confidentiality; Record of grievances awarded.
910.5 Judicial review.
910.6 Pending grievances.

AUTHORITY: Secs. 1106, 1107, 1110, and 2401 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4136, 4137, 4140, and 4172).

### § 910.1 Requests to reopen cases.

The Board may reconsider any decision upon the presentation of newly

discovered or previously unavailable material evidence.

[50 FR 31358, Aug. 2, 1985. Redesignated at 56 FR 55460, Oct. 28, 1991]

### §910.2 Ex parte communications.

(a) ''Ex parte communications'' are oral or written communications between the Board or its staff and an interested party to a proceeding which are made without providing the other parties a chance to participate.

(b) Ex parte communications concerning the merits of any matter which has or may come before the Board for adjudication or which would otherwise contravene the rules regarding written submissions are prohibited until the Board renders a final decision. Any communication made in contravention of this rule shall be made a part of the record and an opportunty for rebuttal allowed. If the communication was oral, a memorandum stating the substance of the discussion shall be placed in the record.

(c) This rule does not apply to communications concerning such matters as the status of a case, the methods for transmitting evidence to the Board, and other procedural matters which do not concern the merits of any matter before the Board for adjudication and which do not otherwise contravene the rules regarding written submissions.

[50 FR 31358, Aug. 2, 1985. Redesignated at 56 FR 55460, Oct. 28, 1991]

### §910.3 Board policy statements.

The Board may publish statements regarding policies it has established as to its operations and procedures.

[50 FR 31358, Aug. 2, 1985. Redesignated at 56 FR 55460, Oct. 28, 1991]

### §910.4 Confidentiality; Record of grievances awarded.

(a) To the maximum extent practicable, the Board will make every effort to preserve the confidentiality of the identity of the grievant or charged employee.

(b) The records of the Board shall be maintained by the Board under appropriate safeguards to preserve confidentiality and shall be separate from all records of the Agencies; provided, however, that records of all grievances awarded in favor of the Grievant in which the grievance concerns gross misconduct by a supervisor shall be separately maintained by the Board and the procedures regarding confidentiality and disclosure of such records shall be as provided in section 1107(e) of the Foreign Service Act of 1980, as amended; and provided further, that the Board shall not make a finding of gross misconduct without first providing the supervisor whose conduct is at issue notice and an opportunity to respond.

[50 FR 31358, Aug. 2, 1985. Redesignated and amended at 56 FR 55460, Oct. 28, 1991]

### §910.5 Judicial review.

Any aggrieved party may obtain judicial review of a final action of an Agency head or the Board on any grievance in the district courts of the United States in accordance with the standards set forth in chapter 7 of title 5 of the United States Code. 5 U.S.C. 706 shall apply without limitation or exception.

[50 FR 31358, Aug. 2, 1985. Redesignated at 56 FR 55460, Oct. 28, 1991]

### §910.6 Pending grievances.

Any grievance pending before the Board prior to February 15, 1981 shall be resolved under the provisions of the Foreign Service Act of 1946 as amended, and the regulations promulgated thereunder.

[50 FR 31358, Aug. 2, 1985. Redesignated at 56 FR 55460, Oct. 28, 1991]

## PART 911—IMPLEMENTATION DISPUTES

Sec.

911.1 Definition.
911.2 Filing complaint.
911.3 Procedure.
911.4 Effect of Board decision.
911.5 Arbitrability of determination.
911.6 Finality of choice.
911.7 Review.

AUTHORITY: Sec. 1014 of the Foreign Service Act of 1980, Pub. L. 96–465 (22 U.S.C. 4114), as amended.

SOURCE: 50 FR 31359, Aug. 2, 1985, unless otherwise noted.

### § 911.1 Definition.

An implementation dispute is any dispute between the agency and the exclusive representative, as provided in regulations adopted as a result of collective bargaining between the agencies and the employee representatives. Such a dispute, also referred to as an institutional dispute, is one which directly concerns the rights and obligations of an agency and an exclusive representative toward each other or the rights or obligations between an agency and one or more employees as set forth in a collective bargaining agreement.

### § 911.2 Filing complaint.

If the dispute is not satisfactorily resolved at the agency level, the moving party may file a complaint within 45 calendar days from the date of the response (or in any case must file within 90 days of filing the implementation dispute) with the Board in writing and with specificity as to the nature of the violation.

### § 911.3 Procedure.

Implementation disputes shall be handled by the Board in accordance with the procedures set forth in parts 901—910 of this chapter.

### § 911.4 Effect of Board decision.

The action of the Board shall be final and binding and shall be implemented by the parties, unless an exception is filed with the Foreign Service Labor Relations Board within 30 days after receipt of the Grievance Board action.

### § 911.5 Arbitrability of determination.

Questions that cannot be resolved by the parties as to whether a complaint is subject to this procedure may be referred by either party to the Grievance Board for a threshold determination.

### § 911.6 Finality of choice.

An alleged violation of an institutional right as reflected in a collective bargaining agreement may be filed under these procedures or as an unfair labor practice, but not both.

### § 911.7 Review.

Resolution of disputes under this section shall not be subject to judicial review.