

Filing a Grievance

A grievance is broadly defined as follows: any act or condition subject to the control of a foreign affairs agency which allegedly deprives an employee of a right or benefit authorized by law or regulation or is otherwise a source of concern or dissatisfaction.

For example, an employee might file a grievance because of a flawed evaluation or denial of benefit in violation of a law or regulation. Any discriminatory practice based on race, color, religion, sex, national origin, sexual orientation, age, or handicapping condition can also be addressed through the grievance process.

Any Foreign Service employee who is a U.S. citizen may file a grievance. However, individuals who are no longer Foreign Service members through resignation, retirement, or separation may only grieve the denial of a financial benefit.

In the case of death of a Foreign Service employee, family members may grieve a financial claim.

Common Types of Grievances

Unfair Performance Evaluations

Most grievances are filed to challenge the fairness or accuracy of performance appraisals.

A performance appraisal may be grieved on the grounds that it is allegedly inaccurate, falsely prejudicial, and/or contains errors of omission that present a false picture of the employee's performance.

Falsity, either in fact or in characterization of the performance, must always be demonstrated. The employee also might want to give an overview of any situation affecting the appraisal (e.g. the employee's relationship with the rater/reviewer or events leading to strains in that relationship).

Performance evaluations are official documents, and a rater's comments are presumed to be correct. The burden is on the grievant to overcome that presumption.

The legal standard is "by a preponderance of the evidence." Inaccurate statements may be rebutted on the basis of fact and documentation. For example, a high score in a foreign language may be used to rebut a rater's statement that the employee was not effectively communicating in that foreign language.

If the rater did not include relevant information, or the EER lacked balance, the grievant could argue that a material error of omission had taken place.

Procedural violations in preparing an evaluation report are also grievable. This would include, violations such as: a Work Requirements Statement that was not prepared within the requisite 45-day time period, and failure to hold mid-year performance counseling.

Although grievable, these technical violations are generally not sufficient to get the report expunged unless the grievant can show how the violation harmed him or her.

Separation for Poor Performance or Low Ranking

Employees low ranked or facing involuntary separation by a Selection Board or Performance Standards Board (PSB) after a finding of failure to meet the standards of his/her class may file a grievance with the agency.

While Selection Board decisions are generally not grievable, an employee may file a grievance if the information relied on by the Board in making its decision is flawed. In a low ranking, the Board decision can be grieved if the Low Ranking Statement lacked balance.

Discriminatory Practices

If an employee wishes to file a complaint alleging discriminatory practices based on race, color, religion, sex, national origin, sexual orientation, age, or handicapping condition, the matter can be addressed either through the DOC's EEO office or through the Foreign Service grievance process, but not both.

Only a careful analysis of the complaint and remedies sought will establish the best forum for the complaint. We advise that employees consult an EEO counselor and AFSA before proceeding in such a case.

The regulations guiding the EEO process are outlined in 3 FAM 1500. <http://www.state.gov/documents/organization/84829.pdf>

In order to file a complaint through the agency's EEO office, an employee must contact an EEO counselor within 45 days of the alleged discriminatory event.

Employees who choose to file an EEO case (other than one alleging sexual orientation discrimination) through the Foreign Service grievance process must file within 180 days of the discriminatory event. If the event occurred while the employee was assigned overseas, the employee must file within 180 days of the expiration of the assignment or within 24 months after the event, whichever is earlier. Employees who wish to grieve sexual orientation discrimination must file

the grievance within the general statute of limitation for non-EEO grievances (generally two years but see the discussion below).

Discipline Cases

The disciplinary procedures of the foreign affairs agencies are found at 3 FAM 4300. <http://www.state.gov/documents/organization/85207.pdf>

Proposed reprimand or suspension without pay may be grieved before being finally implemented. The reprimand or suspension without pay must be finally decided by the agency so that the discipline is ready to be carried out before the grievance process is invoked. The employee then may file a grievance seeking relief from the impending action and should do so within 30 days after receiving the final agency decision to achieve suspension of the discipline during the grievance proceedings. (Different rules apply to separation for cause cases.)

Separation for cause cases are governed by different rules. A 1999 amendment to the Foreign Service Act required the foreign affairs agencies to place Foreign Service employees slated for separation for cause on leave without pay (LWOP) pending final resolution.

If the employee requests a hearing by the Foreign Service Grievance Board, the agency's decision to separate is sent to the FSGB, skipping the usual agency level of the grievance process. The Board rules on the case after conducting an oral hearing. However, the employee may waive the right to this hearing and ruling, thereby accepting the separation. (The specific terms of the separation may in some cases still be negotiated with the agency.)

Another amendment to the Act completely removed the Grievance Board's jurisdiction in certain separation for cause cases (i.e. where the underlying misconduct involves a criminal conviction for which a sentence of imprisonment of more than one year may be imposed). In these cases, once the agency decides to separate the employee, the employee may only challenge the action in federal court.

A unique feature of disciplinary grievances and separation for cause cases is that the agency has the burden of proof, unlike other types of grievances where the grievant must carry this burden. The agency must show by a preponderance of the evidence (the greater weight of evidence) that the proposed action is justified.

Financial Claims

Financial claims stand alone as the only type of grievance that can be filed after the grievant leaves the Foreign Service. Both active and former members of the

Service may submit financial grievances. However, only certain kinds of monetary claims may be adjudicated through the grievance system.

The Foreign Service Act permits employees to grieve an "alleged denial of an allowance, premium pay, or other financial benefit to which the member claims entitlement under applicable laws or regulations". For example, if an employee has been denied a claim due to improper application of the Foreign Service travel regulations, then he/she may file a grievance alleging that the regulations have been improperly applied.

Note, though, that the "financial claims" rubric does not serve as a device to get a regular subject matter grievance into the grievance process after an employee's separation. Designation for selection out or non-promotion, for example, may not be grieved as a financial claim on the basis that such actions have an impact on one's salary.

The Grievance Process

Statute of Limitations

While trying initially to resolve a complaint through informal means, an employee should also consult 3 FAM 4427 at an early stage to make sure that the time limit for submitting a grievance does not lapse. There is a two-year statute of limitations for filing non-EEO grievances. A grievance will be forever barred if it is filed more than two years after (a) the event being grieved or (b) the issuance date of a document being grieved. However, there is a special provision for grievances involving performance evaluations.

For these types of grievances, the employee may wait to file a grievance until one year after the date on which he or she is no longer supervised by the rating or reviewing officer who wrote the evaluation passages that are being grieved. Thus, the applicable time limit is either two years or this special period, whichever ends later. In no case, however, may the time limit exceed three years from the date the evaluation was issued.

The statute of limitations may be longer in some situations. For example, the grievance regulations make special provisions for documents in an Official Performance Folder (OPF) that are relied upon in certain subsequent agency actions (such as a low-ranking by a selection board). Specific reference should be made to 3 FAM 4427(b) for these exceptions. Also, in calculating the applicable time limit, any period is excluded during which the grievant is deemed to have been "unaware of the grounds of the grievance and could not

have discovered such grounds through reasonable diligence." The Grievance Board does not apply this caveat loosely.

The statute of limitations may also be shorter in certain instances. For grievances based on EEO issues (other than sexual orientation discrimination), the two-year rule does not apply. These cases have a much shorter statute of limitations. A special rule also applies to grievances concerning reprimands and suspensions without pay. Employees who are facing separation from the Foreign Service for time-in-class expiration, failure to meet the standards of their class, or other reasons, must file their grievance while they are still employees. Once they become former employees, they may no longer contest their separation from the Foreign Service.

Filing a Grievance with the Agency

If an employee concludes that a complaint cannot be resolved informally, the first step is to submit a written grievance to OFSHC. (An exception exists in disciplinary cases involving separation for cause, where the agency action is sent automatically to the FSGB for a hearing, bypassing the agency level.)

A grievance cannot be filed against individuals. It is always filed against the agency. There is no required format for this submission, but if an employee is utilizing AFSA representation, this must be stated in the submission. A copy of the grievance and all subsequent filings must be sent to AFSA.

Upon receipt of a grievance, the agency should send an acknowledgement letter giving the date on which the grievance was officially received and assigning a number to it. The agency then conducts an investigation and has 90 days in which it must issue a written decision. If the review is not completed and a decision rendered within the 90 days, the grievant has a regulatory right (22 CFR 903.1) to appeal the case to the Foreign Service Grievance Board in the absence of an agency decision. This right lasts for 60 days, i.e. until 150 days from the date of the original filing with the agency. After that, the employee ordinarily must wait until the agency issues the written decision before appealing, although the Board may waive this restriction if good cause is shown. In any case, the employee always has the right to wait for the agency decision. Once the decision is issued, at whatever stage in the process, the employee may appeal to the Grievance Board and ordinarily has 60 days to do so.

Grievances should be directed to the attention of Ejike Obineche, Employee and Labor Relations Officer, OFSHC, and forwarded to ER@trade.gov.