

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.)

#### Editorial Notes

##### 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.

**(e) Record of grievances; copy to committee of Congress; right of review**

(1) The Board shall maintain records of all grievances awarded in favor of the grievant in which the grievance concerns gross misconduct by a supervisor. Subject to paragraph (2), the Committee on Foreign Relations of the Senate shall be provided with a copy of the grievance decision whenever such a supervisor is nominated for any position requiring the advice and consent of the Senate and the Board shall provide access to the entire record of any proceedings of the Board concerning such a grievance decision to any Member of the Committee on Foreign Relations upon a request by the Chairman or Ranking Minority Member of such committee.

(2)(A) Except as provided in subparagraph (B), all decisions, proceedings, and other records disclosed pursuant to paragraph (1) shall be treated as confidential and may be disclosed only to Committee members and appropriate staff.

(B) Whenever material is provided to the Committee or a Member thereof pursuant to paragraph (1), the Board shall, at the same time, provide a copy of all such material to the supervisor who is the subject of such material.

(C) A supervisor who is the subject of records disclosed to the committee<sup>1</sup> pursuant to this subsection shall have the right to review such record and provide comments to the Committee

concerning such record. Such comments shall be treated in a confidential manner.

**(f) Alleged discrimination; substantive law to be applied**

The Board shall, with respect to any grievance based on an alleged violation of a law, rule, regulation, or policy directive referred to in section 4131(a)(1)(H) of this title, apply the substantive law that would be applied by the Equal Employment Opportunity Commission if a charge or claim alleging discrimination under such law, rule, regulation, or policy directive had been filed with the commission.<sup>1</sup>

(Pub. L. 96-465, title I, §1107, Oct. 17, 1980, 94 Stat. 2146; Pub. L. 100-204, title I, §§181(a), (b), 182, Dec. 22, 1987, 101 Stat. 1363, 1364; Pub. L. 102-138, title I, §153(c), Oct. 28, 1991, 105 Stat. 673.)

**Editorial Notes**

AMENDMENTS

1991—Subsec. (f). Pub. L. 102-138 added subsec. (f).

1987—Subsec. (d). Pub. L. 100-204, §181(a), (b), designated existing provisions as par. (1), inserted “, tenure” after “promotion” in first sentence, and added pars. (2) and (3).

Subsec. (e). Pub. L. 100-204, §182, added subsec. (e).

**Statutory Notes and Related Subsidiaries**

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-138 not applicable with respect to any grievance, within the meaning of section 4131 of this title, arising before Oct. 28, 1991, see section 153(f) of Pub. L. 102-138, set out as a note under section 4115 of this title.

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-204 not applicable with respect to any grievance in which the Board has issued a final decision pursuant to this section before Dec. 22, 1987, see section 181(e) of Pub. L. 100-204, set out as a note under section 3946 of this title.

**§ 4138. Access to records**

**(a) Review by Foreign Service Grievance Board of decision denying access**

If a grievant is denied access to any agency record prior to or during the consideration of the grievance by the Department, the grievant may raise such denial before the Board in connection with the grievance.

**(b) Access by Foreign Service Grievance Board; relevant and material records; adverse effect on national security or foreign policy**

In considering a grievance, the Board shall have access to any agency record as follows:

(1)(A) The Board shall request access to any agency record which the grievant requests to substantiate the grievance if the Board determines that such record may be relevant and material to the grievance.

(B) The Board may request access to any other agency record which the Board determines may be relevant and material to the grievance.

(2) Any agency shall make available to the Board any agency record requested under paragraph (1) unless the head or deputy head

<sup>1</sup> So in original. Probably should be capitalized.