BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Senior Foreign Service Performance Pay Cohort Group Grievants	Record of Proceeding FSGB No. 2008-040
and	June 16, 2009
Department of State Agency	**DECISION** **EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:	Susan R. Winfield
Board Members:	Lois E. Hartman Jeanne L. Schulz
Special Assistant:	Linda B. Lee
Representative for the Grievants:	Sharon L. Papp General Counsel American Foreign Service Association
Representative for the Department:	Joanne M. Lishman Director, Grievance Staff
Employee Exclusive Representative:	American Foreign Service Association

CASE SUMMARY

HELD: The Cohort Grievants established by preponderant evidence that they were each eligible for consideration for performance pay when at the end of the 2006-2007 evaluation period, they were members of the Senior Foreign Service whose most recent evaluation covered a period of at least 120 days. The Board concluded that the Department's policy of reading into its regulations an additional unwritten requirement of eligibility – that employees also have been members of the Senior Foreign Service for at least a period of 120 days by the end of the rating period – is not supported by the regulations that impose no time in-grade requirement for Senior Foreign Service Officers who otherwise meet the stated eligibility requirements.

OVERVIEW

Sixty-eight Senior Foreign Service Officers (Cohort Grievants, the cohort, grievants) collectively grieved a decision by the Department of State (Department, agency) denying them the opportunity to compete in 2007 for performance pay under the Foreign Service Act (FSA), based upon the Department's unwritten policy that only employees who had been members of the Senior Foreign Service for a period of at least 120 days by the end of the evaluation period were eligible for review. The Cohort Grievants claimed that a plain reading of the applicable regulations made them all eligible for performance pay reviews even though none had been in the Senior Foreign Service for 120 days by the end of the rating period. The Board concluded that, pursuant to the provisions of 3 FAM 2872.2, eligibility for performance pay review requires only that an employee be a member of the Senior Foreign Service at the end of the rating period and that the latest performance evaluation cover a period of at least 120 days, not that the SFSO have been a member of the Senior Foreign Service for 120 days. Since all members of the cohort met these requirements, all are entitled to appropriate relief.

DECISION

I. THE GRIEVANCE

The grievants (cohort grievants, the cohort) are sixty-eight members[1] of the Foreign Service of the State Department (the Department, the agency) who were recommended for promotion to the Senior Foreign Service (SFS) at the end of 2006. At the end of the rating period in April 2007, the Department declined to allow the Senior Performance Pay Boards to review any of the Cohort Grievants' official performance folders (OPFs) on the ground that none of these employees had been a member of the Senior Foreign Service for a minimum of 120 days as of that time. The cohort grieves this interpretation of the applicable regulations by the Department, claiming that the regulations are unambiguous and require no more for eligibility for performance pay than membership in the SFS at the end of the rating period and a performance evaluation for a period of at least one hundred twenty days. Since all members of the cohort met these requirements, the grievants seek appropriate remedies, including, *inter alia*, consideration of performance pay by reconstituted performance pay boards and, if recommended for performance pay, back pay with interest.

II. BACKGROUND

Grievants were all recommended for promotion on September 28, 2006. Their promotion recommendations were confirmed by the U.S. Senate on December 9, 2006 and were attested by the President on December 21, 2006 with an effective date of December 24, 2006. Each of the Cohort Grievants received an Employee Evaluation Report (EER) or an equivalent evaluation of performance for a period of at least 120 days

[1] The Grievants assert that a total of 97 officers were denied performance pay evaluations in 2007, however, only 68 formally joined the cohort.

during the rating period April 16, 2006 to April 15, 2007. By the end date of the rating period, the Cohort Grievants had been members of the Senior Foreign Service for a total of 111 days.

When the cohort learned that none of its members had been reviewed by the 2007 Senior Performance Pay Boards, the group initially requested information and assistance from the Director General (DG) of the Department by letter dated November 29, 2007. The DG responded in an undated letter explaining the Department's policy interpretation of 3 FAM 2872.2 to require that SFS officers be in-grade for a period of 120 days in order to be eligible for performance pay. The cohort then filed a grievance on February 27, 2008 which was denied by the agency on July 1, 2008. The cohort appeal was filed with this Board on August 22, 2008 with a response from the Department dated September 22, 2008 and a reply dated October 7, 2008.

Upon interim review of the pleadings submitted, this Board requested additional information concerning whether the Department has consistently interpreted the provision of the Foreign Affairs Manual (FAM) to impose a 120-day in-grade eligibility requirement and whether the American Foreign Service Association (AFSA) had been made aware of and been given the opportunity to negotiate the Department's interpretation of the regulation at issue. Both parties responded by providing additional information and arguments. The Record of Proceedings was closed on November 18, 2008.

III. POSITIONS OF THE PARTIES

The Grievants

The Cohort Grievants cite 3 FAM 2872.2-1 and 3 FAM 2872.2-2 which provide in pertinent part:

> 3 FAM 2872.2-1 (Eligibility for Performance Pay):
>
> a. Only officers who were serving as members of the SFS at the end of the most recently concluded rating period under career appointments . . . are eligible to compete for performance pay.
>
> 3 FAM 2872.2-2 (Eligibility for Department Performance Awards):
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> To be eligible for a Department Performance Pay Award based on performance during the most recently concluded rating period, a member must have also been evaluated on the Employee Evaluation Report form, or as otherwise prescribed . . . for a minimum period of service of 120 days or more during the rating period.

The Cohort Grievants argue that these provisions are unambiguous and do not admit of an interpretation that the officer must have served in the Senior Foreign Service for a specific period of time before being eligible for performance pay review. The grievants also reference the 2006 Procedural Precepts as containing no requirement for a period of in-grade service before an SFS officer is eligible for performance pay review.[2] Similarly, grievants cite the Foreign Service Act (FSA) at 22 U.S.C. § 3965[3] as providing only for a system of analogous, but not identical, criteria for issuing performance awards between the Senior Executive Service (SES) and the SFS.

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[2] Grievants cite the applicable 2006 Procedural Precepts as providing: "An award of performance pay, unlike promotion, is based solely on performance during the most recent rating period. A member of the Senior Foreign Service is not eligible for consideration if the Official Performance File does not contain a rating or alternative form of performance evaluation for the most recently concluded rating period."

[3] 22 U.S.C. § 3965 provides: "Members of the Senior Foreign Service who are serving – . . . under career or career candidate appointments . . . shall be eligible to compete for performance pay in accordance with this section . . . . Awards of performance pay shall take into account the criteria established by the Office of Personnel Management (OPM) for performance awards under section 5384 of Title 5 and rank awards under section 4507 of Title 5 . . . ." (Footnote continued on next page.)

The grievance cohort challenges the Department's position that the 120-day in-grade requirement is derived from the statutory requirement that the SFS performance pay system must take into account the criteria applicable to the SES system. Although grievants concede that the FSA incorporates by reference the criteria established by the Office of Personnel Management (OPM) for Senior Executive Service (SES) performance pay awards, they argue that the SES requirements for a minimum evaluation period derive from specific OPM regulations that pertain only to the SES but not to the SFS.[4] Grievants distinguish the Senior Executive Service as a "rank-in-position" system that is different from the Senior Foreign Service that is a "rank-in-person" system. Moreover, the Cohort Grievants argue that the criteria for performance pay awards are not subject to a unilateral expansion by the Department. Rather, they are subject to negotiation between the agency and the union.[5] The grievants argue further that even if the SES requirements applied to them, the minimum time in-grade eligibility for SES employees is 90 days, not 120 days. Thus, even if the analogy were apt, grievants claim that they met the requirement. Lastly, grievants argue that none of the other Foreign Affairs agencies requires an SFS employee to have been at grade for 120 days in order to

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Title 5 U.S.C. § 5384 provides for performance awards in the Senior Executive Service as follows: . . . "(b) (1) No performance award under this section shall be paid to any career appointee whose performance was determined to be less than fully successful at the time of the appointee's most recent performance appraisal and rating under subchapter II of chapter 43 of this title. . . . (c) (1) Performance awards paid by any agency under this section shall be based on recommendations by performance review boards established by such agency under section 4314 of this title. . . ."

[4] See 5 CFR 534.403 (Performance Awards) and 5 CFR 430.305 (Appraisal of Performance.)

[5] The union is the American Foreign Service Association (AFSA). It cites Interpretation and Guidance, Foreign Service Labor Relations Board, Case No. FS-PS-1 (June 4, 1982) attached to the agency appeal as Exhibit B-6. AFSA also observes that in every collective bargaining agreement since 1981, the eligibility requirement reads as it does today: employees must be members of the SFS at the end of the rating cycle and must have an evaluation for a minimum period of 120 days during the recent rating cycle. AFSA argues that at no time did the Department advise, nor did it learn, that the Department was applying "an unpublished 120-day 'time in-grade' SFS Performance Pay eligibility requirement to SFS employees."

be eligible for performance pay. Thus, it would be unfair to apply this requirement only to Foreign Service Officers employed by the State Department.

For relief, the Cohort Grievants ask for the following:

> (1) That SFS promotion boards (for generalists and specialists) be established to review the OPFs of each member of the cohort.
> (2) That Performance Pay Boards be established to review the OPFs of those members of the cohort who are recommended for consideration for performance pay.
> (3) That the same standards and precepts applicable in 2007 be applied in these reviews.
> (4) That those officers recommended for review be paid the difference between the cost of living increase that they received in January 2007 (2.5%) and the amount they would have received based on a performance pay recommendation (4.0%).
> (5) That those officers who are awarded performance pay and those entitled to a cost of living increase receive retroactive awards with interest to the date the award would have been made in 2007.
> (6) Attorneys fees, if warranted, and
> (7) All other relief deemed appropriate.

The Department

In its response to the initial cohort grievance letter, the DG conceded that the FAM provides only two requirements for eligibility for performance pay bonuses: (1) membership in the SFS at the end of the rating period and (2) an EER or equivalent evaluation covering a period of at least 120 days. Nonetheless, the DG concluded that because the FSA creates a parallel between the SES and SFS performance pay programs based upon the language of 22 U.S.C. § 3965(b), the agency could properly "interpret the eligibility requirements for SFS performance pay awards in tandem with those governing SES performance pay awards."

The DG contended further that the Department has always applied the FAM requirement of having an EER covering a minimum of 120 days to mean that the officer must have an evaluation in-grade as a member of the SFS for 120 days. The DG cited the

fact that in the years 2001 and 2002, none of the recently promoted members of the SFS was permitted to compete for performance pay because none of the newly promoted had been in-grade for the full 120 days.[6] Likewise, he claims, the cohort group in the instant case was denied consideration by performance boards because none in the group had been in-grade for 120 days as of the end of the rating period.[7]

Despite these arguments, the DG conceded in his response to the grievants' letter: "[W]e think it would be useful to make this established interpretation more explicit. We intend to amend the FAM to stipulate that the required evaluation report under 3 FAM 2872.2-2 must be a report comprehending the performance at a senior level for 120 days or more and we will inform newly promoted officers of this regulatory requirement."

In its decision, the Department concedes that the Director General's letter was in error when he cited the in-grade requirement for SES employees as 120 days when, in fact, it is 90 days.[8] The Department also concedes that "there is no specific language requiring that the Senior Foreign Service officer serve at grade for those 120 days." Notwithstanding these concessions, the Department argues that it would be inconsistent with the purpose and intent of 3 FAM 2872.2-2 to permit performance pay for a member who was in the SFS for *any* portion of the evaluation period. The Department argues that although it is not "necessary to determine whether the language of 22 U.S.C. § 3965 requires the Department to apply particular criteria established by the [OPM] for the [SES] to [SFS] performance pay . . . [it is] appropriate in light of this relationship between the two statutory systems to conclude that both pay systems are based on the

[6] See Grievants' agency appeal, Exhibit B-8.
[7] See, Grievants' agency appeal, Exhibit B-7.
[8] See, email dated May 08, 2008 from [Named Person #1] to [Named Person #2] appended to the original agency decision.

same concept and operate to the same end, *i.e.*, awarding performance pay to those who occupy a certain-grade for duties performed while at that grade."

The Department continues that the intent of the FSA and the correlation between the SES and SFS systems is to provide performance pay to those employees who "*both* occupy senior-level positions *and* perform senior-level work." (Emphasis in original.) The Department concludes that "individuals can be awarded performance pay only for the work performed while they, in fact, occupy senior or executive level positions." The Department argues that the "true line of demarcation runs between those who have been promoted into the Senior Executive or Senior Foreign Service and those who have not." Finally, in its decision, the Department concluded that its system is neither arbitrary nor capricious because "what is significant is not the term or the time period, but whether the regulation is applied in a consistent manner."

On appeal, the Department repeats and clarifies some of the arguments that it made in its original decision. The agency adds that it has "presumably" consistently applied the 120-day in-grade requirement to SFS members since 3 FAM 2872.2 took effect in January 2005. To the extent that AFSA argues that a 90-day in-grade requirement would be appropriately analogous with the SES requirements, the Department argues that this assertion far exceeds the scope of the original grievance. Finally, the Department argues that "presumably" AFSA was notified of and given an opportunity to negotiate 3 FAM 2872.2.

In response to this Board's request for additional information, the Department asserts unequivocally that it has consistently applied its interpretation of the FAM since it became effective in 2005. It acknowledges, however, that "3 FAM 2872.2 does not

contain the specific language that a member of the Senior Foreign Service must be 'at grade' [for 120 days]." The Department argues that "[g]iven this lack of specificity and as consistent with principles of regulatory construction, the Department looks to: (1) the stated purpose of 3 FAM 2872.2, (2) the statutory authority which provides the basis for 3 FAM 2872.2, and (3) past practice." The Department thereafter concedes that the statutory authority establishing the relationship between the performance pay systems of the SES and the SFS

> does not require that all criteria affecting SES performance pay be applied to the SFS . . . [the relationship between the two systems] provides support for the conclusion that because only those individuals who occupy senior positions in the Civil Service (as in the SES) qualify for performance pay only for the time that they are actually members of the SES, only those individuals occupying the senior ranks of Foreign Service are likewise eligible for performance pay for the time that they are members of the Senior Foreign Service.

In conclusion, the Department argues that since it has consistently applied this interpretation of the FAM provision, it should be permitted to continue to do so unless there is a change in the law or statute or a renegotiation of the regulation.

IV. DISCUSSION AND FINDINGS

Grievants bear the burden of proving their claims by a preponderance of the evidence inasmuch as the grievance does not pertain to discipline. 22 CFR 905.1(a). Here, grievants contend that the Department has violated, misinterpreted and misapplied the regulations concerning eligibility for performance pay and has thereby denied them an "allowance, premium pay or other financial benefit" to which they are entitled. 22 CFR 901.18(a) (2) and (7).

Eligibility for performance pay review for employees in the Senior Foreign Service is governed by 3 FAM 2872.2-1 and -2. These regulations specify that to be eligible for performance pay, a Senior Foreign Service officer must be: (1) in service as a member of the SFS at the end of the rating period, and (2) have an EER or other evaluation covering a minimum period of 120 days. The regulations, which are the result of bargaining and the opportunity to bargain over changes thereto, are silent as to whether eligibility to be considered for SFS performance pay requires an evaluation of performance *in the SFS* for a period of 120 days (as maintained by the Department) or an evaluation of performance for a period of 120 days regardless of how long the employee has been in the SFS (as maintained by AFSA and the cohort). This distinction is critical in this case because if the regulations require the former, then the Department's position is correct and the grievance must be denied, but if the construction urged by AFSA and the cohort is correct, then the exclusion of the cohort grievants from consideration for performance pay was improper and the grievance must be sustained.

The silence in the regulations is, in our view, deliberate and not inadvertent. It would have been a simple matter to have stated that to be considered for possible awards of performance pay, SFS members must have been members of the SFS at the end of the rating period and also have been evaluated for at least 120 days of performance in the SFS. The relevant FAM provisions, however, do not so state. The provision of 3 FAM 2872.2-1 imposes the requirement that as of the end of the rating period, the employee must be a member of the SFS. The provision of 3 FAM 2872.2-2 imposes the additional requirement that the employee have received an EER for a minimum period of 120 days during the most recently completed rating period. Neither of those provisions requires

that the EER for the most recently completed rating period evaluate service in the SFS for at least a 120-day period.

Nor would such a requirement make sense. In the Civil Service, upon whose regulations the Department relies in part, when SES status is attained, one's position changes, the elements and performance standards change, and one's supervisors and raters change. In the Civil Service, the promoted employee receives two evaluations – one for the period of time prior to promotion and a second evaluation for the time after promotion into the SES which is a new position governed by different elements and performance standards. Compare 5 CFR 430.201, *et seq.*, governing performance appraisal systems for GS and GM employees, with 5 CFR 430.301, *et seq.*, governing performance appraisal systems for SES employees. By contrast, however, when a member of the Foreign Service is promoted to the SFS, none of these aspects of employment change immediately. An individual who becomes a member of the SFS during a rating period receives a single EER for performance covering work both before and after the promotion to SFS. Moreover, unlike the Civil Service, the duties and responsibilities of the employee do not automatically change upon elevation into the SFS.

The plain language of the FAM contains no requirement that the EER covering at least 120 days during the most recently completed rating period evaluate service specifically as an SFS officer. Given the timing of promotions to the SFS and yearly employee evaluations, it is often the case that for employees who have been promoted to the SFS, the majority of their evaluated service involves performance prior to the employee becoming a member of the SFS.[9]

[9] Historically, nominations for elevation to the SFS have occurred relatively late in the calendar year. Annual evaluations generally rate performance ending on April 15th of each year. Usually confirmation of

Neither the language of 22 U.S.C. § 3965 nor the implementing OPM regulations support the Department's interpretation of the FAM. The provisions of Section 3965 of the FSA provide that awards of performance pay shall "take into account" the criteria established by the Office of Personnel Management (OPM) for performance awards under 5 U.S.C. § 5384 and rank awards under 5 U.S.C. § 4507. The incorporated references, however, only define the criteria for granting these awards to eligible recipients and do not speak to the criteria for eligibility of the recipients. As noted, because there are material differences between the Civil Service and the Foreign Service assignment, evaluation, and promotion systems, it is this Board's view that although the FSA requires the Foreign Service to take into account the Civil Service approach to defining the criteria for granting performance pay awards, the FSA does not require use of the Civil Service template for defining eligibility for receipt of SFS performance pay.[10]

Several canons of contract and statutory interpretation support the decision in this case. First, "where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others." *Bradbury v. Idaho Falls,* 21 Idaho 28 (Idaho 1918); 2 Sutherland on Statutory Construction, (Sands 4th Ed.) § 493, p. 921. Moreover, "where general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those

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the SFS promotions by the Senate and attestation by the President occur in sufficient time that 120 days remain before the end of the rating cycle. Thus, the issues presented in this case have not arisen frequently. The record indicates that fewer than 120 days elapsed between the effective date of appointment to the SFS and the end of the rating period only twice – in 2001 and 2002. For reasons discussed later herein, the Board is unpersuaded that the actions of the Department in 2001 and 2002 evidenced a past practice or support the denial of the grievance in this case.

[10] Interestingly, the Department's unwritten policy that it urges be engrafted onto the FAM does not incorporate the SES eligibility requirement that an SES member have been evaluated based upon 90 days of performance in the SES position. Thus, even if incorporation of SES standards of eligibility were appropriate, the Department's position that the year-end evaluation should cover a period of 120 days in the SFS would not be sustainable.

specifically mentioned." *Bradbury v Idaho Falls, supra; Id.* § 422, p. 814. Here, if the Department and AFSA intended to condition eligibility for SFS performance pay on receipt of an EER that was based upon service for a minimum of 120 days as a member of the SFS, they presumably would have, and clearly could have, so stated. By defining certain eligibility criteria, the regulations as written impliedly exclude all others. Second, accepting the Department's unwritten policy as the correct interpretation of the regulations at issue could lead to arbitrary and absurd results. For example, under the Department's analysis, it has unilateral control over whether newly promoted SFS employees will be considered for performance pay by virtue of its unilateral control over when it forwards its promotion recommendations to the Senate for confirmation, which, in turn, controls when the President can attest to the promotions. In addition, because of the vagaries of Senate and Presidential timetables, it could happen that in one year, employees who are promoted to the SFS might be considered for performance pay while others similarly situated the following year might be denied performance pay merely because of the timing of the confirmation and attestation. It is well established that construing a contract, law, or regulation to avoid arbitrary and/or absurd results is favored. *Holy Trinity Church v. United States,* 143 U.S. 457, 458, 460 (1892). See also, 2A Sutherland on Statutory Construction (Sands, 4th ed), § 45.12. Third, there has been no showing by the Department in this case that the eligibility criterion which it urges be added to those set forth in the regulations is consistent with the intent of the original drafters or of the discussions of these regulations held with AFSA thereafter. There is no evidence that the Department has ever discussed its interpretation with AFSA or that AFSA ever indicated its concurrence with this additional eligibility requirement. [11]

[11] The Department essentially conceded that it has not made its interpretation of the regulations plain to its

Past practices are significant as tools of contract interpretation because they represent proof, through conduct, of mutual intent that a particular interpretation is appropriate. See, *e.g.*, Past Practice and the Administration of Collective Bargaining Agreements, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators (BNA) 30, reprinted under the same title at 59 Mich. L. Rev. 1018 (1961).[12] The exclusion of the SFS classes of 2001 and 2002 from the group of individuals considered for performance awards might well support a finding that the Department and AFSA mutually agreed that only individuals who had been members of the SFS for 120 days would be eligible for consideration *if* there was evidence that AFSA was aware of the Department's reasons for the exclusion and, despite such knowledge, took no action to protest or challenge that conduct. Absent a showing, however, of actual knowledge – and there was none on this record – or circumstances sufficient to infer such knowledge, there can be no finding of a true past practice. In this case, there is no basis to infer that AFSA was aware of, or concurred by inaction, in the Department's treatment of the SFS classes of 2001 and 2002. The group of affected individuals was not so large (75 and 87 employees respectively) nor is there any record evidence that the class members affected were advised of the fact that they were considered by the Department to be ineligible for

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employees, nor that it secured the agreement of AFSA concerning this interpretation when the DG advised the cohort in this case: "[W]e think it would be useful to make this established interpretation more explicit. We intend to amend the FAM to stipulate that the required evaluation report under 3 FAM 2872.2-2 must be a report comprehending the performance at a senior level for 120 days or more . . . ." It is incontrovertible that the Department may not unilaterally amend the FAM as it chooses, but must instead negotiate amendments during the collective bargaining process with AFSA.

[12] Clear and long-standing practices of the parties – in other words, "past practices" – can establish terms of the agreement that are as binding as any specific written provision. As the Supreme Court has stated, "the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). Generally, factors relevant to a finding of a binding past practice are the duration and consistency of its application and the parties' acquiescence in it. *Cruz-Martinez v. Department of Homeland Security*, 410 F. 3d 1366 (Fed. Cir. 2005).

such awards. Nor was there any showing that any of those individuals complained to AFSA about the matter. Thus, we do not impute to AFSA any knowledge of, or acquiescence in, the exclusion of the 2001 and 2002 promotees for performance pay consideration.

Having determined that the Department used an invalid criterion to improperly exclude each of the cohort grievants from being considered for performance pay in 2007 and since the record reflects that all cohort grievants met the two requirements set forth in the FAM, the question is presented as to the appropriate remedy.

The question whether each of the cohort grievants would have received performance pay, and in what amounts, cannot be determined from the record. Accordingly, the appropriate remedy is to remand the matter to the Department to determine initially by means of reconstituted Senior Foreign Service Selection Boards and a reconstituted Senior Foreign Service Performance Pay Board whether each cohort grievant's performance would have resulted in performance pay and, if so, in what amounts.

V. DECISION

The cohort grievance is sustained. The case is remanded to the agency with the following instructions:

1. Within sixty days of receipt of this decision, the Department shall convene an evidentiary performance review for each member of the grievance cohort by an appropriate SFS selection board (one for generalists and one for specialists).

2. For all members of the cohort who are recommended for performance pay, the Department shall convene a Senior Foreign Service Performance Pay Board

(reconstituted PPBs) (one for generalists and one for specialists) to review the performance folders of such employees.

3. The reconstituted PPBs shall employ the same standards and precepts as the 2007 PPBs.

4. The Department shall make whole all grievants who would have received performance pay in 2007 had they not been improperly treated as ineligible. The make whole relief will be determined in accordance with applicable law and regulation, including the Back Pay Act, 5 U.S.C. § 5596.