

## Foreign Service Grievance Board

August 14, 1974

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TO: The Director of Personnel  
Department of State

SUBJECT: Record of Proceedings 73-146-STATE-8S:  
Remedial Order of the Board in the Case of  
GRIEVANT, FSR-3

INTRODUCTION

Grievant, currently seconded to FAO, RoEte, submitted his grievance to the Board on September 24, 1973 and the Board accepted jurisdiction on October 16, 1973. He then asked that the Board take no action on his complaint pending conclusion of his negotiations with the Department. On June 5, 1974, grievant advised the Board that these negotiations had not been successful. The Board ordered an appropriate investigation.

The investigation took the form of a review of the grievance, grievant's personnel files, controlling laws and regulations, and court decisions. Officials of the Department of State and AXD were interviewed and a number of meetings were held with grievant and his representatives.

Grievant's grievance, as originally submitted to the Board, consisted of four parts. The first and chief component of his complaint dealt with his belief that he had been unfairly denied career status. The second was a charge that his performance file, as seen by the Selection Boards over the years, was incomplete. The third and fourth parts pertained to access to certain files and his entitlement to a diplomatic passport. These last two complaints were subsequently withdrawn as the result of a medial-settlement arranged through the Board's auspices-

Accordingly, the questions to be decided by the Board are: (1) Are his complaints about the contents of his performance file justified? and (2) Has grievant been unfairly denied career status?

BACKGROUND1. Incomplete Performance File

Grievant charges concerning his performance file cover three specific matters: (1) an ICA commendation; (2) a missing part of an efficiency report (OER) and (3) the absence of OERs

covering his service since April 1970. He complains that the absence of these documents has adversely affected his competitive standing.

a. The Missing ICA Citation

In 1961, grievant received an ICA Meritorious Award Citation. This document was not transferred to his performance file when he joined the Department, and he believes, deprived him of some competitive advantage.

As a result of the Board's inquiries, it has been determined that in keeping with standard practice, neither the citation nor any other performance-related material was forwarded to the Department by ICA. Instead it was destroyed following his separation from ICA rolls.\* It appears that there is no Department regulation which would require the inclusion of preemployment honors in a performance file.

b. The Missing Part II of the QER

In early 1973, grievant reviewed his performance file in Washington and noted that Part II of the OER prepared on him in Rome in 1970 was missing from the file. He noted this on the form he completed in connection with the review of that file. Some six months later, when he next reviewed his file, he noted that the report was still missing. He feels that the absence of this report which was an excellent one might explain the low 10% ranking given him by the 1972 Selection Board\*\*.

In the course of its informal review of the grievance, the Department determined that for some unknown reason, Part II of the OER had not been incorporated with the rest of the report when placed in the performance file.

The Department was unable to determine whether this error (which, occurred when the system of maintaining two separate performance files was abandoned) had resulted in the 1972 Selection Board not having seen the report in question. However, the Department did offer to expunge the low 10% ranking and grant him a "non-rate" for that year as redress. The Department also corrected his performance file so as to incorporate the missing Part II.

Grievant does not believe that these concessions by the Department are adequate.

c- Non-Preparation of OBRs since April 1970

Grievant grieved that no OSS had been prepared on him since the FAQ Counselor in Rome submitted his interim report for the period 6/16/69 to 4/30/70.

Grievant remained with the Embassy until his secondment to FAO on January 21, 1971. Regular OES.S were due in June 1970, but none is required for only two months. However, an OER was due at the time his Embassy services were terminated.

3 FAM 529 b. stipulates that "it is important, that every assignment and period of service be documented" and requires that an interim report be prepared at the time an assignment is terminated. 3 FAM 531.4 states that Rating and Reviewing Officers who are delinquent in preparing and forwarding required reports \*shall have their files annotated to show this delinquency" and the annotations should be brought to the attention of the Selection Boards. 3 FAM 531.1 holds principal officers and heads of bureaus responsible for the prompt submission of OERs no more than 30 days after preparation. Accordingly, grievant's last OER from the Embassy in redacted should have been submitted by February 20,

After grievant's secondment to FAO, the direct responsibility for submitting evaluation reports on him no longer rested with the Embassy. 3 FAM 516 c. stipulates that the Department's Performance Evaluation Division is charged with the procurement of evaluation reports on officers serving in international agencies. grievant's file does not show that the Performance Evaluation Division approached WFP/FAO to obtain an OER. However, an airgram from IO/EX of September 10, 1971 to US Missions attached to international agencies asked their cooperation in obtaining OEKs on seconded FSRs. The FAO Counselor at the Embassy in redacted was among the addressees of the airgram but there is no indication that he took any action.

FSRs under PL 85-795 have reemployment rights and are eligible for promotion. Therefore, their files should be submitted to the annual Selection Boards for review and evaluation according to a determination made by the Department's legal division in 1972.

As stated earlier, grievant was low-ranked in 1972. The Department has offered to expunge the low ranking and to assign him a non-rating for that year. In view of the lack of OERs since April 1970, the Department also offered to expunge the 1971 Selection Board rating of the upper 61-80%.

The Department invited grievant in a letter of August 13, 1973 to submit whatever evaluation report he could obtain from WFR/FAO. The initiative was left to grievant and he submitted an evaluation report prepared by two of his FAO superiors on a regular OER form. It covered the period June 20, 1972 to December 31, 1973 and arrived in time for the 1973 Selection Board's review. He was ranked again in the upper 61-80%.

As the performance file is today. Selection Boards will not find any mention of grievant's activities during the April 30, 1970 to June 20, 1972 period. There are no OERs, nor is there any explanation for the gap in his file.

Grievant believes that this situation is unsatisfactory.

2- Inability to Obtain Career Status with the Department

In essence, grievant charges that he joined the Department in 1961 to obtain career civil service status; accepted a Foreign Service Reserve Officer (FSR) appointment as a temporary measure while awaiting implementation of the Civil Service position; and then, through no fault of his, lost the opportunity to acquire either career civil service or foreign service status. Now, at the age of 52, after 14 years of service, he is faced by a situation whereby after his present "secondment" to FAO terminates in 1975 he can be sure of only 8 months and 20 days of employment with the Department. At that point, his FSR appointment will terminate. The Department will not commit itself now to granting him an additional three year FSR appointment, thereby making him eligible for consideration for career status under the Foreign Affairs Specialist (FAS) program.

In 1961, grievant, then an employee of AID'S precursor, transferred to the Department's Bureau of International Organization Affairs (IO). He had been eligible for, had been offered, and had accepted a GS-14 position in IO. However, due to a Reduction in Force (RIF) then in progress amongst the Department's Civil Service personnel, this offer was temporarily changed to an FSR appointment. Grievant understood that this FSR appointment was a measure to protect him against RIF and that he would eventually be placed in the GS-14 position. He states that on he accepted the FSR appointment and joined the IO staff.

Subsequently, grievant's eligibility for appointment to the GS-14 position lapsed due to his being dropped from the Civil Service Commission (CSC) register. He holds that the Department was at fault in not giving him proper advice and guidance on how

to maintain his place on the register. However, grievant personnel file shows that 10's executive bureau did warn him of the necessity for him to resubmit his papers to the CSC, and made that warning a matter of record. Grievant contends that he did not understand the thrust of the executive office's warning. In any event, his status with the CSC was allowed to lapse.

Grievant continued in 10 as an FSR under his five year appointment until 1966 when he was transferred to redacted.

the Embassy's Office for Liaison with the Food and Agriculture Organization (FAO).

In January 1970, as part of an ongoing program to reduce the number of Americans overseas, grievant was notified that his FSR appointment would be terminated and his position reallocated to a career officer. grievant was further notified that as he did not have reemployment rights, he should seek employment elsewhere.

The Embassy and Inspectors took strong exception to [redacted] proposed separation and the Department, in December 1970, [redacted] and him [redacted] extension of his appointment until March 1973. By that time, [redacted] who would be [redacted] 50 and with twenty years' creditable [redacted] would retire. [redacted] expressed appreciation for this offer but suggested that he be considered for the new FAS program intended to give career Foreign Service status to FSRs and civil servants, which had been established in February of that year.

Before the Department could reply to this suggestion, grievant had found a position on the FAO staff for which he qualified, and was "seconded" to that under the provisions of PL 85-795, as amended. By virtue of this transfer, grievant ceased to be a Department employee and the offer of the extension until 1973 -- 3 superseded. However, he did acquire reemployment rights.

Subsequently, in April 1971, grievant submitted his application for the PAS program and he received initially encouraging information from the Department's Assistant Director of Personnel who was in charge of the FAS program. However, before his case had advanced very far, the FAS program became a subject of litigation. An immediate consequence of that litigation was a court injunction against making any conversions under the program pending the court decision. During this period, grievant continued to indicate his interest in the FAS program and received the warm endorsement of his efforts from a Deputy Assistant Secretary in IO. However, in September 1972, he was notified that, {without

regarti to final outcome of the litigation) , the Department had. rejected his PAS application. He was told that the Department: did not consider his service with FAO as the ecpaivaleht of holding the kind of position which would automatically qualify iii&i for consideration, and that therefore the oiily basis upon which he could be considered would be a finding that there was a 'continued need for his services. Moreover, he was told that the Department could find no basis for a finding of such continued need.

Grievant felt that this rejection of his application contradicted sharply the initial encouragement he had received and thatthe rejection ignored the strong endorsement his candidacy, had received from IO. The Department, however, maintained that the XO endorsement meant little unless the Bureau was offering to place him in a funded position. No 3uch funded position was offered.

Grievant's disappointment was compounded by the final court decision in the FAS case. Under its provisions, ©nly employees who were serving uninterruptedly as FSRs for the three years immediately preceding application could legally be converted. The only way that grievant would be able to achieve career status through the PAS program, therefore, would be to exercise his reem-ployment rights and return to the Department's service as an FSR for at least three years.

Under the terms of grievants appointment, the Department i\*>obligated to employ him for only 8 months and 20 days after he returns from FAO. Although the t>epartaent does not exclude possibility that a further three year FSS appointment might be given hin, it refuses to guarantee such an exte- sion. Grievant, for his part, has reiterated his request fc the extension. He feels that in light of all the facts in his ca: , the Department has a moral obligation to guarantee him the Oj. portunity to obtain career

#### BOARD FINDINGS AND CONCLUSIONS 1.

##### Incomplete Performance File

###### a. Missing Citation from XCA, 1960/61

The Board finds that ICA acted in accordance with its policies at the time of grievants' appointment with the Department by not submitting material related to performance. The Department never received the citation and cannot be

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faulted for not including it in grievant's file. Nor is there adequate basis for the Board to order inclusion of the citation now.

b. Missing Part II of QER from Rome for 6/16/69-4/30/70

The Department has belatedly included Part n of the 6/16/69-4/30/70 OER in grievants' file. The Department has also offered to expunge a 10% low ranking by the 1972 Selection Board.

Whether these are adequate remedies will be discussed below.

c. absence of QERs (4/30/70-6/20/72)

There is no satisfactory explanation for the failure of the American Embassy in redacted to submit an OER on grievant for the period beginning 4/30/70 and ending on 1/21/71, when his services in redacted were terminated. The half measure of submitting his file to the Selection Boards for review without up-to-date evaluations was detrimental to grievant.

Similarly, there is no satisfactory explanation for the absence of reports subsequent to 1/21/71. As a result of his grievance. Grievant was invited to secure reports and he was able to secure a report for the 6/20/72-12/31/73 period but this did not arrive until February 1974.

The overall situation is that there are no reports for the 4/30/70-S/2Q/72 period and the 1971 and 1972 Selection Boards rated Hills without adequate up-to-date information. The 1973 Selection Board did see the report for the 6/20/72-12/31/73 period but the 4/30/70-6/20/72 period was an unexplained gap in his record.

It does not appear that there is a realistic likelihood, at this late date, that OERs can be secured for the 4/30/70-6/20/72 gap.

d. Board Findings

The Department's offer to expunge the 1972 "low 10%" rating and to consider grievant as being non-rated for 1971 and 1972 should be accepted as a partial remedy. However, it is quite inadequate. An unexplained gap of more than two years can only be detrimental to grievant. This is especially so when no evidence whatever has been submitted to suggest that his

services during the period of the gap were other than satisfactory. To the contrary, all available evidence suggests that his work was excellent.

Grievant does not request that this Board recommend promotion. In any event, there is inadequate evidence to warrant such a recommendation now. However, as a minimum additional remedy, the Board orders the inclusion of the following statement in grievant's file:

"The Foreign Service Grievance Board has found that no OERs were prepared on grievant for the period of April 30, 1970 to June 20, 1972. This gap in the record was due solely to faults of the Department. • At this late date, it is not feasible to fill the gap by belated retroactive reports. However, the Board's investigation indicates no evidence whatever that his services were unsatisfactory. To the contrary, the available evidence suggests that his services were excellent.

"The Board therefore recommends that future Selection Boards give appropriate weight to the probability that this heretofore unexplained gap was detrimental to grievant. It should not be so considered in the future.

"August 14, 1974."

## 2. Career Service problems

It is unnecessary to repeat here all the facts concerning grievant's career status problems.

The evidence is replete with indications that the Department intended that grievant acquire career status and that his performance has been entirely satisfactory or better throughout his total service since his original employment by 10 in 1961 and for about four years prior to that on a foreign affairs related assignment.

Grievant's present predicament is partially his own fault. He benefited in 1961 by FSR appointment instead of initially contemplated GS status because of danger of a RIF if appointed to a GS-14 position. Subsequently, he failed to heed a clear 10 warning that he must submit certain papers to the CSC to preserve his GS status for conversion after the RIF danger had been removed.

The foregoing important aspect of this case is mitigated by subsequent events. Despite grievants' serious error, all subsequent evidence is that those familiar with his work wanted him to have tenure and a variety of ways were found to continue his employment. Absent the complications of the court injunction and decision, he might have acquired career status.

As matters now stand. Grievant can acquire career status only if the Department voluntarily extends his FSR appointment for another three years after his current appointment expires. The Department has not said "yes" or "no" to his request that this be done. Thus, Hills faces the prospect of returning from his present assignment with only 8 months and 20 days of guaranteed service thereafter.

The Board cannot order that the Department grant the request for a three-year extension. However, under all the circumstances of this case, the Board has no hesitation in recommending that the Department do so at an early date. To leave the decision hanging serves no good purpose to anybody, certainly not to grievant and his family.

This Board recommendation should not be considered as a precedent

SUMMARY

1. Grievant's complaint about the absence of an ICA citation in file is dismissed.
2. The Department's offers and actions already taken concerning a missing Part I" of the 6/16/68-4/30/70 OER and the absence of any OERs for the 4/30/70-6/30/72 period are partial remedies for serious errors of the Department for which grievant is in no way responsible.

In addition, the Board orders that the following statement be inserted in grievants' file:

"The Foreign Service Grievance Board has found that no OERs were prepared on grievant for the period of April 30, 1970 to June 20, 1972. This gap in the record was due solely to faults of the Department. At this late date, it is not feasible to fill the gap by retroactive reports. However, the Board has investigated this grievant's services and finds no evidence to the contrary, the available evidence suggests that his services were excellent.

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"The Board therefore recommends that future Selection Boards give appropriate weight to the probability that this heretofore unexplained gap was detrimental to \ grievant. It should not be so considered in the future.

f "August 14, 1974."  
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3. The Board requests the Department to confirm within 30 days of receipt of this remedial order that the statement noted above has been inserted in grievants' file and that the Department has effectuated its' own offers.

4. Under the special circumstances of this case and without establishing any precedent, the Board recommends that the Department extend grievant current FSR appointment at an early date for an additional three years.

The Board requests early advice as to the Department's action on this recommendation.

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cc: Grievant  
Poe Mr.  
Vincent