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Foreign Service Grievance Board

May 3, 1974

TO: Assistant Director for Personnel and Training
United States Information Agency

SUBJECT: Record of Proceedings 73-148-USIA-17:

Remedial Order in the Case of FSIO GRIEVANT

RTF: 3 FAM 667.2

Introduction

In a letter.of October 31, 1973, FS"lO~4 grievant submitted his grievance to the Board. Grievant charged that the presence in his performance file of two falsely prejudicial efficiency reports had resulted both in a 196 3 decision to deny him a periodic step increase (PSI), and in a 1973 decision to designate him for selection-out. grievant further charged that following that designation for selection-out, USIA had improperly denied him the PSI due him on July 1, 1973. As relief, grievant sought the removal of the efficiency reports from his file; the expunging of his 1970 and 1972 low rankings, and so his designation for selection-out; the retroactive payment of the 1973 PSI due him; the placing of a statement in his performance file recommending his promotion; his reassignment to a position where he could display his capabilities; and a cash award to compensate him for the lost 1963 PSI.

On December 12, following receipt of USIA's confinr-ation that the informal procedures in effect had been conplied wioh, the Board accepted jurisdiction over Foo's grievance anJ tern-ined, without further inquiry, that a hearing would be r.ece ary. A pre-hearing conference was held on February 7, at v.__ . time a. March date was agreed upon for the hearing. The hearing took place on March 25, before a panel of the Board, and a verbatim transcript of the proceedings was made and copias provided both parties.

Background

In 1960, grievant was a Class 5 Officer assigned to DSIS, redacted. There, he carae under the supervision of a since retired officer, redacted, Redacted submitted critical evaluation reports on grievant in both 1961 and 1962. The last report was a very harsh one, in which he commented critically on grievant's energy, ambition and family. This report was prepared after redacted had left redacted, and grievant was not sent a copy. It was not yet

in his file when grievant returned to the Agency *on* reassignment later that year.

In July 1963, the Agency notified grievant that because of his poor performance the ?SI then due hirc was being withheld. Grievant again sought out redacted final report on him, this time successfully. After reviewing the report, he submitted a lengthy rebuttal which was placed in his performance file. Ee also submitted a coraplaint to the Agency that certain aspects of the final redacted report suggested racial or ethnic bias.

As a result of this complaint, the Agency's General Counsel's Office (IGC) undertook an investigation of the equal employment opportunity aspects of redacted complaint. In 1964, "excerpts" from this IGC report of investigation were provided grievant by the Agency. However, he was not given a copy of the full report; and all subsequent attempts to locate that full report have been unsuccessful. (It is possible that the term "excerpts" was a misnomer and that that document was the actual report in its entirety.)

As revealed *hy* the excerpts provided grievant, the IGC investigation had determined that grievant's personal and professional reputation was excellent? and that although Sestanovich did not appear to have been tainted by any racial or ethnic bias, he had clearly exercised bad judgment in his comments on grievant's family. The report noted that redacted record indicated past lapses of good judgment and evidence of impatience; and concluded with a recommendation that grievant's case be reviewed. It is not known what, if any, action was taken on this IGC report. However, the redacted reports remained in grievant's file together with his rebuttal statement. The IGC report was not placed in his file, and its ultimate disposition remains unknown.
In the years that followed, grievant continued \ serve with the Agency, both in Washington and then in redacted, -ere he distin guished himself. On the basis of his perform:. 3 in redacted, he was promoted to Class 4 in 1970.

The next selection board to consider grievant ranked him in the bottom 5% of his new class. The isoarc singled out his assignment in Singapore as reinforcing a perceived "pattern of underachieveriient". *The* next selection board to consider Foo (which for various reasons did not convene until 1973,> also ranked him in the bottom of his class. In explaining this decision, this board cited grievant's general performance as nieasured in comparison with his peers and did not cite any specific reports of assignments as having provided the

basis for its decision. Having been twice low-ranked, grievant auto-matically became subject to possible selection-out. The decision to separate him was made following a recommendation to that effect from the 1973 Retirement Board, and, on May 21, 1573, grievant was notified of his planned separation.

On July 19, 1973, grievant discovered that the PSI due him on the first of that month had been withheld without advance notice or explanation. As a result of his inquiries, he was told that the Agency regarded the payment of the PSI as incompatible with his selection-out. At that point, grievant commenced his grievance.

Discussion

The redacted Reports: The record shows that the sharp, even brutal, criticisms of grievant contained in the redacted reports conflict with other reports and the IGC contemporary investigation. Having no reason to question the IGC's view that redacted was not motivated by racial or ethnic bias, the Board can only conclude that the animus directed against grievant, and the extravagant language employed in the final report did indeed constitute emotional lapses in good judgment, and not considered evaluations of an employee's performance.

While it is probable that these reports may have had some impact on grievant's prolonged assignment in the photo section following his return from redacted, it is obvious that they had significant impact on the 1971 selection board's decision to low-rank him the year following his promotion.

Role of the redacted Re -;orts: £'he redacted reports' role in the decision of -[1]' next selection board to again low-rank Foo, arid in that cf ae Retirement -Board to recommend his selection-out are less cl ,r. For all their deficiencies, the Sestanovich reports alone are not enough to explain the across-the-board competitive low ranking given grievant by the 1973 selection board. Grievant's performance file is such that the Board is not persuaded that but for the redacted reports, his record would ensure that he otherwise would be immune from career difficulties, or have been promoted to Class 3.

y Step Increases: The record shows that the decision to deny grievant his 1973 PSI was not made in conformity with the applicable regulations. Grievant's superiors had duly certified that his performance met the standards required for the PSI, but the Agency's central personnel office had intervened, and initiated

an ad hoc procedure to deny the increase.

Board can appreciate the Agency's concern upon confronting, for the first time, a situation whereby officers found to be *I* BCSi-coBipetitive and designated for selection-out {but who were [temporarily being leapt on the rolls for policy reasons) would • become eligible for and receive PSI's, the prerequisite for which is maintaining an acceptable level of performance. How-; ever, not only is selection-out based on relative rather than absolute standards of performance, but the Agency is also bound L by its own regulations. In the absence of some grant of overriding authority, they may not be circumvented, especially by recotirse to ad hoc procedures.

With respect'to the 1963 decision to deny the PSI, the record is at best obscure. Neither grievant nor the Agency has been able to Shed much light on that action psther than that it appears to have been a consequence of the redacted reports. However, given the unavailability of even copies of the then-existing regulations, and the long passage of time during which grievant failed to raise this issue, the Board concludes that the matter is beyond adjudication.

Findings and Orders

On the basis of this record, the Board stakes the following findings, orders and recojaraendations:

1?w© efficiency reports covering the period July 1, 1960 through Hay 22, 1962 are falsely prejudicial and herewith ordered removed from grievant's performance file, together with his rebuttal statement. In their place the following statement should be inserted:

"The two efficie.-jy reports covering the period July 1, 1960 through May 22, 1962 have been removed by Order of the Foreign Service Grievance Board.

"May 3, 1974"

\ 2. *Jt£h&* low-ranking assigned Poo grievant the 1970 selection board explicitly based the two falsely prejudicial reports and, therefore, is invalid. The Board herewith orders it expunged from th# record, thereby eliminating the basis for 3?oo*s involun-
[Ifcary separation. He should be considered unrated for that year.

3. The low ranfclag assigned Foo by the 1973 selection board is

not based primarily on the falsely prejudicial reports, and the Board dismisses the reguest for its removal.

4. The Board finds no basis for reconBsanding grievant's p and dismisses the reguest for such a recoimaendation ise inclu ded in his file. .

5. The Board finds that the falsely prejudicial reports seeis to &ave played some part in grievant's pattern of assignments, and there fore recommends .to the Assistant Director xor Personnel and draining that he take such steps as -say be necessary, in connec tion /with the termination of tfee seleetion-out procedures direc ted at grievant, to have him reassigned to an

6. The Board finds that the denial of the 1973 PSI was not in conformity with published regulation, and herewith orders that decision reversed and the Agency to pay grievant, retroactively, the isoney due him.

7. The Board finds no adequate basis for granting any cash award as condensation for the PSI denied grievant in 1963.

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s- | TShe Board has ordered the removal of the Sesfcamavich reports and the selection-out. 3?fae Board, however, declines to expunge the

1972 Xow-informaly *iEQ&&ea&ea&* grievant's promotion Witches, nowEyxw tenainatioR o£ ^fche selectJog-put process. tae Board finds that the denial of the 1973 PSI was not done io accordance -"£th regulations, and orders the Agency to reizsburse grievant, it fir. s no adequate basis for any cash award in compensation for the dei al of the 1963 PSI.

'' Hftcpxasted Confirmation

The Board requests confirmation within the next 30 calendar days, that its orders have been carried out; and would appreciate a statement from the Assistant Director regarding the Board's - siendation that grievant be reassigned. :

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Me. Foo . ■: ■ . ■ " . ■ ,- . ■'
Mr. Belman
«r. Ward ■ . ' ■■.-■- ■. -; , ■ ■ --
Mr- Bucklas" "* "" ■ - " . - - " ' -