

EXCISION NO. 473

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant
and
[Agency]

Record of Proceedings

NO. []

Date: September 14, 1981

For the Foreign Service Grievance Board;

Presiding Member: Board Members:

Special Assistant
to the Board:

I]

Representative for the Grievant:

[1

Representative for the Agency: [

J

In order to prevent an unwarranted invasion of privacy names of individuals and other identifying information have been deleted from this material in accordance with Section 552 (b) (6) of the Freedom of Information Act. These names and other identifying information are also withholdable under the Privacy Act.

I. TEE GRIEVANCE

This grievance was filed with the Board on [date] by [grievant], a Foreign Service Staff Officer, [grade], with the [agency]. He alleges that an [evaluation report (ER)] prepared by [Rater A] and reviewed by [Reviewer A] ([ER-A]), for the period [date] to [date], and portions of an [ER] prepared by [Rater B] and reviewed by [Rater B] , ([ER-B]) for the period [date] to [date], are inaccurate and falsely prejudicial.

He contends that these two reports, as well as a [year] [investigation] of his personal conduct, are responsible for his not having been promoted since [year], when he attained his present [] grade. They also resulted, he says, in the denial of his applications for lateral entry into the [Foreign Service Officer corps].

[Grievant] seeks deletion of the two [ERs], three successive promotions ending with [Grade] , attorney fees and "such other relief as the Board deems just and proper."

[Grievant]'s grievance was formalized before this Board in [date], Prehearing conferences were held on [date] and [date], after which it was concluded that the Board would proceed under Part 905 of its regulations, which provide for an oral hearing. Under the 905 proceedings another prehearing

conference was convened on [date] . This was followed by hearings on [dates]. Posthearing briefs from the grievant and the agency were received on [date], and the record was then closed.

During the course of this grievance procedure three different representatives appeared for the grievant. Attorney [name] represented [grievant] during the earlier stages of his grievance before [agency]. An [union] official represented him until the [date] prehearing conference. On [date] Attorney [name] entered the case and represented him until its conclusion.

II. BACKGROUND

[grievant] was appointed a Foreign Service Staff Officer Class [Grade] on [date]. Before entering the Foreign Service he taught high school French and Spanish for [] years and spent [] years as a Peace Corps volunteer teaching English as a foreign language in [country]. In [date], he was sent by [the agency] to [Post] as an [title] During this assignment he spent some [] months as the [title and post].

He was transferred to [Post] in [date] as [title] . After

a little more than a year he was reassigned as the [title]. He was promoted to [Grade] in [date]. The following [month] he was transferred to Washington where he studied [course] at [university] during the spring semester of [year].

In [date] an assignment to [country] as [title] was cancelled. Soon after this, he was assigned to [] language training and [] at the Foreign Service Institute in preparation for an assignment in [Post 1].

On [date] , he arrived in [Post 1] where he had been assigned as [title] to replace [Mr. X]. [X], in turn, had been promoted to the position of [title], thereby becoming [grievant]'s supervisor. Problems arose between the two, culminating in [grievant] ' s transfer to [Post 2] as [title], some [] days after his arrival in [Post 1].

In [date] [grievant] was promoted to [Grade].

Certain allegations concerning [grievant]'s personal conduct resulted in a [investigation]. [Grievant] was absolved of all allegations and the investigation was officially closed in [date].

while assigned to [Post 2] he received two [ER]s prepared by his supervisor, [Rater A], title] and reviewed by [Reviewer A], title], who was resident in [city]. The second [Post 2] report, dated [date], is [ER-A] being contested here.

Upon his return to the Agency in [date], [grievant] was assigned to the same office in which he had worked from [dates] . Assigned initially on [date] to [post] , as [title] , he was reassigned to the position of [title] in [date]. Due to illness his tour had to be shortened, and he was returned to the agency in [date]. Since that time until his present

posting in [post] in [date], his work has been confined to the [agency]. During his career with [the agency] [grievant] has applied several times for lateral entry into the [FSO] Corps. In [date], his application was denied because his personal rank at that time was not equivalent to that of []. In [date], it was again denied because he did not have a full medical clearance. In [date] and in [date] his applications were reviewed by the Qualifications Evaluation Panels for the Board of the Foreign Service. However, neither of these Panels found him sufficiently qualified and recommended that he not be examined for lateral entry.

During the preliminary stages of this grievance the agency removed portions of the [ER-B] covering [grievant]'s performance from [date] to [date] . Dissatisfied with this concession, he asks the Board to remove the report in its entirety on the grounds that certain allegedly prejudicial statements in it were heavily relied upon by the Board of Examiners of the Foreign Service in its refusal to recommend that he be examined for lateral conversion to the Foreign Service [Officer] Corps in [date] and in [date].

At a prehearing conference on [date], the agency, while denying that the protested [ER]s were inaccurate and falsely prejudicial, offered to remove the [ER-A] report and the reviewing statement in the [ER-B] report from his performance file. The grievant did not respond to this offer. Further,

[the agency] maintained that, under [regulation], the [investigation] had been properly authorized, initiated and conducted, [grievant] had been absolved of the charges, and in [date] the Agency had agreed, under provisions of the Privacy Act, to remove all reports of this investigation from its files.

Shortly before the hearing concluded, [the agency] Counsel announced that the agency was prepared to remove four [ER]s from [grievant]'s performance file. Only two of these had been formally grieved: the [ER-B] covering the period from [date] to [date] and the [ER-A] for the period [date] to [date]. The other two, which had been referred to during the course of the grievance, were the [ER] for the period [date] to [date], and the [ER] report for the period of [date] to [date]. This offer was accepted.

III. GRIEVANT'S POSITION

[grievant] claims that his career has suffered severe damage as evidenced by his lack of promotion since [year] and the agency's repeated denials of his applications for entry into the [FSO] Corps. He traces his difficulties to events and circumstances that arose following the personality clash with [X] in [country] and the subsequent allegations related to the [investigation]. He charges that his disagreement with [X] triggered his direct transfer to [Post 2] where he found himself in a position for which his supervisor.

[Rater A] , considered him to be unqualified and where "the atmosphere was poisoned against me by an unfortunate [investigation] which had become common knowledge..." He says [Rater A] "gave me almost no opportunity to demonstrate performance and found it repugnant to have me on his staff." [Grievant] argues that these adverse factors placed him in "the unhappy position of not being entrusted with the duties of a higher level job and not encouraged to show how well I could meet this challenge." He refers to the [ER-A], as a "prejudicial and fallacious document," as evidence of the unfair treatment he received and requests its removal from his personnel file.

[Grievant]'s justification for requesting removal of the [ER-B] is based on his contention that certain phrases of the reviewing statement were interpreted as having pejorative meaning by the Qualification Panel.

In addition, he faults both [Rater A] and [Rater B] for not having provided him with a position description for the periods he worked under their supervision. IV. AGENCY'S POSITION

The Agency contends that the grievant has failed to sustain his burden of proving that any portion of the [ER-A] or the [ER-B] were "inaccurate, erroneous or falsely prejudicial." It points out that he brought not one witness forward, "to corroborate his testimony or describe the manner in which he performed his duties during those periods of time." The

two witnesses he did produce had no first-hand knowledge of his performance during the periods covered in the contested [ER]s. On the other hand, the agency produced the rating and the reviewing officers, both of whom, the agency notes, are senior Foreign Service Officers who testified fully as to the precise matters at issue. The agency contends that the two [ER]s in question are frank, well-balanced reports of his performance. They give him credit where the rating and reviewing officers found it warranted and faulted him where they found he fell short in his performance.

The agency concludes that the grievant's contention of race and sex discrimination are neither substantiated nor justified.

[the agency] contends that even if the Board should find either of the two [ER]s to be flawed, the grievant should not be considered for retroactive promotions. The grievant has asked the Board to judge his performance absent any knowledge of the qualifications of the other Class [] officers. The agency further disputes [grievant] 's argument that but for the contested [ER]s he would have been promoted to Class [] by the [year] Selection Board. The Grievance Board should not proceed further by recommending promotions to Class [] and Class [] without his having competed with other officers in those classes. The agency concludes that there is no evidence shown here that, but for the claimed prejudicial [ER]s,

[grievant] would have been selected for promotion even once, much less than the three times he claims. V. ANALYSIS

The substance of the dispute before the Board, as accurately characterized by grievant's counsel, concerns the impact of the [ER-A] and the [ER-B]. While the propriety and merits of a [year] [investigation] are not directly at issue, there is the contention that knowledge of the investigation unfairly influenced both his relationship with peers at his posts and the drafting of the contested [ER]s.

There is no evidence in this record by which the Board may conclude either that [grievant]'s overall career in general or his [ER]s in particular were influenced by knowledge of the earlier [investigation]. Grievant says he became convinced the investigation was public knowledge as a result of a variety of incidents. He assumes, for example, that [Rater B] had knowledge of it "through the grapevine." One of his secretaries in [country] resigned in early [year]; he had a heated argument with another just prior to his leaving [country] which, he testified, led him to believe he was being "set up" by the [agency] .

[grievant] also concluded that people in Washington knew of the trouble in [country] and that the application for lateral entry into the [FSO] Corps he made upon his return

from [country] to Washington was denied. Subsequently, in [country], he was treated, according to him, "with great disdain" by his supervisor. Moreover, one of the grievant¹'s assistants and one of his secretaries resigned and others turned against him. In [country], he was also told that the [officer] was "very sympathetic to his situation and was going to do his best to get him a promotion." This, too, led him to believe the [investigation] had been public knowledge. Later, in [year], another colleague in [the agency] sympathized with him in respect to the personality conflict with [] .

None of this evidence, however, leads the Board to conclude that the confidentiality of the [investigation] had been breached. To be sure, individuals were well aware of the personality conflict between [grievant] and his former supervisor, [X], The conflict had, after all, been substantial, and had resulted in [grievant]'s transfer from [Post 1] to [Post 2] only [] days after his arrival at Post. Moreover, the allegations, of which [grievant] was subsequently totally cleared, concerned matters that could easily have been the stuff of much unfortunate gossip. But that is to be distinguished from the disclosure or discussion of the resulting [investigation].

In the overall, the [investigation] aspect is of relatively minor import. The obligation of the rating and

reviewing officers, in drafting an [sR] , is to provide a balanced and objective evaluation of the officer's overall performance. Improper reliance on grapevine scuttlebutt could be as destructive and improper as any consideration of a [investigation] of the same incident. Accordingly, it is to the [ER]s themselves that this Opinion now turns.

During the time [grievant] served in [country] he received two [ER]s, both written by [Rater A] and reviewed by [Reviewer A]. The first, not grieved, covered the period [dates]. The second report, covering [dates], is at issue.

In his rebuttal to this [ER] , [grievant] commented that, "The rating officer meted out assignments to me and the [officer]; therefore, I could only implement those programs or duties that he assigned to me. These were generally the mundane and boring tasks. All of the [type] matters were handled by the rating officer and his local assistant." Thus, [grievant] asserts, he was not permitted to function as an [title] in [Post 2] , and consequently the [Rater A] [ER] evaluation of him as an [title] should be considered invalid.

[grievant] contends that [Rater A] confirmed this in the [ER] when he stated: "His actual duties should have been those of a [title] but for various reasons this was not the case." However, in the next section of the [ER] he rated his overall

performance as less than average, because he had not shown the initiative and professional drive he expected of him, nor had he developed the important contacts that the position required. He concluded he lacked the experience, judgment and personality to handle the position, and he believed [grievant] felt this to be the case. [grievant] argues that these comments are totally unfair to him; not only had [Rater A] not allowed him to perform the duties of the position, he had also never sought his opinion of his duties or performance- He f inas [Rater A] ' s comments concerning limited professional acquaintances within [certain] circles, as well as those citing his lack of discussion of his program or the overall office operations, unfair, because they all stem from [Rater A] 's relegating him only to routine office assignments. However, he contends, [Rater A] has entered them in the [ER] in such manner as to imply that he was at fault for not having fulfilled the duties of the assignee position.

As to [Reviewer A's] reviewing statement, [grievant] alleges he saw him only twice during the rating period and that he knew nothing of the menial tasks to which he was restricted- Therefore, he was not qualified to review his [ER] , and his concurrence in [Rater A] 's evaluation of his performance was not based on first-hand information as required by regulations. Further, in documenting his

disagreement with [Rater A]'s comment that the agency had erred in assigning [grievant] to the position in [Post 2] , [Reviewer A] again referred to the [Post 1] episode which had caused his transfer. In justifying his assessment, [Reviewer A] stated it in such manner as to find fault with him when, in fact, he was not in control of the situation.

The testimony of [Rater A] , who was, at the time, the [title] in [Post 2] , highlighted the specific circumstances existing at the time of [grievant]'s arrival. Previously, the entire [Division] were located in [Post 2]. This included the [different Sections], among other things.

...the Ambassador was eager for as much of the program that could be transferred settle up in [city]. It was very difficult to move much of the program at that time because all of the major organizations and institutions - [] - that we were dealing with remained in [Post 2]; the Ministry of [] and all the national institutions, the National [] and so on were all still in [Post 2]. There was an attempt shortly after...to try and create a branch, regular branch operation in [Post 2]. The problem, however, was that there was still some of the national programs centered there as well as all of the [type] division, which was responsible for the whole national [type] program. So, after an attempt to establish this, it was decided that it was -there were too many conflicts, there were too many difficulties. (At page .)

[Grievant] came in the midst of this transition to fill the position of [Officer]. At that time, the position included responsibility for the overall [] program in [Post 2], including supervision of the [projects].

[Rater A] testified that, in several significant respects, [grievant] failed to fill various expectations and job requirements. Complaints were received with respect to a collaborative project with the [institution] . The head of the Institute complained that it was difficult to work with the grievant. On another occasion, there was a mix-up in which a scheduled [function] had to be cancelled on short notice when the [individual] failed to appear. [grievant] was considered to have been responsible for the mix-up.

Grievant was expected to be the principal contact with a substantial number of people in the [] affairs of [Post 2} . But these contacts were not consummated. [Rater A] ' s judgment was that his background and experience was simply insufficient to support responsibilities of this nature.

According to the evidence, there were substantial problems during that assignment. One need not conclude that [grievant] is, in the overall, a sub-standard performer. This is simply to say that this assignment was considered by his rater to be a mismatch, and from the record, such assessment appears accurate.

Significantly, these various judgments were reflected in reasonable detail in the [ER]. [Rater A], as Rating Officer, noted that while [grievant]'s actual duties should have been that of a [Officer] , this was not the case. He listed his responsibilities as including supervising the [] operation,

working with the [offices]] district, and arranging for [other projects]. This was an accurate reflection of his duties.

The overall [ER] establishes that [Rater A] was not impressed with [grievant]'s performance in the [title] position in that country at the time. Taken together with the appended rebuttal by [grievant] , a relatively clear picture is established of the relationship and of [grievant]'s situation at the Post. [Rater A] noted a lack of "initiative and professional drive" and claimed he had difficulty in establishing a "good working rapport" with some of the higher level [personalities who, in turn, did not show the confidence that should have been established in a person in this position. Said [Rater A]:

I feel that while he may possess the necessary qualities to perform effectively in certain positions he did not have the experience, judgment and personality to handle this particular job in [Post 2] .

[Rater A] also noted, in the "Summary Comments", that the Post had been a center of the [] programs; that it was in transition and "impossible to convert what would have been a country operation to a simple post operation and put an inexperienced person in charge." He concluded:

[Grievant] did not have the background or experience for handling such a large program and particularly at such a difficult time. It was an unfortunate assignment for him.

[grievant] responds that his failure to gain exposure or rapport was the result of [Rater A]'s jealously guarding his previously established higher-level contacts and relegating to him only the mundane daily duties. Whatever the cause and effect –whether [Rater A]'s lack of confidence caused [grievant]'s below-average performance or vice versa – it is clear enough that the assignment was not a successful one. [grievant] ascribes this to various factors, including [type] discrimination. However, those witnesses appearing on his behalf – one who testified with respect to his work in [Post] during [years] , and another who discussed his medical condition in [year] – in no way supported these claims. Nor did the testimony of the agency's witnesses, who had been integrally involved in the events, confirm in any sense the contention that [Rater A]'s evaluation was improperly motivated.

In the overall, while one recognizes arguments as to the reasons underlying the substandard performance, the Board finds that the [Rater A] [ER] , while not supportive of the grievant, was nevertheless balanced and sufficiently clear as to the observed problem that one finds it was not falsely prejudicial.

The reviewing statement by [Reviewer A], serves to temper and, finally, to balance the Report. It highlights the same

structural problems of the assignment. He rejects the conclusion that [the agency] erred in the assignment to [grievant], noting instead that, due to circumstances beyond his control/ [grievant] found himself over his head in an unexpectedly complex position. At the time the decision was made to transfer him to [Post 2], notes [Reviewer A], the [title] position was headquartered in a city where it was expected that the staff would remain for another [] years.

The position to which [grievant] was transferred was to operate as an [title] for local operational activities similar to those of other [titles] in cities where we have branches - a job with limited scope and in a city where there was a wealthy [sic] of talent to help him and train him.

In early [date], he wrote, all of the above changed:

Almost overnight [grievant] found himself in a full scale, highly complex [title] position rather than in a low level job where training and guidance was readily accessible.

Even if one perceives [Rater A] ' s criticism as overdrawn in various respects, [Reviewer A]'s statement serves to moderate it and to provide a balanced view. But while the rating and reviewing officers may have differed as to whether this was an erroneous assignment, there is no real question that grievant's performance on that assignment was lacking and, in the overall, one may conclude that the [ER] was neither inaccurate nor falsely prejudicial.

[SR-B]

[Grievant] contends that the rumors of his problems in [country], including the [investigation] followed him to Washington and influenced the preparation of his next [ER] by [Rater and Reviewer B]. He requests that the entire report be removed. He justifies his request for its removal by highlighting certain offensive statements. He feels that the reference in this [ER] to "buying a house" was inappropriate, as it had nothing to do with his official duties. He also objects to the inconsistency of the [ER] in describing his personality. In one part he is pictured as a shy and retiring person, while in another he is hardhearted and stubborn. He argues that because [Rater E] knew the circumstances surrounding his tour of duty in [country], the reference to the completion of tasks in the [ER] is a reference to the fact that [grievant] had not completed his assignment to [country].

In the reviewing statement he is most offended by the description of him as "reserved - even guarded - and marches to his own drummer." [Reviewer B] goes on to say [grievant] has had a "run of ill luck in [the agency]." [grievant] charges that these statements are pejorative, and he faults [Reviewer B] because of his failure to explain what the "run of ill luck" had been. [grievant] contends that [Reviewer B]

was unhappy with [grievant]'s assignment to the agency because [Reviewer B] wanted him to teach a course at the [] and go on consulting trips abroad. [Grievant] believes this displeasure with him accounts for [Reviewer 3] 's reference to [grievant]'s not having "plunged into the life and work of the office to the extent that many other officers on overcomplement assignment have done." [Grievant] argues that this was totally unfair to him as he had to remain in Washington to try to defend himself against the [country] events, which would have been impossible, were he [overseas].

[Grievant] concludes his objections to the [ER-B] by pointing out how heavily the Qualifications Evaluation Panel of [] relied upon it in recommending against his application for lateral entry into the [FSO] Corps. This is evidenced by the following quotations from the Panel's memorandum of [date] :

In [date], he returned to Washington to be an [title] working on updating agency materials on that subject. Although there were no personality conflicts as before, the rating, by a person described (in the words of the reviewer) as one of [grievant]'s "staunchest backers," illuminates some difficulties that may have caused earlier problems. He is "almost stubborn where achieving a goal is concerned," "tends to want his head" and "unconsciously gives the impression of not wanting to be particularly friendly." He is a "loner" who "is on his guard." The reviewer praises him for being "well organized and accurate," thorough and "business-like." Yet he "marches to his own drummer"

and has not "plunged into the life and work of the office to the extent that many other officers on overcomplement assignment have done." The reviewer adds that despite his "run of ill luck in [the agency]" he has not lost his poise or had his attitude soured. If this is a report by one of his "backers," one wonders what somebody less favorably disposed might have written.

To be sure, the report may be read as significantly critical in a number of respects. As counsel for the grievant argues in his post-hearing brief, the report is itself subject to criticism in its failure to concentrate or even comment on the officer's goals, standards and performance during the rating period. The rating officer's evaluation is limited to a personality description and, in that regard, is far from supportive. To an extent, this problem is compensated by the reviewing officer's statement, inasmuch as it focuses to a greater extent on his work. Here, too, the comments are at best reserved:

Although pleasant and friendly personally with his colleagues here, he has not plunged into the life and work of the office to the extent that many other officers on overcomplement assignment have done.

This statement, too, focuses on personality considerations, describing [grievant] as "reserved, even guarded - and marches to his own drummer." At least one of the comments of the reviewing statement is unnecessarily damning and sufficiently vague in its context that it should have been stricken.

Reviewing Officer [B] stated "he had had a run of ill luck in [the agency] without losing his poise or having his general attitude soured." The faint praise of this statement is well overshadowed by the vague and inappropriate suggestion of chronic problems. That connotation, despite the [ER-A] report, was inaccurate and unfair.

On the one hand, as observed above, BEX clearly relied on this report in [year] denying [grievant]'s application for lateral entry. On the other hand, while the report may be faulted for the reasons stated above, it also accurately reflects what was, at the time, an observed problem with respect to [grievant]'s working relationship with others, as noted earlier. Whether described as a lack of "rapport" or a reserved or generally guarded approach, the [ER-B], like the [ER-A] report, describes a personal trait that had apparently impacted his professional performance.

Considered in the abstract, an argument may be made that the [ER-B] report was at once so damaging, yet so imprecise, that it should have been removed from the file- As noted above, however, the problems observed in that report had been noted elsewhere; they were real problems at the time, one concludes, and it is not possible therefore, to find that this report was itself responsible for a denial of promotions.

VI. BOARD DETERMINATION

As noted herein, [the agency] has offered to remove from [grievant]'s personnel file both [SR-As] and the two [ER-Bs], with this offer having been accepted by the grievant. The Grievance Board concurs in this course of action and expects the agency to implement it forthwith.

Since the foregoing analysis shows that the [ER]s, both those grieved and not grieved, have not been responsible for [grievant]'s failure to be promoted, the Board cannot sustain the claim for the retroactive promotions or other remedies sought by the grievant.