DECISION
CHRON #550

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

EXCISED

In the Matter Between

[redacted],
Grievant

and

The Department of State

Record of Proceedings
No. G-83-106-State-68

Date: January 29, 1987

For the Foreign Service Grievance Board:

Presiding Member: Jerome H. Ross

Board Members: Geraldine Sheehan
Stanley J. Siegel

Special Assistant to the Board: James B. Riley

Representative for the Grievant:

Frances J. Chetwynd
Attorney for Grievant

Representative for the Department:

Stephen M. Block
Director of Grievance Staff

Exclusive Representative:

American Foreign Service Association

G106(3)

SUMMARY

The U.S. District Court remanded a grievance to the Board to consider whether the agency bore its burden of proof on one aspect of the complaint. The court had found that certain EER comments, which the agency acknowledged were flawed, may have been a substantial factor in grievant's non-promotion. With that finding, the burden shifted to the agency to show that he would not have been promoted even in the absence of those comments.

To produce evidence on the point, the agency deleted the critical comments, reconstituted a selection board, and placed before it the grievant's corrected file along with files drawn from the bottom of the promotion list for the year in question. The reconstituted board ranked the grievant behind the last of the actual promotees, and the agency submitted the results to the Grievance Board as its proof.

The grievant argued that the agency had not made all the required deletions from the EER before the reconstituted board. He also protested the use of such a board, which he contended was an experimental procedure and one that left him recognizable as a grievant. In addition, he claimed the chairman of the panel was biased.

The Grievance Board found that the agency had correctly eliminated the EER wording that had concerned the court. It turned aside the grievant's protests concerning the reconstituted board, pointing out that it had long since endorsed the use of such boards as a means for agencies to obtain evidence to be weighed along with other evidence in the agencies' effort to meet their burden of proof. It noted that board members swear an oath to base their decisions solely on merit, and it rejected the grievant's charge of bias on the part of the panel chairman. The Grievance Board found that the agency had met its burden of proof and denied the grievance.

The grievant appealed once again to the U.S. District Court, where the Grievance Board decision was affirmed in its entirety.

I. THE GRIEVANCE AS REMANDED

This grievance is before the Foreign Service Grievance Board on remand from the United States District Court for the District of Columbia [redacted] v. United States of America and [redacted], Secretary of State, Civil Action No. 85-1086, January 31, 1986). It had been considered previously by the Board as Record of Proceedings No. G-83-106-State-68, and a decision was issued March 8, 1985. In that decision the Board denied the grievance after finding that a 1980 Settlement Agreement between [redacted] and the Department had not been breached and that various procedural and substantive deficiencies relating to his 1983 selection board competition had not unfairly prejudiced him in the promotion process. [redacted]s failure to be promoted that year caused his separation through expiration of maximum time in class.

On appeal, the court upheld the Board's decision on all issues but one. That issue concerned the possible prejudicial effect of misleading or erroneous comments in the 1983 evaluation report which the Department had acknowledged should have been deleted. The court found that these comments may have been a substantial factor in the Department's failure to promote [redacted]; it said the reasoning offered by the Board in rejecting [redacted]s *prima facie* showing concerning these comments was not supported by substantial evidence. Consequently, it remanded the matter to the Board with instructions to consider whether the Department has carried its

burden of showing that plaintiff would not have been promoted even in the absence of these critical comments and to determine what relief, if any, is appropriate.

II. PROCEEDINGS BEFORE THIS BOARD

A panel of the Board convened a meeting March 11, 1986 to hear the views of the parties relative to the implementation of the court's order. On March 13, 1986 the Board asked the Department to submit evidence within 45 days on the question of whether grievant would have been promoted but for the comments the Department had offered to delete from the EER.

On March 12, 1986, grievant renewed an earlier request for interim relief; he sought reinstatement retroactive to the date of his separation, with full back pay and benefits. His initial request for interim relief, in September 1983, had been denied by the Department and then by the Board. The Board turned down his renewed request on June 27, 1986. In that ruling, we noted that our interim relief authority serves to preserve the status quo until the grievance is resolved by the Board; we said that aim could not be met when the employee has, like [redacted], been off the rolls for two and one-half years. We pointed out that even had we decided favorably on interim relief when the question was first posed, the relief would have ended -- and [redacted] would have gone off the rolls -- with the issuance of the Board's decision on the merits in March 1985. That is because an agency action can be suspended only until the Board rules on the grievance.

Grievant filed interrogatories to elicit information that would permit him to compare his own record with that of the Foreign Service officers who were promoted with him in 1972 and of those who entered the service with him in 1954. He sought details on their promotions in subsequent years, on their education and training, assignment history, language qualifications, etc. The Department objected to providing the information, and in a meeting with parties April 18 argued that a comparison with others' promotion records is not relevant to the issue. Grievant cited court rulings in Reiner* and Ehrman** to show that a statistical comparison with the promotion record of peers over time is the appropriate method to determine what would have happened in 1983 absent the flaws in the EER. The Board ruled that the only suitable comparison was with officers who had been competed with grievant by the 1983 selection board. We held that no other group would be relevant to the question of how grievant would have fared before that board had his most recent EER been in order. We found that the circumstances in Reiner and Ehrman were not parallel to those in this case since in the earlier cases the grieved errors had persisted for years, whereas the error in the case at hand was seen by only the 1983 selection board.

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* Reiner v. United States, 686 F.2d 1017, 1021 (D.C. Circ. 1982)

**Ehrman v. United States, Civil Action 82-1984 (U.S. District Court D.C., vacated and remanded as compromised and settled May 17, 1984)

Subsequently, grievant filed similar interrogatories concerning individuals who had been recommended for promotion in 1983, and this Board ordered the Department to answer most of them.

To produce evidence as to whether grievant would have been promoted in 1983 had his file been in order, the Department reconstituted a selection board. After removing from grievant's 1983 EER the comments it had earlier agreed to delete, the Department placed before the board the amended file, together with files drawn from the bottom of the promotion list that year. The reconstituted board ranked grievant below the last promotee.

III. DISCUSSION AND FINDINGS

[redacted], who had been in the Foreign Service since 1954, was an FS-1 economic officer at the time he was mandatorily retired in 1983. From August 1981 until his retirement he was assigned to Geneva as an international economist, with responsibilities as the chief resident U.S. negotiator at the United Nations Conference on Trade and Development (UNCTAD). It was the final evaluation report he received for his work in [redacted]a that contained the critical comments that the Department, following [redacted] grievance, agreed to delete and that the court found may have been a substantial factor in his non-promotion.

Grievant claims that in amending his file for review by the reconstituted board following the court's remand, the Department should have deleted additional words, not just those it had previously agreed to delete. He objects that the reconstituted board procedure is experimental and not fully tested, and that it was flawed and tainted. He asserts that the only way the Department could carry its burden is to compare his record with the records of those recommended for promotion in 1983. He contends that the number of files considered by the reconstituted board was too few to provide a reasonable basis for determining his relative performance. He asserts that he was recognizable to the board as a grievant and that the chairman of the reconstituted panel was not impartial. He claims that his grievance significantly parallels Ehrman v. United States and that, like Ehrman, he is entitled to relief. He also asks this Board to reconsider two of the issues he had raised initially which the court subsequently dismissed -- the uncertainty of the date on which a cabled copy of his EER was placed in his file and the fact that a personnel officer twice discussed that file with the selection board.

The Wording To Be Deleted from the EER

Grievant contends that when the court in its remand order held that certain comments in the EER had possible prejudicial effect, it was referring not only to the wording the Department

had earlier agreed to delete, but to additional phrases as well.

The record before the court showed that the Department had agreed to delete two full sentences plus the underlined words in the following sentence, which appears in the EER's Section IV -- Evaluation of Potential:

> At the same time, his work still needs oversight, partly for the reasons noted in Section IV.C. below, and partly for those alluded to earlier.

Grievant claims the court intended deletion of that entire sentence.

The court's finding (slip op. No. 85-106, Pp. 6-7) reads as follows:

> The troublesome issue concerns the possible prejudicial effect of misleading or erroneous comments in the 1983 EER relating to Harter's potential for promotion which the Department has acknowledged should have been deleted. Grievance Board Dec. p. 24-27. The 1983 EER gives a very favorable, sometimes glowing evaluation of [redacted]s abilities and service to the Department but stops short of recommending him for promotion. The rating officer made four mildly critical comments, three of which the Department, subsequent to the Selection Board's decision, offered to delete. These comments included a negative comment on Harter's potential for promotion which incorporates the other critical comments. After these comments are deleted there are only a few other statements directly addressing plaintiff's potential for promotion, all but one of which were favorable.
>
> The Grievance Board concluded, however, that in light of the generally favorable statements in the EER the deleted criticisms that were presented to the Selection Board were not a substantial factor in the decision not to promote Harter...Plaintiff carried his initial burden of showing that these comments may have been a substantial factor in the failure to promote him. Reiner v. United States, 686 F.2d 1017, 1021 (D.C. Circ. 1982). The reasoning offered by the Grievance Board in rejecting plaintiff's prima facie showing was not supported by substantial evidence. (Emphasis added.)

It is clear to us that the court is referring to the wording the Department had already agreed to delete. This is plain from the phrase in the first paragraph above, "...comments...which the Department has acknowledged should have been deleted," and from the phrases in the second paragraph above. "The Grievance Board concluded...the deleted criticisms...were not a substantial factor..." and "...these comments may have been a substantial factor..." We conclude on the basis of the above that the court was not making an independent judgment as to which comments in the EER were falsely prejudicial. Rather, it was saying that certain comments the Department had agreed to delete, which this Board had found to be not a substantial factor in Harter's non-promotion, may indeed have been a substantial factor. The remand followed so as to determine whether the Department could show that grievant would not have been promoted even absent those comments.

We are persuaded that in deleting only the wording it had earlier offered to delete, the Department eliminated from the EER the flaws that had given the court concern as to their possible prejudicial effect.

The Reconstituted Selection Board

Grievant charges that the reconstituted board procedure is experimental and not fully tested.

The use of reconstituted boards developed in response to the court's decision in Reiner, which emphasized the shift in the burden of proof once a grievant has established that an error had been committed and that it was a substantial factor in a subsequent agency action. The decision said the agency was then required to show that it would have taken the same action even in the absence of the error.

Subsequently the Department tried various means to bear this "but for" burden: In 1983, the Department itself compared grievants' files with the files of others (but it lost before this Board when it then claimed that that review proved it was unlikely the grievant would have been promoted even absent the error), and in one case it passed to this Board for review the files of the officers with whom the grievant had been competed originally (it won that case here, but the employee organization, which represented the grievant, filed an appeal, which is still pending, protesting that this Board had usurped the function of selection boards).

In 1984, the Department took a different tack. It reconstituted selection boards to consider the file of a grievant who for three years had not been competed before the appropriate selection boards. In each review, the reconstituted boards ranked the grievant below the last of the actual promotees. In our decision, we stated that we fully

endorsed the use of reconstituted boards as a means for agencies to obtain evidence to be weighed along with other evidence in their effort to meet the burden of proof under Reiner. Our decision pointed out that the selection board process is the statutory mechanism for promotion in the Foreign Service and that the process, even in its imperfect reconstituted form, is a much fairer way to determine promotability than is a decision by management alone.

In subsequent Reiner-rule cases, this Board, mindful of the possibility of reconstituting selection boards, and in the interest of eliciting the best available evidence, has separated the issue of promotion from the issues of error and substantial factor. Once a grievant has proved the latter two, we have called for a second stage and asked the Department to produce evidence on the promotion issue. Grievants have been offered a chance to respond. Given the time and expense involved in reconstituting boards, a second stage has been considered justified as a practical matter, and necessary in cases where the extent of the error must first be determined.

The record in the cases that have come before us indicates that agencies have taken care to structure reconstituted boards in accordance with the rules for regular boards: Public members are included, as required of selection boards by the Foreign Service Act; and regulations have been followed in the

selection of officers of the appropriate grade and functional specialty to serve as members. Some agencies have reconvened the members of the original board. The State Department says it always includes a woman and a minority representative on such boards. Members have been sworn and instructed to follow the negotiated precepts that governed selection boards for the year in question.

The Department says it has used reconstituted boards in 17 grievances to date -- other agencies have added to the total -- and in seven of these cases the grievant was promoted as a result of the reconstituted board action. (Some of these cases were grievances that were still at the agency level; when the reconstituted board outcome was favorable to the grievant, a settlement agreement was reached.)

In the two years that have passed since the first use of reconstituted boards, nothing has caused us to change our judgment that they represent the most acceptable way to place aggrieved members as nearly as possible back into the competitive setting they would have been in but for an agency error. We consider their use well past the experimental stage.

In rejecting the reconstituted board as a means of showing how he would have fared absent the errors in his 1983 EER, grievant asserts that the only way the Department could carry its burden is to show, by a comparison of his record with the records of those recommended for promotion in 1983, that others

exceeded him in the performance characteristics identifed in the board's precepts as "decision criteria for promotion" -- substantive knowledge, leadership qualities, and managerial, intellectual and interpersonal skills, and in out-of-agency assignments, training, and geographic diversity in assignments. Presumably he would have this comparison done by the Department and, if the outcome there were unsatisfactory, by this Board.

. It is exactly such a comparison that was done by the reconstituted selection board -- although not with all who were recommended for promotion, but only with the lowest ranked of those who actually achieved promotion.

The question at issue is not only whether grievant meets the qualifications set out in the precepts. That much would only make him eligible for promotion -- that is, put him among those recommended by a selection board. But promotion opportunities seldom are sufficient to include all who are recommended, and those below the promotion cut-off line are left by the wayside as surely as if they had not been recommended. It is necessary to determine where grievant's performance ranks in comparison with those actually promoted.

Such a rank ordering requires examination of the performance file of the grievant and the performance files of at least the lowest names on the original rank-order list of promotees. It cannot be achieved simply by comparing computer

printouts that indicate assignment and training patterns, promotion records and language competence (such as those grievant has entered in the record). The degree to which officers meet the precepts' criteria for promotion emerges only in EERs as raters describe their subordinates' performance. It is these descriptions in the Official Performance File of each individual that must be examined in order to rank order competitors for promotion.

That examination and the determination of whether File A is stronger or weaker than File B in the areas of the promotion criteria are most reliably done not by Department management and not by this Board, but by a mechanism that resembles as closely as possible the selection boards that are mandated in the Foreign Service Act.

The detailed comparison grievant calls for of his qualifications with those of his 1983 competitors -- or at least with the most critical fraction of them -- was done by the reconstituted selection board, the body most competent to do it.

The Number of Files Competed

Grievant asserts that the small number of individuals whose files were competed by the reconstituted selection board gave that board too limited a view of his relative performance. He cites the wording of our decision in the 1984 case in which a reconstituted board was used for the first time. That board compared the grievant's file with the files of the two officers

who had been promoted one year, and with the file of the sole officer who had been promoted another year. In our decision we remarked on the paucity of files involved -- an unnecessary abridgment given the scant handful of files that constituted the total group competed in that grievant's specialization -- but found for the agency nonetheless.

[redacted]s corrected file was placed before the reconstituted board with the files of five others -- the last three individuals on the rank-order list of promotees in classwide competition and the last two individuals on the rank-order list of promotees in functional (economic) competition. Those five names had placed just above the cut-off line of available promotions in the original competitions.

Regular selection boards divide competitors into those it recommends and subsequently rank orders and those it does not recommend, who are then placed alphabetically in the mid-rank zone. In the 1983 review of [redacted] and his competitors, of the 526 files examined in the classwide review, 32 were recommended for promotion, but promotion opportunities were limited and only the top 24 of the rank-order list were reached and actually promoted. Of the 147 files examined in the functional competition -- they had already been examined in the classwide review -- 43 were recommended, but promotion opportunities extended to only the first five on the list. [redacted] was not recommended for promotion in either competition, and fell into the mid-rank zone.

However, for purposes of the reconstituted board, grievant was considered as if he had been recommended, and the board was asked simply to rank order the files before it. The reconstituted board's first review was intended to serve as classwide competition. It considered the files of the five promotees plus grievant's. The two economic promotees were ranked first and fifth, and the three classwide promotees second, third and fourth. Grievant placed last. Then the board conducted a second review intended to serve as the functional competition among economic officers. Following the practice of regular selection boards, it eliminated from the functional competition the file that had been given first place in the "classwide" competition -- the first three in the rank order in that competition were considered to be already "promoted" as a result of the review -- and competed grievant against the sole remaining economic officer. Grievant was ranked below him.

It is true that additional files might have given a broader view of grievant's relative performance, but that would not necessarily have been to his advantage. For purposes of the reconstituted board, grievant was treated as though he had originally been recommended and had ranked just below the promotion cut-off line, but the fact is that he had not been recommended but fell among the hundreds who were mid-ranked. In the smaller economic competition before the original board, 38 individuals were recommended but not reached for promotion;

all of these had placed higher than even the best of those who were mid-ranked. Had the recommended-but-not-reached files from below the promotion cut-off line been added in the reconstituted board review, or had files been added from the mid-rank group, it would have served only to show how grievant would have placed among others who had not achieved promotion.

The central question is whether or not his corrected file could edge out at least the last individual to gain one of the limited number of promotions. We believe the reconstituted board's results are convincing evidence that grievant, even after elimination of the errors that gave the court concern, could not compete successfully with the lowest-ranked promotees from the original competition.

Grievant's Identifiability

Grievant states that it is virtually inconceivable that members of the reconstituted board would not have spotted his file as that of a grievant, and that in these circumstances it was probably inevitable that they would rubber stamp the original 1983 ranking. However, we have no way of knowing whether, in fact, his file was recognized as that of a grievant; in any case, we are conscious that members swear an oath to apply the precepts without prejudice or partiality. The precepts call for decisions made "solely on merit with absolute fairness and justice."

There appears to have been a fair and just basis -- without regard to his status as grievant -- for ranking Harter below those promotees who had emerged as part of the top 4 percent of the 526 officers competed classwide or part of the top 2 percent of the 147 officers competed in the economic function. Grievant had gone unpromoted for 13 years before the flawed EER in 1983 raised questions about the outcome that year. As grievant argues, this fact may have been a clue to the reconstituted board that he was the grievant. But it is also a telling indication of the lack of competitiveness of his file as assessed by annual selection boards up to that point. And the reconstituted board was judging him not on the 1983 EER alone but on his file as a whole.

Objectivity of the Reconstituted Board Chairman

Grievant charges that Ambassador [redacted], who served as chairman of the reconstituted board, was biased against him and had "long held and publicly expressed personal opinions" regarding him.

To support his charge, he submitted part of the transcript of [redacted] press briefing on behalf of the Department on January 25, 1972 and an article that followed in The Washington Post the next day. [redacted] at the time was assigned as the official spokesman for the Department, and he met with the press daily in on-the-record briefings.

At the January 25, 1972 briefing, [redacted] announced that the nomination of the then Director of Personnel as ambassador was being withdrawn, and when questioned by a reporter he volunteered that the proposed ambassador had been "attacked in testimony [in Congress] in open session by a very few former employees of the Department and I believe several employees still on active duty." He did not identify them.

The Post article the following day identified [redacted] as one of two active-duty employees who had criticized the Director of Personnel in testimony before the Senate Foreign Relations Committee. It quoted "a State Department spokesman" as volunteering criticism of the officers in these terms: "It was certainly inappropriate and unprecedented for current employees to attack a presidential nominee." Grievant calls the article a "deliberate and provocative plant" by [redacted] and says it damaged his reputation in an out of the foreign service at a very critical stage of his career.

In response to grievant's charge, [redacted] asserts in a sworn statement that when he assumed the chair of the reconstituted board in 1986 he had no recollection of the content of the 1972 press briefing, and that, in any case, the views he expressed in that briefing were, by definition, not his own since the official spokesman of the Department never expresses a personal view in the daily briefings. He says that fact and the fact that he did not identify [redacted] by name in the briefing argue

against any inference of personal bias on his part against grievant. [redacted] suggests that the wording of The Washington Post article indicates a source other than himself for the criticism of [redacted] expressed there. Had any bias existed at the time he discovered [redacted] file before the reconstituted board, he says, he would have disqualified himself immediately.

We find [redacted] persuasive when he explains that the Department spokesman speaks from briefing notes prepared each morning by a variety of offices in the Department and that his reply to a reporter's follow-up question "was almost certainly provided to me by the originating office...I would not have initiated such a comment on my own authority."

And we find plausible the significance he draws from the distinction between the Post article's attribution of a quoted comment critical of [redacted] to "a State Department spokesman" -- an attribution that is routinely employed by reporters to describe Department officials at any level who do not wish to be identified by name -- and its direct attribution to him, by name, of quoted remarks from the press briefing.

[redacted] adds that, on a personal basis, he was very much a partisan of the pending legislation for which [redacted] testified in Congress. He says that if he had any bias, it was against the then Director of Personnel who, after [redacted] took leave without pay to work for a year with the American Foreign

Service Association, "took it upon himself to organize an effort to 'exile' me to a distant post abroad in retaliation for my views on the need for reform of the personnel system of the Department of State..."

We find that [redacted]s statements as official spokesman of the Department cannot be held as persuasive evidence of personal bias. Furthermore, grievant has not shown that [redacted] was the source of The Washington Post article's quoted comment critical of [redacted], nor that he inspired any part of that article other than by the comments he made at the briefing on behalf of the Department. These comments are directly attributed to him by the article. In sum, the evidence does not support a charge that -- 14 years after [redacted] briefed the press, mentioning unidentified employees -- he took up his duties on the reconstituted selection board with a bias against grievant. His support of the legislation that [redacted] was defending before Congress and his own sense of grievance against the then Director of Personnel reinforce our finding that there was no personal bias.

Comparison with Ehrman

Grievant claims that his grievance significantly parallels Ehrman v. United States in which the grievant was awarded a triple retroactive promotion to correct cumulative career damage over a period of many years. He says that, like Ehrman, he is entitled to relief.

The parallels grievant asserts are these: Both he and Ehrman established years ago that they had been prejudiced by inclusion of falsely prejudicial material in their files. ([redacted] claims that a grossly flawed evaluation has remained in his file ever since.) Both won grievances years ago that brought decisions calling for assignment to a competitive position, but no such assignment was made. Both in ensuing years were denied competitive assignments. Both faced maximum time in class and grieved a second time, alleging that the failure to implement the earlier recommendation had handicapped their competitiveness. For both, the second grievance led to a mainstream assignment and an extension of time in class. Both then were victim of new prejudicial material, and their overly long time in grade handicapped them. Both grieved a third time, with [redacted] urging the Grievance Board to take the prejudicial material into account in the context of his exemplary performance and the Department's many past errors.

The principal difference between the two cases, he alleges, is that Ehrman's second grievance led to a formal decision whereas he himself agreed to a negotiated settlement.

We find here, as we found when we ruled on [redacted] initial interrogatories, that, unlike Ehrman, the case before us is limited to determining the effect of an error committed in a single EER and seen by only a single selection board. We repeat here what we said in our earlier ruling on interrogatories:

> Grievant bases his request ... in part on his assertion that the 1983 selection board could have looked at flawed material from an earlier date. But the file that was before the selection board contained no proven errors. What the selection board saw was what it properly should have seen except for the defective sentences in the 1983 report that are now in question. In urging the need to reach back through the years for a comparison, grievant argues that there is a history of 15 years of his inability to get a fair chance. But if wrongs were committed in the past, they are not before us now. We are limited to the question of whether the 1983 selection board would have promoted him absent the errors in his 1983 EER.

Request for Reconsideration of Two Issues

Grievant appeals to this Board to reconsider two procedural ssues that were before us when his grievance was heard initially -- the uncertainty of the date on which a cabled copy of his EER was placed in his file and the fact that a personnel officer twice discussed that file with the selection board.

The Board denied his claims on these issues, and that finding was reviewed by the court on appeal.

Regarding the late and uncertain date of the presentation of his evaluation to the selection board, the court wrote:

> The Selection Board reviews files that are completed late in the same way as those presented to it earlier. Given this procedure for assuring that files receive fair and adequate consideration, the Grievance Board properly concluded that although the late arrival of plaintiff's EER was an obvious deficiency, plaintiff had failed to show he had been prejudiced by it.

Regarding the personnel officer's discussions of Harter's file with the selection board, the court wrote:

> Plaintiff was not prejudiced by staff inquiries of the Selection Board before it reached a final decision because these inquiries were prompted by plaintiff's efforts to get early notice of the Board's determination and had no relation to the merits.

Given the court's ruling, we believe any reconsideration of those issues by this Board would be inappropriate.

Conclusion

The burden of proof placed on the Department under Board regulations and Reiner is one of preponderance of the evidence, calling for a finding that it is more likely to be true than untrue that [redacted] would not have been promoted even absent the admitted flaws in his EER.

On the basis of all the above, we find that the Department has met its burden.

DECISION

The grievance is denied.