

EXCISION

90-72

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Name]
Grievant

and

The Agency for International Development

Record of Proceedings
No.

Date: February 14, 1992

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

James M. Harkless

Board Members:

John H. Rouse
Raymond L. Perkins

Special Assistant to the Board:

Irene M. Barbeau

Representative for the Grievant:

(Name]
Attorney

Representative for the Agency
for International Development:

William D, Jones
Chief, Labor-Management
Relations Division

I. THE GRIEVANCE

[Grievant], currently a Civil Service employee of the Agency for International Development (AID), filed grievances with his agency on June 10 and 11, [year], shortly before his limited appointment as an AID Foreign Service career candidate expired. The grievances alleged that two Employee Evaluation Reports (EERs) which together assessed his performance as [title] in the AID mission in [post], from July [year] to September [year], contained errors and omissions as well as falsely prejudicial statements. On August 31, [year], [grievant] filed an amended grievance combining and augmenting the [year] grievances and presenting a new grievance contesting his EER from [post] for the period October 1, [year], to March 31, [year].

[Grievant] alleges that the errors and falsely prejudicial statements in the disputed EERs directly affected his failure to be recommended for tenure and promotion and his consequential separation from the Foreign Service. As remedy, he requested reinstatement in the Service with retroactive tenure, promotion, back pay and allowances, and modification of the EERs or their removal from the OPF.

On August 2, [year], the agency issued its decision denying the grievance. [Grievant] appealed to this Board on September 28. Completion of the Record of Proceedings (ROP) was protracted, requiring several preliminary rulings regarding discovery and admissibility of evidence. The ROP was closed for decision on October 8, [year].

II. BACKGROUND

From [year] until [year], [grievant] was employed in Civil Service positions in AID. On March 11, [year], he received a five-year limited appointment as an AID Foreign Service career candidate at the rank of FS-

03. [Grievant] was assigned to [post] as [title] and served there until [year]. He was then transferred to Washington where he worked as [title] during [year-year].

[Grievant] was reviewed, but not recommended, for tenure by the April [year] Tenure Board. Before being reviewed a second time, he grieved the EER covering his performance from April-November, [year], on the [Washington assignment]. The agency found the EER to be defective and removed it from grievant's OPF. However, it did not grant his request for additional time to augment his OPF. Instead, it placed his file before the January [year] Tenure Board, which again did not grant him tenure. [Grievant] then appealed to this Board, reconverting to Civil Service status when his five-year appointment expired in March [year].

In its decision No. G-86-021 of January 21, [year], the Grievance Board directed the Agency to grant [grievant] a new limited appointment in the Service of up to one year in order to ensure that the Tenure Board considering his candidacy had before it evaluative material which covered at least a six month period equal to the existing gap in his performance file caused by the removal of the erroneous EER.

Pursuant to this order, [grievant] reentered the Foreign Service in April [year]. He was assigned [to post] as [title], in an FS-01 level position, where he served from July [year] to March [year]. The three EERs he is grieving were written during this assignment.

Before going to [post], grievant learned that [the person] who had been reviewing officer for the EER he had successfully grieved, would be the Mission Director at his new post. He states that, because this concerned him, he sought and received assurances that [this person] would not be his reviewer there. However, due to unforeseen circumstances it was

subsequently decided that [the officer] would be the reviewer for his first [post] EER. Grievant contends that [the reviewer] coerced the rating officer into downgrading this EER and that his bias against him adversely affected his review statement as well as the later ratings he received from rating and reviewing officers whom he rated or reviewed.

[Grievant] was considered anew for tenure by the November [year] Tenure Board on the basis of his OPF containing the first two EERs prepared in [post]. The Tenure Board did not recommend him for tenure. Grievant left the Foreign Service upon expiration of his renewed limited appointment on June 15, [year]. He exercised his Civil Service reemployment rights and is now working [in Washington] in AID's Bureau for [title].

III. POSITIONS OF THE PARTIES, DISCUSSION AND FINDINGS

This grievance includes a number of issues involving differences between the parties on the material facts, the inferences to be drawn from them and the import of relevant law, regulation and policy. For clarity, the positions of the parties and our analysis and findings on each issue will be discussed together

A. [Post] EER for the period July 23, [year] to March 31, [year].

1. Allegation: The failure to recommend tenure was erroneous and inconsistent with grievant's overall superior rating for performance in an FS-01 position; the rating was flawed because it failed to discuss the significance of an FS-03 candidate filling an 01 position.

Grievant first finds error in the statement for the record of his supervisor and rating officer [name] that he did not recommend tenure because he understood from the agency that tenure was not an issue in this EER. Since he did recommend [grievant] for promotion, [rater] now states, he would have recommended him for tenure. Grievant also faults the failure

of [rater] to comment on the significance of his two-stretch assignments, because readers might underestimate the significance of his superior performance. He maintains, as well, that rater's assessment that his performance had been superior in an FS-01 position, a level two grades above his own rank, confirms that he was entitled to a tenure recommendation. The sole criterion for tenure is "demonstrated potential to serve effectively over a normal career span, with potential for promotion to class FS-1." Superior performance in a position at the FS-01 level, grievant asserts, unquestionably demonstrates that potential. This is borne out, he says, by a quote from AID's Desk Top Guide for its Foreign Service evaluation program which states, "When an FS-03 officer is working in an FS-01 job and is performing in a superior manner, ... the employee has already 'demonstrated the potential to perform at a higher level.'"

Grievant contests the agency assertion that his duties reflected his grade rather than the position level. He also disputes the agency contention that a "superior" rating does not in itself suggest readiness for tenure, since statistically such adjective ratings are below the median of officer ratings. He notes that the agency abandoned adjective ratings in [year] as "invalid indicators of performance," and asserts that [supervisor's] rating and grievance statement demonstrate that he considered grievant's performance to be "two grades above his personal rank", at or above the median, and demonstrating readiness for tenure. Grievant argues that a statement of reviewing officer [name] that [rater] decided not to recommend tenure after considering the views of other [agency] officers, is not credible. He describes as "preposterous" the agency assertion that, as [rater] says he believed, tenure was not an issue in this EER. He observes that the EER form itself requires an assessment of tenure eligibility.

The agency states that under its performance appraisal program the annually established work requirements are to be commensurate with the employee's grade and within his/her "control to accomplish" and that evaluations are to measure success in achieving the requirements set. It argues that grievant has not established any violation of the performance evaluation system or that he was not evaluated as an FS-03 assigned appropriate duties. Likewise, it finds no error in [rater's] failure to comment on differences in graded and position level. No such comment is required, it asserts, or was necessary, as grievant was assigned duties and evaluated commensurate with his personal rank. Nor is a recommendation for tenure required by law or regulation, the agency contends, for superior performance in an FS-01 position. Grievant's quote from the Desk Top Guide, it points out, is only the opinion of one selection board.

According to AID, during this rating period, 60 percent of AID Foreign Service employees were rated "outstanding", indicating that the less strong rating of "superior" is mediocre at best. It asserts that the rating officer made an appropriate recommendation regarding tenure in checking the EER block indicating that grievant was "[I]likely to serve effectively in career field but additional evaluated experience is needed." It concludes that grievant has not established any inconsistency or inappropriateness between [rater's] review of [grievant's] performance as "superior" and his determination that more training and experience was necessary for his higher level performance.

Discussion and Findings. The Board finds no inherent inconsistency between the rater's failure to recommend tenure and his rating of [grievant's] performance in an FS-01 position as "superior". The term "superior" as a block rating and even as a textual adjective has assumed special connotations within the AID rating system as a result of agency rating

patterns. Both parties have agreed that such markers have become invalid indicators. The rating itself indicates very positive performance in a number of areas, but also significant need for improvement in others. While we would not find the text of the rating inconsistent with a recommendation for tenure, it appears more consistent with the block checked, that more evaluated experience is needed.

Furthermore, as the agency notes, employees are supposed to be assigned duties commensurate with their personal grade. The uncontradicted grievance statement of the reviewing officer, [name], that the [title] officer and [other person] reported directly to [rater] rather than to [grievant] as ordinarily would be expected, establishes that [grievant's] duties as [title] were less extensive than those which would have been given to an FS-01 incumbent. We conclude that grievant has not demonstrated that he was assigned the full scope of duties of his FS-01 position. Accordingly, we hold that he has not shown any error in the failure to recommend tenure which can be grounded in the level of the position he occupied or the overall level and content of his work requirements and the EER appraisal of them.

For similar reasons we find no error or harm in the failure of the rater to comment on the two-grade stretch assignment. Grievant has not established the extent to which in actuality he was working above his own grade level. Moreover, any possibility that readers of the EER might not adequately credit [grievant] for performing well in this stretch assignment was substantially negated by grievant's own statement opening his remarks in the rated officer's section of the EER which pointed out the stretch.¹

¹In his final pleading, grievant also introduced the argument that his two-grade stretch assignment to [post] is invalid for a career candidate since "such a leap" interferes with the

This brings us to the question of whether [rater's] failure to recommend tenure was based on error, misinformation or misunderstanding. In material part, [rater] stated as follows:

Neither [grievant] nor I believed that tenure was an issue in the EER, since we [had been] led to believe by PM/FSP that he would not be eligible for tenure that year... Again, I did not recommend [grievant] for tenure since we did not believe tenure was an issue for that promotion period. Since I believed he deserved a promotion, however, I would have recommended [grievant] for tenure. To do otherwise would be obviously inconsistent.

What this statement means is not completely clear. Grievant reads it as an implicit acknowledgment of error based on misunderstanding or misinformation. The agency interprets the statement to mean that since [rater] learned that [grievant] would have another rating before tenure review, he thought it more appropriate to check the EER block indicating that additional evaluated experience was needed.

[Grievant's description of what he was told by PM/FSP reveals no error -- [grievant] was not scheduled for tenure review until after another period of rated performance. The EER itself would not seem inconsistent with either a tenure recommendation or a recommendation for more experience first. The most detailed account relevant to the recommendation comes from the reviewing officer. [Reviewer] states he understood that [rater] after hearing

requirement of the career development program to assure "orderly professional growth," and since regulation provides that such assignments "are exceptions and require justification..." Grievant did not object to the assignment at the time and does not now argue that any specific assignment procedures were neglected. Considering grievant's prior agency and area experience, we do not find that the assignment was contra to law or regulation, which is the only basis upon which an individual assignment may be grieved. The prior Grievance Board decision cited by grievant (in consolidated cases G-90-012 State-70 and G-90-038-State-28) does not require or suggest a different result. There the Board held, in effect only that the circumstances of a career candidate stretch assignment (in that case to a position four grades above personal rank) may invalidate the assignment.

that he did not believe [grievant] was ready for tenuring and checking with other mission personnel who had similar reservations, decided it more appropriate to check the box indicating that [grievant] needed more experience and evaluation.

In light of this background, we believe that the most likely meaning and most reasonable interpretation of [grievant's] statement is this: since [grievant] would not be reviewed for tenure for some time, that decision was not an immediate issue at the time of this EER. Had this EER been the final rating before tenure review, [rater] would have recommended [grievant] for tenure. Since it was not, he, without apparent objection from [grievant], decided to check the more tentative block indicating [rater] thought that tenure was likely but more evaluated experience was needed.

Such a construction appears to us to be the fairest reading of [rater's] incomplete answers to questions posed by the agency for this case. It is consistent with the detailed statement of [reviewer], which we do not find to be implausible or unworthy of belief. It also tracks with [rater's] separate block check in the EER indicating that [grievant] "needs training and experience to perform at a higher level." And it is more in line with the overall tenor of the EER than would be the conclusion that [rater] believed [grievant] was ready for tenure but failed to check the proper block only because of some misunderstanding or error. Unquestionably, [rater] understood that he had to check some block regarding [grievant's] readiness for tenure, and did so. We do not find that grievant has established that [rater] did not mean to do what he did or misunderstood or was misled into checking the wrong EER block or into declining to recommend tenure.

2. Allegation. The reviewing officer "coerced" the rating officer into making changes in the EER.

Grievant asserted at agency level that rating officer [name] had initially recommended him for tenure and promotion in this EER but withdrew both recommendations and deleted certain favorable adjectives under pressure from the reviewing officer. Although he did not develop argument or evidence in pleadings before the Board to support all of the changes allegedly coerced, he has not expressly changed his position.

[Grievant] finds evidence of coercion in statements of the rater and reviewer and of other officers at post. He relies heavily on the statement of fellow employee [name] that [rater] had expressed outrage at [reviewer's] efforts to impose his views on his ratings of employees over which they disagreed, including [grievant]; that [rater] also had observed he was inclined to be more positive than [reviewer], and said he was incensed at his decision to postpone writing his own EER until he had completed all his ratings. [Fellow employee] took this statement to mean that [rater] saw [reviewer's] action as a threat made to influence his ratings. Grievant also cites the statements of two other AID employees that [rater] indicated he was under extreme pressure to complete all of his EERs before departure and complained that [reviewer] wanted several of his ratings, including [grievant's] altered. Grievant construes this evidence and a statement by [reviewer] that he completed his rating of [rater] at about the time he completed his rating of [grievant] and after all other ratings had been finished, as creating a "compelling inference" that he had withheld the [rater's] EER in order to have him change the [grievant's] EER.

Grievant has not presented evidence showing that [rater's] statements regarding tenure were, in fact, changed. He asserts that certain adjectives opposed by [reviewer] were not deleted only because the mission review panel intervened. He alleges that [rater] recommended [grievant] for promotion in

the first draft of the EER but removed the recommendation in face of [reviewer's] opposition. While acknowledging that he reluctantly agreed to removal of the recommendation in view of [reviewer's] intention to state his disagreement if it remained, [grievant] argues that "[reviewer's] coercion was thus transferred to" him.

Grievant admits the agency assertion that reviewers are expected to discuss EERs with rater to ensure that the evidence here demonstrates that [reviewer's] discussions with [rater] were not for such purposes but were intended to impose his views on the rater. To cause the rater to change an EER assessment, he contends, violates merit principles and the obligation to rate employees truthfully. The proper way for [reviewer] to express any differences with the rating was in his own review statement, which regulations provide may present a different perspective. Grievant discounts reviewer's and rater's accounts of events and denials of impropriety, attribute them to embarrassment, embellishment or faulty memory. He argues that the independent statements of three employees with nothing to gain, indicating that [reviewer] pressured [rater] into altering the [grievant's] EER, are more persuasive.

The agency denies any effort to coerce changes in the rater's evaluation of [grievant]. It notes statements in the record by [rater] denying the [reviewer] had withheld his EER until the [grievant's] rating was modified, recalling nothing notable in his discussions of [grievant] with him, and endorsing the accuracy of the rating. It also cites statements by the reviewer that he did not single out [grievant's] EER with [rater] or put him under pressure to change his convictions, but believed that [rater] must complete all of his EERs before leaving post. AID points out that discussion

of EERs between [reviewer] and [rater] were appropriate expressions of those duties.

AID observes that none of the employee statements cited by grievant exhibits personal knowledge of coercion or of specific changes in the [grievant's] EER. Moreover, it argues that those statements are consistent with a conclusion that [rater] was simply feeling pressure to complete all of the 20 EERs he had to write or review. AID contends that the only change made in [grievant's] EER after [reviewer] reviewed the draft was deletion of [rater's] recommendation for promotion. It notes that [reviewer's] plan to record his disagreement with the recommendation in the review statement properly reflected his regulatory authority to "present a different view" when warranted. The agency concludes that [rater] did not "withdraw" the recommendation because of "opposition" from [reviewer] as alleged, but left it up to [grievant] whether he preferred to retain the recommendation and have [reviewer] include a statement of disagreement, or not have the issue expressly referred to by either. [Grievant's] election of the latter course it states, was his own choice.

Discussion and Findings. The evidence makes clear that the reviewing officer was a forceful person who disagreed with [rater's] rating of [grievant] in a number of respects and who made his views clearly known to [rater]. However, we do not believe the evidence establishes that [reviewer's] actions constituted coercion of, or improper pressure on, the rater.

Both [rater] and [reviewer] deny that pressure was exerted on [rater] to change the rating or that his appraisal or him was withheld as leverage. We see no reason why [rater] would be reluctant to admit that he was under pressure, as grievant suggests, since the evidence shows that, if so, he successfully resisted changing the EER. The detailed recollections of

[reviewer], a senior AID officer with a reputation for integrity, on the whole also have the ring of credibility. Nor do we find any vital inconsistency between [rater's] and [reviewer's] statements and the comments of others cited by grievant. [Rater's] complaints as reported by them do not show any prejudicial focus on the [grievant's] rating. We believe at most these statements can reasonably be interpreted as indicating [rater] felt under real pressure to complete all of his ratings before departure, that he found his task complicated by specific disagreements with [reviewer], and was not happy with his decision to hold up his own EER until this task had been completed. We cannot conclude that the evidence persuasively indicated [reviewer] was improperly pressuring or threatening [rater] to alter the [grievant's] EER.

However, the most compelling reason why we cannot find coercion in this case is that the evidence clearly shows that [reviewer's] disagreements with [rater's] assessments did not cause him to change the EER. Grievant has alleged that three changes took place, in the tenure and promotion recommendations and in certain adjectives. With regard to tenure, there is no evidence in the record that the EER at any stage included a tenure recommendation other than [reviewer's] statement that it "possibly" did. [Rater] states that he did not include a tenure recommendation because he believed it was not an issue. An early draft of the EER, perhaps the first, which is included in the ROP, does not contain such a recommendation. We conclude that the evidence fails to indicate that the EER was modified in this respect. The record clearly establishes that adjectives which [reviewer] objected to were not deleted despite his opposition. Grievant does not now appear to contend otherwise.

[Grievant] asserts that [rater] included a recommendation for promotion in the first draft of his EER and argues that [reviewer's] statement cannot be credited that such a recommendation was only added later after an appeal by [grievant]. However, the document cited by grievant to support the contention, a draft review statement which he introduced into the record, itself is marked "Second Reviewing Officer's draft statement." This indicates that the comment it contains, opposing a promotion recommendation, was an addition to the original draft. The earliest draft of the EER included in the record by grievant and said to have been marked up by [reviewer], contains no promotion recommendation but includes a checked block, "Needs training or experience to perform at higher level." These circumstances tend to support the [reviewer's] statement that [rater] proposed to recommend [grievant] for promotion only in the midst of the EER review process.

Most importantly, both [reviewer] and [rater] indicate that the reviewing officer accepted inclusion of a promotion recommendation in the EER, but planned to note his disagreement. Grievant admits that reviewers have a duty to present their own perspectives in the rating. [Rater's] statement makes clear, and grievant admits that he was prepared to retain the promotion recommendation and only dropped it when grievant chose to do so. While [grievant] contends that [reviewer's] determination to state his disagreement with the promotion recommendation amounted to coercion of him, we do not agree. [Reviewer] was within his authority and exercising his regulatory responsibilities in expressing his difference with the rater on this point. While this may have influenced grievant not to press for the promotion recommendation, this does not amount to an impropriety. We can only conclude from the evidence of record that grievant's choice, to have direct comment on promotion deleted, was freely made.

We conclude that grievant has not established that any changes were made in the EER as initially drafted by [rater], except the promotion deletion for which [grievant] opted. Accordingly, even if the Board were to consider that [reviewer's] intensity of involvement in disagreeing with the rating officer had been excessive, we would be obliged to judge this to be harmless error. This is so because no revision of the rating officer's statement resulted [except the promotion deletion where we find no error). We hold that grievant has not met his burden of proving that coercion or threats by the reviewing officer led to prejudicial revisions in this EER.

3. Allegation: [Reviewer's] review statement criticism were undeserved and unduly harsh and were motivated by his bias against grievant or reprisal for his earlier grievance.

Grievant observes that this review statement was the first opportunity [reviewer] had to take action against him for the [year] grievance he had won which alleged wrongdoing on reviewer's part. He maintains that [reviewer's] actions and unwarranted criticisms compel an inference of reprisal or bias. To corroborate his allegation of bias, [grievant] relies principally on statements obtained from other AID employees in [post]. He cites the statement of [a colleague], who served temporarily as substitute [section] officer and grievant's supervisor from May 2 to June 15, [year], a period of four weeks. [The officer] states that before going to [post] he was informed by key AID-Washington personnel that [reviewer] had been "overworking staff and micromanaging their performance," generating stress and complaints and requiring intervention by the Ambassador and regional medical personnel. The officer says:

[Grievant] was described to me as one of the most seriously injured victims of this situation, and I was given to understand

that the Mission Director showed bias and animus toward him in particular.

[Grievant] finds confirmation for this judgment in the declaration of AID employee [name], who was in [post] during the full relevant period. [This person], while asserting a "strong personal respect for" [reviewer], describes him as "fairly judgmental," trusting and relying on only a small group of subordinates, tending "to doubt the capability of staff," and declining to work closely with those he did not trust. He adds:

Unfortunately for [grievant], it seems he was never able to leave the decidedly larger "out" group which everyone started in. I would say he was in good company as the group included many seasoned professionals who were well respected.

[Grievant] maintains these witnesses agree that [reviewer] "was an unduly harsh judge and that he harbored animus towards grievant." He also quotes from a study of post morale issued by the State Department's Medical Director in December [year], which singles out the poor morale situation among AID staff, attributes the problem to AID mission "management difficulties," and cites staff emphasis on "the poor work atmosphere and unrealistic expectations of management as the heart of the problem." Describing [reviewer's] direction as a management "disaster", [grievant] contends that his harsh and unobjective judgments precluded fair review.

The main review statement criticisms disputed by [grievant] are these:

[T]o become a full fledged [section] Officer he will need to polish his writing skills and sharpen his analytical capacity. During his stint as acting [type] officer the need for improvement in these areas was apparent and was exacerbated because he did not rely sufficiently on those most familiar with the topic to draft these major cables. These included cables to brief high ranking AID/W officials on points to make with the [country] Finance Minister, to inform AID/W of Mission actions on trade

and investment, and to brief them on our views on donor coordination. [Grievant's] drafts required substantial reworking by my deputy or me.

To substantiate his allegation that these comments are unjustified and evidence bias, [grievant] relies principally on statements by [another officer]. Before [that officer's] reassignment two and one-half months after [grievant's] arrival in [post], he was [title] and [grievant's] designated second-level supervisor and reviewing officer. He states that he reviewed [grievant's] cable drafts on donor cooperation and trade and investment and found them "very good drafts," reflecting adequate consultation and not requiring an unusual degree of reworking. He also characterizes [grievant's] performance in positive terms and expresses confidence that had he remained in [post], he would have "supported his tenuring without reservation." Grievant maintains that [name] was more familiar with both [post] and his own work than [reviewer], and, therefore, his judgment should carry more weight. He asserts that the "contrast in their conclusions compels an inference of bias or error by [reviewer]."

The Agency argues that [grievant] has produced no evidence of bias against him by [reviewer] or of grievance reprisal. It observes that the [year] EER which [grievant] had grieved was removed because of rater errors and that [reviewer] was subjected to no adverse action because of the grievance. [Reviewer] specifically denied any effort to discredit him. AID relies on a statement of the U.S. Ambassador to [post] at the time and other evidence to demonstrate that, far from being a management "disaster" as alleged, [reviewer] was respected for his leadership and integrity. Additionally, the agency finds [reviewer's] own statement detailing two frank counseling sessions with [grievant] as contradicting any possible inference of animus.

AID characterizes the [colleague's] statement relied on by [grievant] as overstated and out of context. It explains the poor morale situation he describes as the result of extraordinary difficulties which confronted the [Office] in [post] at the time. It also quotes from [the colleague's] answers to agency interrogatories to show that he had no personal knowledge of and had not personally experienced the problems he alludes to. The agency asserts that [reviewer] took many remedial measures to redress the morale situation, and it argues that, in any event, [the colleague] has not shown how grievant may have been injured by the situation he describes.

Regarding the [first employee's] statement, AID regards the "in" and "out" groups he posits to be facile and simplistic, and it maintains that [this person] ignores the Mission Director's responsibility to be "judgmental" concerning the performance capabilities of the staff. AID dismisses these statements as providing no evidence beyond mere conjecture that [reviewer] was an unduly harsh judge and harbored animus towards [grievant].

The agency finds [reviewer's] review statement criticisms appropriate comments based on his observations on [grievant's] performance over the eight month rating period, and it perceives nothing wrong with citing as representative examples only his shortcomings as acting [section] officer. AID argues that [first reviewing officer's] favorable comments must be discounted as he has not had the experience and understanding of the rating and reviewing offices with whom he differs, and his observations of [grievant's] performance had been limited to their brief period of overlap. The reviewer's comments, it says, are based on a longer period and reflect higher qualifications for judging the substance and quality of the work criticized and of [grievant's] readiness for tenure. Further, the agency contends that [grievant's] own EER statement as rated employee admits the

criticisms levied. AID concludes that [reviewer's] criticisms were neither undeserved, unduly harsh or animated by bias or reprisal.

Discussion and Findings. The statements and other evidence relied on by the parties cannot be fully reconciled. The declarations of [the two colleagues] convey a distinctly more negative picture of [reviewer's] management style and practices than that painted by AID. [The first reviewer] has a more positive recollection of [grievant's] performance and of two of the cable drafts he produced as acting program officer than does [reviewer]. From our review of the evidence, the Board does not find any of the declarants or their statements to be unworthy of belief. We consider the central differences to be matters of judgment rather than of fact. On balance, we conclude that grievant has not met the burden he carries of proving by a preponderance of the evidence that [reviewer] was biased against him, sought reprisal for his earlier grievance, or levied EER criticisms that were unwarranted or unduly severe.

The [two colleagues'] statements do not expressly charge personal bias by [reviewer]. [One] says that he "was given to understand" in Washington that [reviewer] had shown bias towards [grievant]. However, we read that indirection in a notably direct statement only to mean that [he] inferred this from the description of Washington officials that [grievant] had been one of the most seriously injured victims of the "situation" in [post]. [He] describes that situation as the Mission Director "severely overworking staff and micro managing their performance and activities." At the time [he] went to [post] in May [year], it was already known that [grievant's] final Tenure Board had denied him career status, thus the negative consequences of his assignment were indeed severe. However, the evidence indicates that the situation said

to have contributed to those consequences was [post] management. There is no direct evidence of bias or reprisal by [reviewer].

We consider that the evidence of both parties clearly establishes beyond doubt that [reviewer] was a demanding chief who set high standards and was not notably forgiving or understanding when they were not met. The evidence also tends to show that [reviewer] failed to provide a work environment which fully reflected the especially difficult conditions confronting AID personnel in [post]. Undoubtedly, grievant was affected by that "situation", but, as the [second colleague's] statement illustrated, so were many, if not most, of his AID colleagues. We cannot conclude from the evidence that the requirements, approaches or atmosphere established by the Mission Director, while not beyond criticism, were themselves arbitrary, contrary to law, regulation or policy, or otherwise erroneous. Moreover, we are not persuaded that they were unreasonable or oppressive to a degree that improperly disadvantaged grievant. We find no basis for relief in the alleged inadequacies of [grievant's] management and direction.

Nor can we infer bias against grievant from these circumstances. [Reviewer] denies any animosity and provides details of a relationship with [grievant] that would appear to belie such a conclusion. Nothing in the statements of [rater] or [first reviewer], or of [other colleagues], [grievant's] subsequent rating and reviewing officers, or the EERs they wrote, suggests personal animosity by [reviewer].² We have only grievant's charges and the implications that can be reasonably drawn from the [two colleagues' and first

²Grievant also contends that as [reviewer] was rater or reviewer of the officers who rated or reviewed his performance in the last two EERs he received in [post], "presumably he had an adverse influence" on these evaluations as well. We find nothing in those two EERs or in the other evidence of record to support such an inference. We hold that grievant has not sustained this contention.

reviewer's] statements to support the allegation. We believe that it is at least equally reasonable to conclude from those statements simply that [grievant], like his colleagues, was the object of demanding mission direction. This may have made his assignment more difficult than it might have been under a different director. However, as noted above, we cannot conclude that it constituted grievable error. We do not find that a preponderance of the evidence supports an inference of bias or reprisal on the part of [reviewer].

Neither can we conclude, on the basis of the evidence presented, that [reviewer's] review statement criticisms were erroneous, unfairly harsh or undeserved. Undoubtedly, [reviewer] was a critical superior, but we do not consider that his criticisms of [grievant's] performance defied reason. [Rater] repeated some of the same critical comments in the rating.³ He has affirmed his judgment that the statement is fair and well-founded. Clearly, [rater] believed that those criticisms were representative of [grievant's] performance. [Reviewer's] concerns are reflected in other EERs in [grievant's] performance file as well.

With regard to [reviewer's] specific examples, his statement substantiated in convincing detail the shortfalls he found in one of the cables for which [grievant] was criticized. Moreover, while [first reviewer] recalls the other two cited cable drafts favorably, we do not find that his judgment invalidates [reviewer's]. There is room for reasonable differences of opinion among supervisors. [Reviewer] worked with [grievant] directly when he was acting [section] officer, and, albeit at some remove, for the full eight months of the rating period. He could dependably assess the specific cables cited and

³Grievant also maintains that the rating officer's parallel criticisms of his performance as acting [section] officer are unwarranted and improper. The rating officer's statement is considered in a different context beginning at page 26, below. The present discussion of the review statement is equally applicable to the rating officer's parallel references.

relate them to his work and work-product over the full period. [The first reviewer], less experienced overall, overlapped with [grievant] only from his arrival at the end of July until mid-October, and grievant states in his submissions that "he was away from the office most of August," as well as during part of the September-October period when [grievant] was acting [section] officer.

Additionally, grievant's own EER comment on the criticisms noted that he attempted to do everything as acting [section] officer but quickly learned, after making a few errors, that staff resources are there for a purpose, and now understands that it is important to coordinate with all Mission elements prior to preparing final drafts of cables and other documents. Although [grievant] contends that critical resource persons were not at post when needed and that he had not been informed as to who they were, his EER comments can only be seen as an admission that he had not coordinated the criticized cables as fully as could have been done. The Board finds that Grievant has not established that the reviewer's comment, that he had not relied sufficiently on others in drafting the assigned cables, was erroneous or falsely prejudicial.

In summary we can conclude from the evidence only that [the reviewer] was a rather demanding chief and a not overly generous reviewing officer. We cannot reach the judgment that his criticisms of grievant's performance reflected bias or reprisal or were unfounded, indefensibly harsh, or otherwise erroneous.

4. Allegation: Comments in the rating officer's statement regarding grievant's participation in Mission meetings are erroneous; the EER references to grievant's shortcomings as acting [section] officer are improper

and prejudicial; in any event, grievant was not counseled concerning the criticisms mentioned, to his detriment.

Grievant contests several comments in the rating officer's statement, in section IV.C, "Areas for Improvement", as follows:

[Grievant] is not very assertive at Mission meetings on portfolio review or policy discussions. When contributions are made, he should review them more carefully to ensure that they make a positive contribution to the discussion....

At times, [grievant] strives too hard to demonstrate his competence, with less than fully successful results. This has been more evident in his role as Acting [type] officer. He is learning that, to be an effective supervisor and prospective Program Officer, he must utilize staff resources to the best possible effect, especially deferring to staff that have a greater command of the substance of an issue. I believe he will make a greater use of staff resources as he learns the competencies and sources of expertise within the Mission.

Grievant asserts that [rater's] criticism of his performance in Mission meetings is "contradictory". He maintains that the comment seeks to have him defer to staff with greater substantive command, yet be more assertive in certain meetings such as those which include the rater himself despite the rater's own greater substantive command. He also alleges that the absence from the rating of examples of his inadequate contributions failed to satisfy EER instructions to "explain what the employee can do to improve."

[Grievant] asserts that most of the criticisms in this EER are based upon his temporary duty as acting [section] officer.⁴ He notes that this duty covered only a four-week period carrying out a responsibility which was

⁴[Grievant] also includes in this complaint the reviewing officer's criticisms which are set out and discussed beginning at page 19, above. That discussion covers grievant's related complaint that EER criticism of his performance as acting program officer was unjustified and unduly harsh.

given relatively low priority among his work requirements. He had only been at post two months and was an FS-03 filling an SFS position. Moreover, the rater, who was away, had no firsthand knowledge of this aspect of his performance. Grievant concludes that these criticisms are "invalid and irrelevant" because they are not a proper basis for evaluating a career candidate at his level for tenure and since three-grade stretch assignments are prohibited by regulation.

While acknowledging that the rating officer discussed his performance with him on several occasions, [grievant] claims that [rater] never mentioned the specific criticisms cited in the EER and he (and the reviewing officer) never indicated any performance areas which might bar a tenure recommendation. Grievant maintains that this failure contravened the supervisory duty to provide subordinates with candid feedback on areas of weakness and deprived him of the opportunity to improve his performance.

The agency finds no contradiction in the rater's comments that [grievant] should both be more assertive in some meetings and defer to those with greater substantive command. It notes that the criticism concerning assertiveness is directed specifically at "portfolio reviews and policy discussions," whereas the comment about substantive deference concerns [grievant's] overall performance and relates to utilization of staff resources. It states that the EER rules do not require examples in this part of the report.

AID also finds no error in the rater's -- and reviewer's -- criticisms of [grievant's] performance as acting [section] officer. It states that regardless of ranking among work requirements each assigned duty is an appropriate subject for EER comment. Further, AID asserts that grievant's designation as acting [type] officer and his performance of the specific duties commented

on in the EER were entirely proper. Grievant was not assigned to the position, it says, but merely assumed those responsibilities temporarily in the absence of his supervisor. This is a standard and necessary practice.

Moreover, grievant has presented no evidence to show that assignment of the specific duties he was criticized about were beyond his capability or function

Concerning counseling, the agency notes that [rater] states he provided close and effective supervision and had mentioned to [grievant] his need to improve writing and drafting of strategy papers in order to perform at a higher level. The reviewing officer states that [grievant] was specifically counseled at the time regarding the three cables he drafted. AID concludes from the extensive interaction that took place, and from grievant's own EER statement acknowledging the criticism, that the rater met his obligation to provide feedback and an opportunity to correct weaknesses.

Discussion and Findings. The Board holds that grievant has not established that any of the questioned EER criticisms is erroneous or improper, or that he was disadvantaged by inadequate counseling concerning weaknesses in performance. We see no contradiction in the rater's judgments that grievant should be more assertive in particular situations, while deferring more generally to staff with command of substance. The former comment manifestly relates to the extent of his engagement and influence in meetings developing and discussing policy and portfolio areas; the latter is expressly cited by the rating officer as an aspect of more effective staff utilization. We see no inconsistency or lack of clarity in these comments.

Similarly, we can discern no impropriety in the EER references to aspects of [grievant's] performance as acting [type] officer. The rater's comments, and the reviewer's, make clear that these references are illustrative of more general concerns. This is an entirely appropriate manner

of documenting criticism. We also agree with AID that it is common and expected practice for subordinates, including career candidates, to act, in the absence of others in the chain of command, for superior officers whose positions may be ranked several grades higher. Such duties involve no reassignment and violate no restrictions. The responsibility was included in grievant's job requirements, ranking relatively low on the priority list most likely only because the duty was sporadic and temporary.

Grievant suggests, in effect, that these criticisms improperly cited and emphasized shortcomings in much higher-level duties at the beginning of his new assignment which he could not reasonably be expected to meet. However, the pertinent review statement comments specifically relate only to [grievant's] preparation of three cables which he has not shown to have been improperly or inappropriately assigned to him. And the rater's criticism, that [grievant] sometimes strives too hard to demonstrate his competence, and that this was more evident in his role as acting [type] officer, not only seems inoffensive but also can be seen as mitigating the general concern.

With regard to the counseling provided grievant, he acknowledges that he and [rater] met several times to review his performance. A formal review session was held several months before the end of the rating period. Nevertheless, grievant maintains that the areas of weakness cited in his EER were never brought to his attention, and he was never advised that shortcomings might bar a tenure recommendation.

However, [rater] states he believes that his supervision was close and effective, that he provided informal counseling almost daily, and that he mentioned that grievant's writing skills needed to be improved. [Reviewer] states that [grievant] was counseled concerning the cables he criticized.

Grievant's own EER statement evidences no surprise at, and little disagreement with, the critical comments made

We see no error in any failure of [rater] to warn grievant that he might not be recommended for tenure. [Grievant] alleges that he received positive feedback from [rater], and the EER depicts positive performance, overall. [Grievant] does not allege that [rater] indicated he would recommend tenure but later reversed himself without warning. As discussed above, this was a relatively close call. [Rater] may have expected to be able to recommend tenure at the end of the period or may not have been able to make a judgment until then. We do not believe that the evidence sustains a finding that [grievant] was improperly misled into a conclusion that a tenure recommendation would be made.

On the basis of the evidence we are unable to conclude that grievant was not made aware during the rating period of the areas of weakness ultimately cited in the EER or denied an adequate opportunity to address them.⁵

B. [Post] EER for the period April 1 to September 30, [year].

Grievant contests a critical statement of the reviewing officer, [title-name]. He contends that the statement is erroneous and not supported by

⁵ With respect to this EER, grievant also alleges prejudice because of the extended absence of a second-level supervisor during part of the rating period and because the reviewing officer initialed and dated work requirement certification and performance review blocks in the EER when she had not participated in developing the requirements or reviewing performance. We have carefully considered these additional contentions and find them to be without merit. Grievant has not shown that the vacancy of several months in the Deputy Mission Director position resulted in inadequate supervision or occasioned any injury. Likewise, we can perceive no harm to grievant from any irregularity in the reviewing officer's initialed notations in the EER. Grievant contends, as well, that the errors concerning this EER "deprived him of the fair and equal competition to which he was entitled under [the previous] Grievance Board order." As we have found no error or irregularity in the EER, we hold that this contention is without merit.

required examples, and that he was never counseled about it. The disputed statement is:

The critical issue for this EER is whether [grievant] meets the sole criterion for a tenure recommendation "to serve effectively with promotion potential to class FSO-1." In this regard I endorse the recommendation for tenure but not as a career [type] officer. [Grievant's] work has been solid but it has yet to fully demonstrate the intellectual and conceptual skills, related to the development process, that are particularly necessary for a career [type] officer in the Agency. [Grievant's] career strengths, amply demonstrated in this rating period, are in organization and task implementation. His dedicated commitment to the Agency, and to the Foreign Service, together with these proven skills provide ample basis for my positive recommendation for tenure. However, [grievant's] skills will be best used by the Agency in the future as a [type] Officer.

[Grievant] also amended his grievance before the Board to include objection to a statement of the rating officer, [name], which had been cited by AID to corroborate its position concerning the review statement. The rater commented that [grievant's] full realization of his potential over a normal career span will involve "self-development of program and leadership skills, especially in the area of conceptualization and analysis."

Grievant asserts that these comments are erroneous because he did not fully demonstrate the necessary intellectual and conceptual skills related to the development process. To corroborate this assertion, he refers to two studies which he completed in draft during the rating period and which were issued shortly thereafter. He declares that 95 percent of his drafting was retained unchanged.

The first paper was a cable describing the scope and design for a study of social and institutional constraints to development in [country] (called an

SIP). The second was a position paper analyzing issues in the [country] urban sector. Grievant cites praise of both papers by the rating officer and by AID employee [name], who supervised him in [post] for a few weeks in [year] and who reviewed the papers at his request. He also quotes from a commendation of the SIP by an AID working group. He maintains that these statements establish that the two studies were major conceptual papers and that the praise generated persuasively shows that he had fully demonstrated the intellectual and conceptual skills necessary for a career program officer. Grievant suggests that the failure of reviewing officer [name] to mention the urban study may indicate that he was unaware of it. He argues that the positive independent assessments he cites demonstrate that the reviewer's and rater's EER criticisms on the point were mistaken.

In addition, [grievant] notes that agency EER instructions provide that the "reviewer's statement should include an assessment of the employee's performance and potential, citing examples as appropriate." He argues that the disputed review statement criticisms were so sweeping that it was appropriate to have some citation of instances where he could have demonstrated the criticized skills but failed to do so. This "defect", he says, compels expunction of the contested passage. Even if the criticisms were valid, grievant concludes, they should be expunged because he was never counseled about them, in violation of a career candidate program requirement that candidates be provided candid feedback on weaknesses in performance.

The agency argues that grievant's evidence does not demonstrate that the disputed EER remarks are erroneous. Its position may be summarized as follows: The urban study [grievant] drafted was merely a preliminary strategy paper. This may explain why it was not expressly mentioned by the

reviewing officer. The rating officer's comments in the EER show that despite his positive description of these efforts, particularly in terms of research, [rater] concluded that additional development of [grievant's] conceptual and analytical skills was needed. The subsequent endorsements cited by the grievant, which were not available to the reviewer, describe the works in such terms as "doable", "very useful", and a "launching point". They do not establish that the reviewer's remarks are in error. Grievant's own statement that his drafts were revised "less than 5%" is a self-serving quantification which does not address the significance of the changes made. On the other hand, statements for the record by rating officer [name] indicate that substantial editing was generally required of [grievant's] drafts which he also took an inordinate time to complete..

AID discounts [the other employee's] positive assessment of the drafts for a number of reasons and maintains that, as he is a less qualified officer than the rater or reviewer, his appraisals should be given less weight. AID concludes that grievant has not demonstrated that the EER comments on either of the two studies [grievant] drafted or on grievant's conceptual and intellectual abilities are inaccurate, erroneous or falsely prejudicial.

Discussion of Findings. Grievant seeks to refute the reviewing officer's clearly stated judgment, and the rater's more indirect suggestion, that his conceptual and intellectual skills as a [type] officer had not been fully established. His main line of argument is that the SIP and urban study papers he drafted were significant conceptual papers, almost entirely reflecting only his own work, which have been professionally accepted as highly successful studies. These assessments demonstrate that the reviewer, who may not have considered both studies, and the rater were incorrect in their judgments, believe it necessary to reach a conclusion as to just how

significant these studies were, to what degree they represented only [grievant's] own efforts, or to what extent the assessments he cites can be accepted as endorsements of his own conceptual and analytical capabilities. We conclude that, even if other observers found these finished products to have been positive conceptual papers, the clearly expressed judgment of the reviewing officer, and the less strongly stated reservation of the rater, have not been shown to be in error.

The evidence clearly shows that the involvement of the rater and reviewer in this aspect of [grievant's] work was not casual or uninformed. The rating officer commented extensively in the EER on both papers. He had worked closely with [grievant] during the rating period to provide a full opportunity for him to show his conceptual drafting abilities. The reviewer specifically directed that [grievant] be assigned the urban study for this purpose. Undoubtedly, [reviewer] saw the rating officer's appraisal. He also commented on the SIP in the review statement. We cannot conclude that he was unaware of the urban study draft because he did not mention it, or was otherwise inadequately apprised of grievant's performance in this regard.

It may be that some agency observers found the finished studies to be important and comprehensive analytical studies. But the observers cited by grievant could not have the knowledge of [rater] and [reviewer] concerning the process by which the papers were completed or the extent to which they were attributable to the efforts of the grievant. In at least one major respect, [grievant's] analytical and conceptual work was judged to be manifestly inadequate.

In his statements for the record, [rater] reviews in detail the consultations he had with [grievant] during this rating period. In addition to indicating that he was involved very closely with [grievant] in editing and

discussing the drafts he produced and in providing a full opportunity for [grievant] to demonstrate conceptual drafting, [rater] states that while the EER was in preparation, he thoroughly reviewed [grievant's] performance with him. [Rater] says that he then told [grievant] that "writing cogent 'concept' papers require[d] exhausting effort for grievant, whereas it is so easy for others;" he indicated that at times [grievant's] "productivity was low" in other areas "because he took so much time trying to perfect and polish;" and he suggested that [grievant] might consider another backstop where his strong operational skills would shine, rather than the [type] officer backstop where there is a need "to demonstrate greater breadth in conceptual and analytical skills which [grievant] needs to work so very hard at."

[Grievant's] comments persuasively show that, for [grievant] conceptual and analytical drafting was an arduous and time-consuming task to an unusual extent, and that this problem adversely affected his productivity. Grievant has not disputed [rater's] account. In the Board's view, even if, as grievant says, his final drafts represented successful conceptual products, the exceptional amount of energy, time and effort which the evidence indicates he was obliged to devote to that product clearly would warrant a judgment that these skills had not been adequately developed. Although the reviewing officer does not specifically refer to this aspect of [grievant's] performance, in view of his position and responsibilities and his close involvement in helping to give [grievant] a fair chance to demonstrate those skills, it is only reasonable to conclude that he must have been aware of this aspect of grievant's work.

It would have been unusual for [reviewer] not to have discussed grievant's performance with the rater in view of his demonstrated interest and his duties as reviewing officer to ensure uniformity and objectivity in

appraisals. [Reviewer's] recommendation, mirroring [rater's] informal comments, that [grievant] be tenured in another backstop, reinforces the conclusion that [reviewer] was thoroughly acquainted with grievant's performance. As we find a solid basis for the judgments of the rating and reviewing officers, we hold that grievant has not established that their comments regarding his conceptual and intellectual skills are inaccurate or unwarranted.

Nor do we find any error in the lack of examples to support the reviewing officer's comments regarding tenure. AID EER instructions call for examples in the reviewer's assessment of performance and potential "as appropriate." [Reviewer's] general comments about [grievant's] potential and relative strengths are not unclear in any way. While they may differ from the rater's EER recommendations, they are consistent with [rater's] comments in the EER about [grievant's] drafting and analytical skills.

The EER instructions do not restrict the discretion of reviewing officers to determine when it would be appropriate to cite examples. We do not believe that the reviewer's failure to illustrate more fully his conclusion, that [grievant's] work has yet to fully demonstrate the intellectual and conceptual skills, related to the development process, that are particularly necessary for a career [type] Officer," is a breach of that discretionary authority.

Likewise, we do not believe that grievant has established any failure to provide the counseling he was entitled to as a career candidate. The evidence shows clearly that during this relatively short rating period of four months the rater and reviewer were actively engaged with [grievant] in helping him demonstrate his analytical and conceptual skills. In his own EER statement, [grievant] expresses no surprise over the reviewer's

reservations and recommendation. Rather, he agrees that "the areas needing work are strategy formulation and conceptualization," but he explains this as the result of inadequate past opportunity, and he asserts that his overall performance in an FS-01 position demonstrates his readiness for tenure in the [type] officer field. We hold that grievant has not met his burden of proving any deficiency in counseling.

C. [Post] EER for the period October 1, [year], to March 31, [year].

We need not discuss this issue at any length. In his amended grievance of August 31, [year], [grievant] raised this failure to recommend tenure though he had done so in the previous appraisal. [Grievant] attributed the failure to rating officer [name's] knowledge that [grievant] had not been tenured. He alleged that AID had improperly instructed the rater to check the potential block showing that additional evaluated experience was needed for tenure.

In denying this claim, the agency pointed out that since this EER had not been before the final Tenure Board which had denied [grievant] tenure, the rating could not have caused him any harm. It also provided documentary evidence showing that AID/W had properly provided guidance that [grievant] should be rated entirely without regard to the Tenure Board results. Nevertheless, on appeal to this Board, grievant had renewed the contention, asserting that evidence indicating that he was or would have been recommended for tenure by preceding and succeeding rating officers "compels an inference" that knowledge of "the fact of tenure prejudiced grievant in the view of the rater and reviewer."

We deny grievant's claim for two reasons:

1. Grievant has submitted no independent evidence to substantiate the contention that knowledge that grievant had not been granted career

status prejudiced the rating and reviewing officers. The rating officer was advised by AID/W to address [grievant's] tenure "as though the rater was living in a vacuum; i.e., didn't know the outcome of the Tenure Board's deliberations." We find the evidence insufficient to sustain an inference that the rater did not properly follow the agency's instructions.

2. As the rating was not due or completed until after grievant's final review for tenure, it played no part in the denial of career status to him. Even if there had been error, we cannot see how it might have been harmful.

D. Conclusion

On the basis of the evidence, the Board is satisfied that the period of [grievant's] candidacy considered in this grievance was demanding and difficult because of local hardships and the work situation in [post]. These circumstances challenged grievant in ways which he might not necessarily have experienced in some other assignment. However, we find nothing improper or erroneous in the assignment, supervision or appraisals of performance that grievant received. We hold that he has not met the burden of proof he carries to demonstrate by a preponderance of the evidence that the EERs he contests were inaccurate or falsely prejudicial or that he was the subject of bias or reprisal or of any other agency action which violated or misapplied law, regulation or policy or was otherwise arbitrary, capricious or improper.⁶

IV. DECISION

The grievance is denied.

⁶ In connection with his requests for relief, grievant has asserted a number of additional allegations disputing such matters as earlier ratings, his assignment patterns, his "truncated" performance record and erroneous distribution of an agency grievance cable. As we hold the grievance is without merit and grievant is not entitled to relief, we do not address those issues.