

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████,
Grievant

and

The Department of State

Record of Proceedings
No. G-91-087-STATE-74

Date: October 8, 1993

ORDER

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Leroy S. Merrifield

Board Members:

G. Richard Monsen
James S. Landberg

Special Assistant
to the Board:

Karl H. Sprick

Representative for the Grievant:

Self

Representative for the Department:

Joanne M. Lishman
Director, Grievance Staff

Exclusive Representative:

American Foreign Service Association

ORDER

The grievant, ██████████, a Foreign Service security officer with the Department of State, contests his Employee Efficiency Rating (EER) for the period from September 3, 1990, to February 22, 1991,¹ when he was Assistant Regional Security Officer at the U.S. Embassy in ██████████. During the course of proceedings, ██████████ has filed a number of requests for discovery of material that he contends is necessary to the pursuit of his grievance. The Board issued rulings on June 7, 1993, and July 20, 1993, denying ██████████ motions to compel the Department to respond to his requests for remaining discovery material. In the July 20, 1993, ruling, the Board also set forth the schedule for concluding arguments by the parties to the grievance.

Grievant responded with memoranda of August 12, 1993, and September 3, 1993, primarily contesting the cited Board rulings on discovery and again requesting that the Board compel the Department to provide certain material. This order rules on grievant's motions and closes the record of proceedings (ROP) in this case.

The Board's authority with respect to access to records is spelled out in Section 1108 of the Foreign Service Act of 1980, as amended (The Act). The pertinent provision states as follows:

(1)(A) The Board shall request access to any agency record which the grievant requested to substantiate the grievance if the Board determines that such record may be relevant and material to the grievance.

¹ The original EER was erroneously marked August 3, 1990 to February 22, 1991. The record does not contain a corrected EER, but a review panel statement in the record indicates that the rating period began September 3, 1990.

Thus, the criterion the Board applies in instances in which a grievant requests the Board to compel an agency to supply records is whether the requested records are relevant and material to the issue or issues which gave rise to the grievance.

We have examined the issues raised by grievant in this case. They principally concern the unsatisfactory rating he received in his [REDACTED] EER, based on several specific criticisms of his performance and capabilities.² The fundamental criticism is that he displayed deficiencies in professional judgment, managerial ability and interpersonal skills. Four specific examples of the basis for this judgment are mentioned in the rating officer's portion of the EER:

The first is that grievant's supervision of the ambassador's personal security detail led the ambassador to request that grievant not be assigned to accompany him in a security capacity on future trips.

Second, that on several occasions, grievant engaged in strong emotional outbursts that gave the appearance he had lost self-control. These outbursts caused those around him to be concerned for their safety and reinforced doubts about his reliability in stressful or crisis situations, according to the EER narrative.

Third, that based on their personal experiences with grievant, the ambassador and the DCM directed that he not be designated as acting regional security officer in the absence of his supervisor, the regional security officer.

Fourth, that despite counseling regarding his performance deficiencies, grievant continued to exhibit poor professional judgment. An

² Grievant also alleges procedural errors in the preparation of his EER, but these are not the subject of the outstanding discovery requests.

example given is that without authorization he declined to accept responsibility as weekend duty officer, creating confusion among Marine guards that could have led to problems in an emergency. The rating officer states that "Such incidents eventually led to a total lack of confidence in predicting [grievant's] willingness or ability to perform."

An additional example of unsatisfactory performance is mentioned in the reviewing officer's portion of the EER, which states that she personally observed grievant's poor performance in briefing members of the American community in [REDACTED] following the bombing of the U.S. Marine security detachment residence.

Grievant disputes these criticisms, alleging that they are inaccurate and falsely prejudicial, and asks that the subject EER therefore be removed from his Official Personnel File. In his requests for discovery, he contends that the records he seeks from the Department are essential to establishing the merits of his case. As noted in our earlier rulings on discovery, the Board disagrees. We find that the information grievant requests is neither relevant nor material to the EER criticisms at issue. Our reasons for this conclusion are explained below with respect to each of the records he seeks

Accountability Review Board Reports

Grievant contends that he requires access to two classified reports by an Accountability Review Board (ARB) regarding the bombing of the Marine residence in [REDACTED] on October 10, 1990. He says that other irregular incidents occurred in this period, including shots fired at his personal residence, and that the two reports may reveal a pattern of hostile intent. His reasoning seems to be that these incidents formed the background in which his performance occurred, and that the two ARB reports are necessary to explain the circumstantial aspects of the EER criticisms. He also alludes

to the possibility that he was deliberately denied the opportunity to be interviewed by the ARB, possibly because he might have been critical of his superior's conduct of the security function.

As indicated in its previous rulings, the Board obtained and reviewed the two classified ARB reports and found nothing in them that relates to the EER criticisms of grievant, either directly or as essential background. The reports do not mention grievant or the rating and reviewing officers, or any other individual by name or position in their brief descriptions of the bombing incident. The reports do not mention or allude to other incidents raised by grievant, such as the shots fired at his house. The reports mostly concern measures that could be taken in the future to enhance Embassy security, a subject not relevant to the issues in this grievance.

The only specific criticism of grievant in the contested EER related to the bombing incident concerns his briefing of the American community afterwards. Neither this briefing nor any embassy measures to inform the American community are referred to in the ARB reports. Although the ROP contains evidence that the DCM criticized grievant for his performance at the bombing site, the ARB report contains no reference whatsoever to grievant's or anyone else's performance on the scene after the bombing. Grievant makes much of the fact that he was not interviewed by the ARB and that there may have been some design behind this. Regardless of the merits of this allegation, the reports themselves are largely devoted to a discussion of future measures that could be taken to improve Embassy security, and contain nothing remotely relevant or material to the criticisms contained in grievant's EER or to his allegations regarding the circumstances that pertained at the post. Therefore, the Board has no basis for exercising its

authority under Section 1108 of the Act to compel the Department to submit these classified reports.

Inspector's Notes

Grievant seeks handwritten notes from his interview with an inspector in which he says he was questioned about the ambassador's policy regarding his being accompanied by American security officers on out of town trips. He contends that these notes may shed light on the EER criticism regarding the ambassador's request that grievant not accompany him on such trips.

As grievant has noted, since he participated in the interview, he is aware of what was discussed. If there was a relationship between the discussion in the interview regarding the general policy on accompanying the ambassador and the ambassador's specific request regarding grievant, the grievant has had plenty of opportunity to advise the Board of what this relationship might be. He has failed to describe any relationship between the two subjects. Further, he does not contest the Department's assertion that the interview deliberately excluded any discussion of his performance. The grievance-related issue is whether the ambassador's decision to exclude grievant from his travels was reasonable and whether mention of it in the EER was fair, accurate and appropriate. We find nothing to indicate that the interview notes would provide anything relevant or material to the grievance issue and we have no basis for requesting the Department to provide the notes.

Curtailments of Other Individuals From [REDACTED]

Grievant seeks information on curtailments of other individuals from [REDACTED], on grounds that such information may reveal a possible pattern of improprieties, such as the improper use of medical reasons to justify curtailments.

We find no logical connection between other curtailments and grievant's. It is absolutely clear from the record that grievant's assignment was curtailed because senior embassy officials perceived his performance to be unsatisfactory. Whether these perceptions, as stated in the EER, were unfair or falsely prejudicial is a matter for the Board to decide when it considers the merits of the grievance. With regard to discovery, however, we find nothing to be gained from a review of other curtailments or any possible relevance of such information to the grievance issues.

Freedom of Information Act Requests

Grievant seeks through grievance discovery procedures information that he originally sought through FOIA channels, and later, in some cases, through grievance discovery. The desired information includes: 1) a local guard's report on shots fired at grievant's residence in [REDACTED]; 2) an Office of the Inspector General audit of his Personnel Audit Report (PAR); 3) a series of telegrams and messages regarding support for the Marine security detachment in [REDACTED]; 4) documents requested in grievant's FOIA request number 920461; and, 5) documents regarding grievant's alleged misconduct, performance and an inspector's audit report of his performance in February 1991.

1. Local Guard Report. Grievant's rationale for obtaining the local guard report seems to be that the shots fired at his residence were part of a pattern which included the marine residence bombing, and that the report would provide necessary information on these events. We find no relevancy.

Grievant is not criticized in the EER for his activities at the bombing site, nor do we discern any relationship between the shooting at his house and the EER criticisms. Moreover, the record already contains a U.S. official's detailed telegraphic report on the shooting. We cannot imagine that the local

guard report, even if it exists, could provide additional information relevant and material to the issues in this grievance.

2. Audit Report of PAR.³ Grievant implies that this audit may have been an attempt to intimidate him, since it occurred just at the time he filed his grievance with the Department. We find no credible evidence that supports such a thesis. The record contains an explanation which makes clear that the audit was simply part of a general inspection of PARs to determine the extent of errors in such documents. It appears entirely coincidental that grievant's PAR was selected for inclusion in the audit. The audit explanation makes clear that names would not be used and that the only result would be a statistical profile on the accuracy of the PARs. We find no possible relevance to the issues in the grievance from a statistical report on errors in PARs.

3. Support for the Marine Detachment in [REDACTED]. Grievant previously sought through FOIA channels information on support for the Marine detachment, and now seeks this information through the discovery process. He has never explained the relevance of such information. As previously noted, the specific EER criticisms are unrelated to the Marine residence bombing (except with respect to grievant's briefing on the subject) nor can we discern even a remote connection between the Marine security situation and the issues in the grievance.

³A personnel audit report (PAR) contains basic factual information on members of the service, such as their training, former assignments and language capabilities. This computerized information is frequently used by personnel management for such things as identifying employees with certain combinations of experience and skills. The audit in question was intended to determine the extent of errors in individual's PARs, which could reduce efficiency of personnel management. There is no classified or performance information in an individual's PAR.

4. FOIA request 9204671. Grievant describes this request as four excised documents from an unspecified security update file and recent records from DS/CR/SI, plus one document requiring intra-departmental review. The Board experienced some difficulty in identifying the nature of the records requested. Grievant has submitted copies of correspondence with the FOIA office which indicate that he requests documents from his security and personnel file, including for the period September 19, 1992, to October 23, 1992. He says the requested documents would uncover unsubstantiated allegations that reflect directly on grievant's evaluation. This explanation is totally inadequate. We are unpersuaded that documents from security files in the Department for a period long after grievant's departure from [REDACTED] would be relevant to the contested EER.

5. Documents on Grievant's Misconduct. These documents, originally sought by grievant through FOIA channels, relate to his alleged sexual relationship with an embassy foreign service national (FSN) employee. There is no explicit mention of this subject in the contested EER, but grievant contends that it is an underlying reason for the criticisms of his judgment and for prejudicial actions toward him by his superiors. The matter originally arose during the previous rating period and the record contains a written counseling statement on the subject given to him at the time. The record also contains telegrams explaining the issue and its outcome. Even if this matter could be related to the EER criticisms of grievant's judgment, the additional documents he seeks, assuming they could be located, would only provide further details on a subject already well covered in the existing record. Therefore, such documents would not have a material effect on the Board's consideration of the merits.

Closing of the Record.

As previously indicated, the Board's order of July 20, 1993, denied grievant's remaining requests for discovery and established a schedule for concluding arguments by the parties. Grievant was given 30 days from receipt of the order to file a supplemental submission, the agency was given 30 days to respond, and grievant was given an additional 15 days for a concluding submission, in accordance with "Grievance Time Limits."

Although grievant's submissions of August 12, 1993, and September 3, 1993, and the Department's submission of August 20, 1993, are primarily directed at discovery, they also contribute to the elucidation of the parties' positions on the merits. Thus, we find the subject submissions adequately responsive to the final submission schedule contained in the Board's order of July 20, 1993.

Having thoroughly reviewed the record of proceedings, the Board is confident that it contains ample basis for a decision on the merits. The record in this case contains over 50 documents and hundreds of pages of material covering the events and issues in the grievance in great detail. There is extensive argument on the merits by both parties, such as grievant's memoranda of July 24, 1992, (Summation of Grievance and Administrative Remedies Sought), October 14, 1992, (Bullet Brief) and October 30, 1992, and the Department's decision on the merits of September 2, 1992. This grievance was filed with the Board on December 23, 1991. Grievant has obtained a great deal of information in the discovery process and, as we have indicated above, we find the remaining material he has requested irrelevant and immaterial to the issues he is grieving. We find no reason to further prolong this process. The parties have had a full, complete and protracted

opportunity to establish their positions. Consequently, the record is hereby closed, and the Board will proceed to reach a decision on the merits.

ORDER

1. Grievant's requests for further discovery are denied.
2. The record is closed.

For the Foreign Service Grievance Board.



Leroy S. Merrifield
Presiding Member



G. Richard Monsen
Member



James S. Landberg
Member