

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: December 23, 1993

DECISION

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

DECISION

I. GRIEVANCE

The grievant, [REDACTED], a class FP-04 diplomatic security officer with the Department of State, filed a grievance with his agency on July 25, 1991. He alleged that while he was serving as an assistant regional security officer at the U. S. Embassy in [REDACTED], his superiors engaged in a series of actions which were prejudicial to his career interests, including improper curtailment of his assignment and preparation of an unfair and falsely prejudicial Employee Evaluation Report (EER) covering his performance from September 3, 1990 to February 22, 1991.¹

When the Department failed to reach a decision on the grievance within 90 days, grievant appealed to this Board on December 23, 1991. Board consideration of the grievance was suspended pending the outcome of efforts by the parties to negotiate a settlement. When settlement efforts failed, the Board resumed consideration of the grievance.

If his grievance is found meritorious, [REDACTED] requests the following remedies:

1. Expungement of all documents pertaining to his alleged misconduct, unsatisfactory performance and any documents related to psychological counseling of him and his spouse.
2. Retroactive promotion to the 1991 Selection Board with 12% interest on all back pay retroactive to the actual date of promotion.

¹ The EER in the record was erroneously dated August 3, 1990 to February 22, 1991. It should have been dated September 3, 1990 to February 22, 1991.

3. Receipt of American Embassy [REDACTED] differential (25%) with 12% interest for the period February 26, 1991 to February 26, 1992 (the remainder of grievant's tour of duty at post if his assignment had not been curtailed).
4. Payment of attorney fees.
5. A changing in grievant's skill code to General Service (GSO) or Administrative officer.

II. BACKGROUND

Grievant began his assignment as Assistant Regional Security Officer (ARSO) at the American Embassy in [REDACTED] in February 1990. His initial EER, prepared by his supervisor, Regional Security Officer (RSO) [REDACTED] [REDACTED] covered the period February 21, 1990 to August 31, 1990, and was very favorable. It recommended that grievant be promoted and contained no major criticisms of his performance. The EER reviewing officer, embassy Administrative Counselor [REDACTED], concurred in the favorable assessment.

[REDACTED]'s replacement, RSO [REDACTED], arrived in mid-August, 1990 and took over embassy security responsibilities in late August/early September as [REDACTED] phased out and departed post. A series of incidents and events ensued that led to grievant's voluntary curtailment of his assignment five months later, and to [REDACTED]'s preparation of an unfavorable EER on grievant's performance for the September 3, 1990 to February 22, 1991 period.

The unfavorable EER contained specific criticisms of grievant's performance, but neither it nor the previous EER mentioned a matter which had arisen during the earlier rating period. That was grievant's alleged improper sexual relationship with an embassy Foreign Service National

(FSN) employee. According to the record, grievant's first supervisor, [REDACTED], along with [REDACTED] counseled grievant about the alleged relationship on August 13, 1990, telling him that it could not be tolerated, and that it demonstrated a lack of judgment that could endanger his career. Subsequently, the embassy made inquiries to the Bureau of Diplomatic Security (DS) in Washington, without grievant's knowledge, about the possibility of bringing misconduct charges against him due to the FSN's possible pregnancy. No such charges were ever brought, however.

An event occurred on October 10, 1990 that heightened tensions in the embassy and put additional pressures on security personnel. A terrorist group attacked the embassy Marine security detachment's residence. Two local police were killed in the attack and the terrorists placed a bomb which destroyed the residence, although no U.S. Marines were harmed.

Several unusual incidents involving grievant also occurred during this period. They included a series of threatening telephone calls to grievant and his wife, shots fired at his residence just a few days before the attack on the Marine residence, and the possible poisoning of grievant's wife at a Christmas party at their residence. Sometime during this period, grievant also learned that he was the subject of telegraphic communications involving his possible misconduct, and he launched an effort to obtain copies of these communications. Finally, in a document submitted to the record, grievant contends that his rating officer, [REDACTED], made improper sexual advances towards his wife and he alleges other instances of improper behavior towards him and his wife by senior embassy officials.²

² See grievant's memorandum of October 14, 1992 to [REDACTED] (PER/G) entitled "Bullet Brief of Prejudicial Behavior and Salient Issues Surrounding Rating Period September 3, 1990 - February 25, 1991."

It was the supervision and evaluation of grievant's performance under these stressful circumstances that gave rise to this grievance. The U.S. Ambassador, Deputy Chief of Mission, and grievant's rating and reviewing officers severely criticized his performance during the period covered by the contested EER. Because of his loss of confidence in grievant's judgment and reliability, the ambassador ordered that grievant not be allowed to act in charge of embassy security in the absence of the RSO. The ambassador also indicated that he did not want grievant to accompany him on official trips in a security capacity.

These reductions in grievant's responsibilities and other performance problems were the subject of several contentious meetings between grievant and his superiors in the November through January period. Finally, on January 22, 1991, the ambassador strongly recommended to grievant that he seek curtailment of his assignment. Grievant did so the next day. The EER prepared by [REDACTED], which rated grievant's performance as unsatisfactory, was signed by grievant on February 25, 1991 and he and his family departed [REDACTED] on February 26.

III. POSITIONS OF THE PARTIES

Grievant

Grievant contends that his EER for the period September 3, 1990 to February 22, 1991 is both procedurally and substantively flawed. Second, he claims that his assignment in [REDACTED] was improperly curtailed. Grievant asserts that he was the victim of unfairly prejudicial and biased attitudes and improper actions towards him by the ambassador, DCM, and his immediate supervisors [REDACTED] and [REDACTED] and that this was the real reason for the falsely prejudicial EER and his forced curtailment.

A. Work Requirements and Performance Counseling

Grievant charges that the contested EER is procedurally flawed because his work requirements were not established until late November 1990, more than 45 days after the beginning of the rating period, in violation of 3 FAM 522.1a. He says the rating and reviewing officers also violated 3 FAM 523(a), which requires the rated officer's participation in the formulation of his work requirements, goals and responsibilities to ensure understanding by both parties of what constitutes successful performance. The lack of a formal work requirements statement led to his performance being wrongly judged, according to grievant.

Grievant also complains that he was not given timely counseling about the performance inadequacies noted in the EER. He says the rating and reviewing officers violated 3 FAM 523(b), which gives a rated officer the right to meet periodically with the rating officer to discuss performance and ways of improving it. They also violated 3 FAM 522.3(d), which requires the reviewing officer to discuss the rated member's performance with him. Grievant says he continually had to prod his supervisors to comply with these regulatory responsibilities, but without success. Finally, grievant contends that no performance discussion occurred on January 18, 1991, as stated in Part IV of the EER.

B. Content of the EER

Grievant alleges that the critical EER comments about his performance are inaccurate, falsely prejudicial and reflect a bias against him. There was nothing in the record, he asserts, suggesting anything less than exemplary performance until he received a copy of a November 9, 1990 memorandum from the DCM to the RSO criticizing his performance. The memorandum stated as follows:

Dating from the arrival of ARSO [REDACTED], the Ambassador and I have had serious reservations concerning his judgment and his abilities as a security officer. This lack of confidence in him has continued and was very much reinforced by his demonstrated poor judgment in his involvement with an Embassy FSN employee.

Subsequently, as senior officer present at the scene of the bombing attack on the Marine House, I was unimpressed with [REDACTED]'s response to that situation and would have expected a more take-charge approach to the many problems that confronted us. In the aftermath of the attack, [REDACTED] accompanied me to two security briefings, one with USAID employees and the second with spouses. In the briefing of the USAID employees, [REDACTED] said that he could not brief in Spanish so I did the brief along with the USAID administrative officer. In the briefing of spouses, I found [REDACTED]'s remarks to be more alarming than calming and to need significant improvement in delivery and content.

While I am not involved with [REDACTED] on a day-to-day basis, front office concerns regarding [REDACTED]'s professional competence, intemperate outbursts and judgment continue and are serious. He is not authorized to be Acting RSO and the Ambassador does not want him to accompany him in a security capacity.

[REDACTED] should be counseled concerning his professional shortcomings.

Grievant claims nothing in the record indicates that the Ambassador or the DCM had ever complained about his performance before then.

Contrasting his previous favorable EER with the criticisms of his performance in the DCM's memorandum, and in the highly critical EER subsequently prepared by his new supervisor, [REDACTED], grievant asserts that his performance could not have declined so rapidly in such a short period of time. He attributes the change to personal animosity towards him by the ambassador, DCM and by his new supervisor, [REDACTED], whom he accuses of improper sexual conduct towards his wife and other improprieties. Grievant refers to instances of misbehavior by other senior embassy officials as well,

which he suggests contributed to personal conflicts and animosities that formed the basis for their criticisms of his performance and the prejudicial actions towards him.³

Concerning his alleged improper involvement with an FSN (which was not mentioned in the EER), grievant asserts that it was never substantiated. He points out that the Bureau of Diplomatic Security (DS) dismissed the effort to bring misconduct charges against him as groundless. The evidence strongly suggests, grievant contends, that criticisms of his judgment were not motivated by an objective evaluation of his performance, but by unwarranted assumptions about his private conduct that colored perceptions of his character and performance.

Grievant also suggests that rather than performing an objective appraisal of his performance based on their own observations, as required by regulations, the rating and reviewing officers, [REDACTED] and [REDACTED] were influenced, in preparing the adverse EER, by the ambassador's and DCM's biases against him. He concludes that it was unjustified personal animosities towards him by these officials that resulted in an inaccurate and falsely prejudicial EER and curtailment of his assignment.

Grievant contests the EER criticism that he was insubordinate when he refused to accept weekend security duty. He argues that he was following the only written guidance available, a memorandum from the DCM specifically stating that the grievant was not to act as the Supervising RSO. Consequently, it was proper for him to decline the duty responsibility.

In rebuttal of the charge that his performance in briefing the American community following the Marine residence bombing was inadequate,

³ Most of these charges are explicitly referred to in grievant's "Bullet Brief" chronology of events in [REDACTED] but they are implicit throughout his submissions contained in the record.

grievant submits a statement from an American dependent who was present at the briefing, affirming that he performed well at this event. He also submits a statement from a Marine security guard praising his performance at the scene in the hours immediately following the attack on the Marine residence.

C. Curtailment of Assignment

Grievant states, "It is apparent that, through a series of administrative and procedural blunders at post [and] the resultant embarrassment by post management, it became convenient to force the curtailment of the grievant for cosmetic reasons." He asserts that there were no valid grounds for his curtailment and that his personal and professional life was made so miserable by the hostile attitudes of his superiors that he had no choice but to request curtailment.

III. The Agency

A. EER Procedural Issues

A.1. Work Requirements

The agency acknowledges that 3 FAM 522.1a requires that the rated member's work requirements be established in writing within 45 days of the start of the rating period, which in grievant's case would have been 45 days from September 3, 1990, or October 18, 1990. The actual work requirements statement was first given to grievant November 7, 1990 and it was not finalized until later in the month.

The agency points out, however, that RSO [REDACTED] discussed work requirements with grievant the first week of October, 1990, so that grievant had timely notice of his responsibilities even though the written statement was not signed until later. While compliance with the regulations was "technically deficient," there was good reason for the delay, the agency

argues, arising from "Service needs.," i.e. the bombing of the Marine House, October 10, 1990. Since grievant had, within the prescribed period, a set of articulated work requirements to which he could direct his performance, the agency concludes that grievant "suffered no harm in the delay in reducing them to writing."

A.2. Performance Counseling

The agency notes that 3 FAM 522.1a requires at least two performance counseling discussions during a rating year. When performance is unsatisfactory, 3 FAM 521.2e requires that the rated member must be advised of the areas of performance judged to have been inadequate, be given guidance to remedy those deficiencies, and then be allowed a reasonable opportunity, -- 30 to 60 days -- to correct those deficiencies prior to preparation of the EER.

The agency cites the Review Panel Statement appended to the grieved EER as evidence that grievant received timely and specific guidance about his performance deficiencies. The Review Panel notes that grievant received copies of memoranda of November 9, 1990 and January 11, 1991 regarding his unsatisfactory performance, which satisfied the 30 and 60 day requirements of 3 FAM 521.2e.

The agency also argues that other evidence in the record, such as the RSO's November 20, 1990 memorandum to embassy Personnel Officer [REDACTED], shows that grievant received timely counseling about performance deficiencies and what he needed to do to bring his performance to a satisfactory level.

Concerning grievant's assertion that no performance discussion took place on January 18, 1991, the agency notes that [REDACTED] affirmed to the Review Panel that he did discuss the January 11, 1991 memorandum with

grievant on January 18, 1991. This, plus [REDACTED]'s detailed account of that discussion (see [REDACTED] 7495), the agency contends, are convincing evidence that the disputed performance discussion did occur.

B. EER Content

B.1. Bias Issue

The agency challenges grievant's claim that there was nothing in the record suggesting dissatisfaction with his performance until the DCM's November 9, 1990 memorandum to [REDACTED]. It points out that [REDACTED]'s reply to an interrogatory mentioned criticisms of his performance even before the arrival of [REDACTED] and the beginning of the rating period covered by the grievant's EER. Grievant was counseled by [REDACTED], his first RSO, about the alleged inappropriate relationship with an Embassy FSN employee. The DCM's knowledge of this relationship contributed to her concerns expressed in the November 9 memorandum.

There were other criticisms of grievant's performance, the agency asserts. The earliest documented instance was when the ambassador told [REDACTED] he did not want grievant to travel with him because of his lack of confidence in grievant's judgment, decisiveness and Spanish language skill. Grievant was counseled about the Ambassador's criticisms, the agency states, with a focus on some of the same points raised in the grievant's EER.

In response to grievant's assertion that [REDACTED] and [REDACTED]'s unfavorable EER comments may have been in reaction to the ambassador and DCM's criticisms, the agency argues that the ambassador and the DCM had a right and a managerial responsibility to express their concerns about grievant's performance, particularly since it involved the ambassador's personal safety. Thus, it was appropriate for [REDACTED] and [REDACTED], who agreed

with the concerns, to take the ambassador's and DCM's view into account in preparing the EER.

Noting that [REDACTED] and [REDACTED] both found positive things to say about grievant's performance, the agency concludes that they were not unduly prejudiced by their superiors.

Regarding grievant's claims that his alleged inappropriate relationship with an FSN was never substantiated, the agency observes that [REDACTED], in his response to an interrogatory (February 4, 1992 [REDACTED] memorandum to [REDACTED]) confirmed that he was aware of it. The agency asserts that other embassy officials certainly were also aware of the relationship. The ambassador, for instance, in [REDACTED] 1294 of January 30, 1991, supporting curtailment of grievant's assignment, referred to grievant's "professed indiscretions with an FSN." The agency contends that a relationship between a married American Service member and an FSN colleague was certainly good cause for doubting the Service member's judgment.

B.2. Accuracy and Balance in the Grievated EER

Grievant contends that the favorable comments about his performance and potential in his previous EER refute the criticisms in the grievated EER, since it is unlikely, he suggests, that his performance would have deteriorated so greatly from one rating officer to the next. The agency responds that the previous EER is not directly relevant, but what is relevant is the accuracy and balance of [REDACTED]'s and [REDACTED]'s EER evaluation.

The Agency goes on to assert that the specific criticisms of grievant's performance are fully and amply documented in the record, showing that the content of the EER is adequately based in fact and properly balanced in presentation.

C. The Curtailment Issue

In response to grievant's charge that his curtailment was improper because there was no valid basis for it, the agency points out that a curtailment is an assignment action which is not grievable under 3 FAM 662d(1) unless the assignment is alleged to be contrary to law or regulation. Grievant does not allege that curtailment was contrary to any particular law or regulation. Under Section 504 of the Foreign Service Act, the Secretary of State has broad discretion to assign and reassign foreign service members. Grievant's curtailment orders were properly issued in compliance with existing rules and regulations at the time.

IV. DISCUSSION AND FINDINGS

The principal issues in this grievance are whether the contested EER contains falsely prejudicial material, and/or whether any violations of law, regulation or published policy were committed in the preparation of grievant's performance evaluation and work requirements, in his supervision, guidance and counseling, or in the curtailment of his assignment.

A. Grievant's accusations of bias and other improper actions by his superiors

The EER rates grievant's performance as unsatisfactory on grounds that he displayed deficiencies in professional judgment, managerial ability and interpersonal skills. Grievant's response, in essence, is that the rating is false and reflects prejudicial attitudes and bias towards him by the rating officer and other senior embassy officials, largely as the result of personal animosities and conflicts.

In support of his argument, he contends, particularly in his submissions at the agency level, that his performance could not have

deteriorated so dramatically from the time of his previous, favorable, EER, and that there is no documented evidence of his poor performance prior to the DCM's critical memorandum of November 9, 1990. The implication of his argument is that it was only with the arrival of the new RSO, [REDACTED], that grievant's performance began to be regarded negatively.

That is plainly not the case. The record contains substantial and credible evidence of deficient performance by grievant prior to November 9, and prior to [REDACTED]'s arrival, and shows that his supervisors brought the performance problems to grievant's attention.

The first instance of this was grievant's alleged sexual involvement with an embassy foreign service national employee. The matter arose during the previous rating period and was the subject of a counseling session between grievant and his then rating and reviewing officers, [REDACTED] and [REDACTED] on August 13, 1990. The record contains a memorandum from [REDACTED] to grievant dated August 14, 1990, documenting that they had counseled him for poor judgment in becoming involved with the FSN. The memorandum mentions that grievant's actions had negative security implications which could not be tolerated, and concludes that:

You must understand, that your judgment displayed to date has been faulty. This situation affects your role within this Mission and your ability to satisfactorily fulfill your responsibilities.

Grievant contends that his involvement with the FSN was never substantiated. However, there is nothing in the record to indicate that he denied the involvement at the time of the August 13 counseling session or at any other time during his [REDACTED] assignment. The record shows that the ambassador and DCM were aware of and concerned about the matter. In [REDACTED] 1294 of January 30, 1991, the ambassador mentioned grievant's

"professed indiscretion with an FSN." The DCM states that as her concerns about grievant's behavior mounted, she consulted with [REDACTED] (i.e. in the previous rating period) and later [REDACTED], as well as with embassy and regional medical authorities.⁴

The situation was considered serious enough that when the possibility arose that the FSN might be pregnant, the embassy communicated with the Bureau of Diplomatic Security as to whether grievant's actions constituted misconduct. When it appeared that the FSN was not pregnant, however, DS informed the embassy that the counseling of grievant appeared to be the appropriate remedy.⁵ Thus, misconduct charges were not pursued.

Grievant suggests that this and other criticisms of his conduct and performance were the result of personal animosities towards him and that several of his superiors themselves engaged in misbehavior. For example, he alleges that his supervisor and rating officer, [REDACTED], made sexual advances toward his wife and made suggestive sexual remarks to her in grievant's presence. This led to a personal conflict which motivated [REDACTED] to prepare the critical performance evaluation, according to grievant.

We are not persuaded by grievant's argument that senior embassy officials were biased against him. He has provided no evidence beyond his own word to substantiate his allegations of improper behavior by others. His "Bullet Brief" chronology of events is uncorroborated by any independent evidence, either from grievant's wife or from any other person who might have had knowledge of the events. Grievant presents a favorable statement on his character from a member of the embassy military attache group (Lt.

⁴ [REDACTED] telegram 2229 of July 20, 1993 contains the DCM's views.

⁵ State Department telegram 403441 of November 27, 1990.

Col. [REDACTED], but it is general and does not refer to any of the events or incidents in this grievance.

Moreover, the "Bullet Brief" chronology is highly selective. It refers to various encounters by grievant and his spouse with the rater, reviewer, ambassador and DCM, but fails to mention most of the events which led to the EER criticisms of his performance. It contains no reference, for instance, to the bombing of the Marine residence, grievant's briefing of the American community afterwards, or to grievant's differences with the ambassador over travel, but it does reference incidents which allegedly occurred on nearby dates.

Nor does the "Bullet Brief" or any of grievant's other submissions contain anything unfavorable about the previous rater, [REDACTED], or [REDACTED]'s personal integrity. [REDACTED] conducted the August 13, 1990 counseling session regarding grievant's involvement with the FSN, and he has specifically reconfirmed that he was aware of the relationship.⁶

Accordingly, we find the "Bullet Brief" incomplete and unpersuasive evidence that misbehavior or animosity towards grievant was the motivation for a falsely prejudicial EER.

The record does not indicate why [REDACTED] and [REDACTED] proceeded to prepare a favorable EER on grievant's performance, in light of their concerns about the FSN matter, but the fact that they did further undermines grievant's intimation that the relationship was the unsubstantiated allegation of biased embassy officials. [REDACTED] and [REDACTED] would have been constrained from preparing an unsatisfactory rating on grievant by the 30 to 60 day rule of 3 FAM 521.2e, however, and it probably was understood that

⁶ Memorandum of February 4, 1993 from [REDACTED] to Per/G - [REDACTED].

grievant would have been criticized in the EER if he did not end his relationship with the FSN.

A second area of performance problems also occurred well before the November 9 memorandum, involving grievant's security-related travel with the ambassador. The record contains evidence of two separate events. The first occurred during the previous rating period when the ambassador, displeased by grievant's performance on a motor trip into the [REDACTED] countryside, informed [REDACTED] that he did not want grievant to accompany him on future trips.⁷

A similar incident occurred on September 14, when grievant warned the ambassador that he could not go on a trip with the [REDACTED] president without his personal security guard. The ambassador proceeded to go on the trip, and after returning, he discussed the matter with RSO [REDACTED] and reiterated that he did not want grievant to accompany him on future trips. [REDACTED] says that he then met with grievant and counseled him on what the appropriate response should have been.⁸ Grievant does not dispute that the two incidents involving the ambassador's travel occurred.⁹

Accordingly, we find grievant's argument that there was no evidence of his unsatisfactory performance prior to the DCM's November 9 memorandum completely without foundation. The record shows that serious performance-related concerns occurred earlier and were raised with grievant, including his involvement with the FSN employee. It also is clear that grievant's

⁷ In a memorandum of February 28, 1992, [REDACTED] says that it was after grievant's second or third trip with him that the ambassador made this request. According to [REDACTED] 2530 of December 20, 1992, the DCM was present when the ambassador made this request to [REDACTED]. Grievant's last recorded trip with the ambassador was on August 22, 1990.

⁸ [REDACTED] 7495 of May 8, 1992 contains [REDACTED]'s description of this event.

⁹ As previously noted, grievant's "Bullet Brief" chronology does not mention these incidents.

superiors were seriously and justifiably concerned about his judgment as a result of these events.

As a result of these concerns, the ambassador ordered, as indicated in the November 9 memorandum, that grievant should not be allowed to be in charge of embassy security in the RSO's absence. Grievant reacted strongly when he learned that authority to be acting RSO would be removed from his work requirements. ██████████ 3865 of March 9, 1992, for instance, describes grievant's temper outburst with the DCM in early November because he had been denied the acting RSO responsibility.

B. EER Content

We now turn to the content of the contested EER itself. We will address each of the four examples of grievant's unsatisfactory performance given in Section III of the rating portion of the EER.

1. [Grievant's] supervision of the COM protective detail led the Ambassador to request that he not be assigned to accompany him in a security capacity during future trips.¹⁰

The record indicates that the ambassador made this request both to ██████████, and before him, ██████████. It is mentioned in the November 9 memorandum from the DCM to ██████████¹¹ Grievant does not attempt to explain the circumstances or rebut the criticism. Instead, he devotes much attention in his grievance submissions to an embassy policy adopted at about the same time making it unnecessary for American security personnel always to accompany the ambassador on out-of-town trips. We find no logical connection between this policy and the ambassador's well-documented order

¹⁰ COM stands for Chief of Mission

¹¹ ██████████'s statement in ██████████ 11596 of August 19, 1991 says he was called to the ambassador's office on November 17 and told that grievant was not to accompany the ambassador on trips.

excluding grievant from all such trips. Based on the evidence, we have no reason to find the cited EER criticism unfair or inaccurate.

2. . . . on several occasions, [grievant] engaged in strong emotional outbursts that gave the appearance he had lost self-control. These outbursts caused concern to those around him for their safety as well as reinforced doubts as to his reliability in stressful or crisis situations.

One such instance is recorded in the DCM's statement that she was frightened by grievant's angry confrontation with her in a hallway. The record also contains evidence of discussions among senior officials, particularly the DCM and embassy health officials, regarding grievant's mental stability as the result of his outbursts. The embassy mental health counselor, for example, pointed out that grievant carried a weapon and could be dangerous in a stressful situation.¹²

Grievant denies that he engaged in intemperate outbursts, but he does not explain the circumstances or provide any independent evidence to contradict the observations of the DCM, ambassador and others on his temper, except for his general defense that his superiors were biased against him. Consequently, we have no basis for ruling this comment inaccurate or unfair.

3. Their personal experience in dealing with ██████████ led the Ambassador and DCM to direct that under no circumstances would he be designated Acting RSO.

This statement of fact is documented in the DCM's memorandum of November 9, 1990 to the rating officer and confirmed by the ambassador's statements. The ambassador's decision clearly was the result of his and the

¹² ██████████ 7495 of May 8, 1992.

DCM's concerns about grievant's judgment and management abilities, arising from the events referred to earlier.

In light of our earlier finding that concerns about grievant's judgment were justified by his performance deficiencies and his poor judgment on several occasions, we have no basis for ruling that this statement is unfair or falsely prejudicial.

4. Despite counseling, [grievant] continued to exhibit poor professional judgment. For example, [REDACTED] on his own initiative and without consulting with the Acting RSO decided he was not eligible to accept the responsibility of security weekend duty officer. At close of business on Friday, he informed the Marines that the RSO, who was on leave, had duty for the weekend. Both the RSO and Acting RSO were unaware of this action until the Detachment Commander contacted the RSO at home later that evening, stating that the Marines were confused as to whom to contact--a situation which could have had serious implications in case of an emergency. Such incidents eventually led to a total lack of confidence in predicting his willingness or ability to perform.

The event in question occurred on January 4, 1991, according to a January 11, 1991 memorandum from [REDACTED] to the DCM, in which [REDACTED] explained his concerns about grievant's performance as follows:

The duty officer is not to assume the role of the RSO, but is primarily to answer and respond to routine security matters such as after-hours questions from the MSGs, employees, or local guards. Any incident of a threat or terrorist nature is always to be referred directly to the RSO or Acting RSO. [REDACTED] was aware of this guidance.

. . . he [grievant] had already been informed that he was eligible for duty officer even though he could not be acting RSO. As an example, I mentioned the fact that the Embassy duty officer is not the acting Ambassador. Additionally, [REDACTED] had previously assumed the responsibility of duty officer subsequent to his being notified that in my absence he would not be the Acting RSO. I informed [REDACTED] that he was not precluded from being the duty officer and that he had the duty that weekend.

Grievant justified his actions in a January 31, 1991 memorandum

to the Embassy personnel officer [REDACTED]

. . . my Work Requirements Statement was revised eliminating the requirement for me to serve as Acting RSO in the absence of the RSO. On the day in question, [REDACTED] was on vacation and [REDACTED], the Acting RSO, was out of town. . . . Thus, my acceptance of Duty Officer would have left me as Acting RSO, which clearly defies the DCM's Executive Order Memorandum dated November 9, 1990, and my Work Requirements Statement. I could not accept this obvious contradiction without written support.

Grievant's behavior in this instance reflected his resentment at being denied the acting RSO responsibility, but that does not justify his actions, in our view. As a trained security officer, grievant surely knew that the weekend duty responsibility was different from that of acting RSO. We see nothing unfair or unreasonable in the conclusion that this incident added to his supervisor's lack of confidence in his judgment and reliability. In fact, it seems possible that this incident finally exhausted the ambassador's patience. Only a few days later he strongly urged grievant to curtail his assignment.

The reviewing officer's portion of the EER contains an additional criticism of grievant's performance. Following several positive comments on aspects of his performance, the reviewer states:

The foregoing notwithstanding, the Rating Officer, senior mission management, and I have felt it necessary to counsel [REDACTED] regarding his demonstration of lack of judgment and performance in stressful situations. These situations range from the examples cited by the RSO herein to poor performance in briefings of community members as observed by myself. [REDACTED] has been provided with verbal counseling as well as written specifics in these matters.

Grievant's performance in the briefings is described in a memorandum of November 9, 1990 from the reviewing officer, [REDACTED] to [REDACTED]. It also is mentioned in the DCM's November 9 memorandum. [REDACTED] memorandum

says grievant appeared highly nervous during the briefing of American community members and that several of them reported afterwards that they were made more nervous by his attempts to explain the security implications of the bombing.

Grievant attempted to counter these criticisms in a November 14, 1990 memorandum to [REDACTED], in which he stated:

The allegations of hesitancy of speech, tremors and nervousness are conjectures on the part of the Reviewing Officer. In my opinion my deliveries at the briefings was [sic] forthright and honest.

. . . I was shocked and dismayed by the statements you allege your wife made. I also received feedback from my wife . . . She told me that after speaking to teachers and mission dependents who attended an exercise class with her that evening, they felt my security briefings had positive connotations . . .

Grievant also submits a statement from an American dependent present at the briefings who says that she did not receive an unfavorable impression of grievant's performance.

Obviously these were all individual subjective reactions to unusual and stressful events. Despite the conflicting views, however, we do not find that grievant's explanation (which refers to his wife's and other dependents' reactions) augmented by the statement of one American community member, is adequate to disprove the professional judgment of two senior embassy officials, the DCM and the Administrative Counselor.

We conclude that grievant has failed to establish that the specific examples of unsatisfactory performance referred to in his EER are inaccurate or falsely prejudicial. To the contrary, we find the rating of unsatisfactory based on poor judgment, management ability and interpersonal skill amply

justified by the evidence in the record.¹³ We understand that these events occurred during a turbulent period in the embassy, particularly following the attack on the Marine residence, and specifically with regard to security, so that tempers and emotions were running high. However, grievant has submitted virtually no evidence to substantiate his wide-ranging accusations that bias towards him by the ambassador, DCM, EER rater and reviewer explain their attitudes towards his performance in these stressful circumstances rather than legitimate concerns about his judgment and reliability. The well-documented deficiencies in his performance led to his superiors' loss of confidence in him, and eventually to curtailment of his assignment.

C. Procedural errors in preparing grievant's EERs.

Grievant alleges procedural errors in the preparation of his EERs, primarily, that his work requirements were not prepared within the period required by regulations. The record confirms that work requirements were not prepared for the period covered by the previous EER. However, that EER was not unfavorable and we find no harm that grievant suffered as a result of the error.

The new rating period began on September 3, 1990, at about the time the recently arrived RSO, [REDACTED], took complete charge. Thus, new work requirements (WRS) were due by October 18. The WRs were not finalized until late November. Under normal circumstances, that would have constituted a violation of the pertinent regulation, 3 FAM 522.1a. However,

¹³ A number of other incidents involving questionable judgment or poor performance by grievant are documented in the record, although they are not specifically mentioned in the EER. They add further weight to the unfavorable assessment of grievant's judgment, managerial ability, and interpersonal relations.

the situation was not normal and there were extenuating circumstances that mitigate the failure to complete the WRs within 45 days.

The first was the attack on the Marine residence October 10, 1990, eight days before the WRs were due. According to the record, grievant's work responsibilities were discussed with him by the rater in early October, but the attack interfered with their written completion. Since security personnel were heavily engaged in post-attack security matters, we believe that some of the delay was justifiably attributable to this unusual event.

A second, and more important extenuating circumstance, was the managerial problem which grievant's supervisors faced in preparing and presenting to him work requirements that reflected the ambassador's orders that he not be acting RSO, i.e., the second ranking security officer in the embassy. While there were no work requirements prepared for grievant's first rating period, Section I of the EER for that period spelled out his responsibilities, which included that of acting RSO in the absence of the RSO. Confronted with the removal of this responsibility in the November work requirements, grievant could have been expected to react very negatively, and he did, in fact, express his anger at this demotion to the rater, reviewing officer and DCM in a series of meetings and encounters. This culminated in the counseling sessions of November 9, the DCM's critical memorandum of that same date, a similar critical memorandum by the rating officer, [REDACTED], and [REDACTED]'s counseling statement of November 20.

Thus, there were legitimate reasons for the delay in finalizing grievant's work requirements. Although it is not clear precisely when the ambassador ordered the reduction in grievant's authority, it probably was after grievant's perceived unsatisfactory performance in the wake of the attack on the Marine residence. In effect, grievant's work responsibilities

changed in the period, albeit under unusual circumstances. In our view, the 45-day requirement of 3 FAM 522.1a is premised on normal working circumstances and is not meant to apply regardless of unusual situations affecting an employee's responsibilities and relevant management considerations. Moreover that section also provides for changes in work requirements as appropriate.

Consequently, we find no violation of 3 FAM 522.1a. Grievant was verbally informed of his work requirements within the 45-day period, but circumstances, including the bombing incident, and the demotion in his responsibilities ordered by the ambassador, properly delayed their being reduced to writing. In any event, we find no harm to grievant resulting from the failure to complete his WRs within 45 days. The harm he suffered was the result of his own performance deficiencies in specific situations, not the absence of written work requirements or adequate supervision and counseling.

Similarly, we find nothing to substantiate grievant's allegations that his supervisors violated regulations by failing to discuss preparation of WRs with him (3 FAM 523(a)), declining to discuss his performance with him (3 FAM 522.3(d) and 523(b)) or by failing to give him timely counseling of his performance deficiencies.

Grievant had the opportunity to discuss his work requirements with the rating officer in early October 1990. Draft written work requirements reflecting the reduction in his responsibilities were given to him in early November. He reacted negatively to the change, but had the opportunity to discuss it in several meetings with the DCM and his supervisors on November 9.

Grievant certainly received adequate and timely counseling on his performance deficiencies, in our view. Although it occurred prior to the period covered by the contested EER, the counseling session with [REDACTED] and [REDACTED] on August 13 clearly put him on notice that there were concerns about his judgment and conduct. He continued to demonstrate poor judgment, however, such as in his ill-considered warning that the ambassador should not travel with the [REDACTED] President without his personal security guard.

This, and grievant's perceived inadequate performance after the Marine house bombing, resulted in the November 9 counseling sessions, when he was notified that he would be denied authority to be acting RSO. This was over 100 days prior to the February 22, 1991 EER and over 70 days prior to his curtailment request. Grievant, nevertheless, continued to demonstrate poor judgment and unsatisfactory performance, especially in his irresponsible conduct regarding weekend duty on January 7. He was counseled on this on January 11, more than 30 days prior to the EER. We find that grievant had more than adequate guidance, counseling and performance discussion, and the evidence is overwhelming that he nonetheless failed to improve his performance. These well-documented events also disprove grievant's contention that he could not get his supervisors to discuss his performance with him.

D. Grievant's curtailment

Grievant contends that his curtailment was improper because it was the result of unfair and biased attitudes and actions towards him by his superiors. We believe the record amply demonstrates that grievant lost his supervisor's confidence due to poor, and at times irresponsible, performance. This explains and justifies his decision to seek voluntary curtailment,

admittedly at the ambassador's strong urging. Voluntary curtailment was appropriate and fully consistent with applicable regulations, in our view.

E. Conclusions

We find that the preponderance of the evidence substantiates the criticisms of grievant's performance contained in the EER, and that the events and circumstances justified his decision to seek curtailment of his [REDACTED] assignment. We also find no violation of applicable law and regulation by the agency.

During the course of proceedings, grievant repeatedly sought discovery of documentary material which he contended was necessary to pursue his case. Several times he requested the Board to compel the agency to provide material or to search for material which might exist. The Board thoroughly reviewed these requests, and found that the information he sought was neither relevant nor material to the issues in this grievance. He sought, for example, detailed information on the embassy decision to not require American security personnel always to accompany the ambassador on trips, a matter which was irrelevant to grievant's problems with the ambassador over *his* travel on such trips. Grievant sought alleged medical records on the possible poisoning of his wife, a matter of no relationship to the grievance issues.

Grievant persistently sought further documents regarding the consideration of misconduct charges against him due to the possible pregnancy of the FSN. Documents already in the record amply explained this issue, however, and clearly indicated that the misconduct charges were not pursued. There is no indication that additional documents on this matter (which is not mentioned in the contested EER), even if they existed, would have added materially to the record. Although the FSN issue undoubtedly

contributed to concerns about grievant's judgment, there were plenty of other examples of his poor performance which justified his superiors' loss of confidence in his judgment and reliability.

Consequently, after lengthy and thorough consideration of grievant's repeated motions to compel further discovery, the Board ruled that the information requested was irrelevant and immaterial, and proceeded to close the record in this case. We are confident that the additional material sought by grievant, even if it existed, would not materially affect our determination that the grievance is without merit.

IV. DECISION

The grievance is denied.

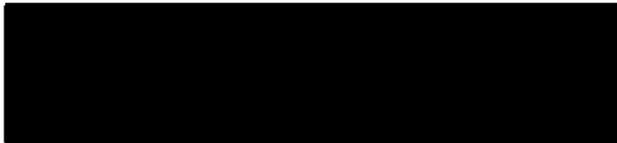
For the Foreign Service Grievance Board.



Leroy S. Merrifield
Presiding Member



G. Richard Monsen
Member



James S. Landberg
Member