

DECISION (EXCISION)

I. THE GRIEVANCE

Grievant {name} is an FP-04 career Foreign Service specialist in the Department of State (Department). She was last promoted in 1988. She filed a grievance with the Department in 1995, alleging agency error in omitting the documentation of a 1994 award from her file and in poorly executing expunctions from past EERs. She also claimed that the participation on her 1992 Selection Board of a previous supervisor, {name 2}, was a prejudicial error. The agency found no error associated with {name 2}'s participation but concluded that the award had been omitted. It inserted the award documentation in grievant's file, substituted copies for original pages in her 1989-90 EER, and convened a reconstituted 1994 Selection Board. The reconstituted board did not recommend grievant for promotion.

Grievant's appeal to this Board presents these claims: (a) {name 2}'s participation in the 1992 Selection Board review of grievant's file was prejudicial error; and (b) flaws in the appearance of EERs remain and have prejudiced the review of grievant's file since 1988. As remedy, grievant seeks a directed promotion to Class 3, effective as of the date a majority of her colleagues in Class

4 (presumably those promoted to Class 4 in 1988) were promoted. She also seeks further corrections to her record, an appropriate overseas assignment, and attorney fees.

II. BACKGROUND

Grievant joined the Department in 1976, as a Foreign Service secretary, and converted to the Civil Service in 1979. In 1986, she became a Class 6 Foreign Service specialist, was promoted to Class 5 in 1987, to Class 4 in 1988, and was tenured in 1989. In 1986-1988, she served in {post 1} and in {post 2} from 1988 to 1991.

In {post 2}, her supervisor was the regional personnel officer, {name 2}. {Name 2}, as rater, wrote grievant's 1989-1990 EER, which was the subject of a grievance filed in August 1990. In 1992, the Board found the EER to be flawed and directed the Department to amend it, but declined to grant grievant the relief she sought, *i.e.*, expunction of the entire EER, a time in class (TIC) extension, and the establishment of a reconstituted 1990 board. (1) The Board noted the difficult relationship between grievant and {name 2} and concluded that {name 2} bore the primary responsibility for it. {name 2}, we said, provided "poor supervision" and "was deficient in maintaining an appropriate relationship."

1. G-91-024-S-17 (March 16, 1992)

The EER subsequently was redacted by the Department, but the redaction, grievant contends, was not properly done. The 1990-1991 EER, also written by {name 2}, was the subject of a second agency-level grievance. In 1993, the Department agreed to expunge it from grievant's file, and a "gap memo" was substituted for it.

In 1992, {name 2} was appointed to serve on the selection board that was to review grievant's candidacy for promotion, and his membership on the board was announced in a Department notice.⁽²⁾ At the time, grievant was working in Washington, in the (office 1). She did not request that {name 2} not be permitted to review her file, pursuant to her right to do so under 3 FAM 566, App. A, III.C.3f. ⁽³⁾ In the summer of 1992, several months after the Grievance Board's decision in G-91-024, the selection board met and reviewed grievant's redacted file, but did not recommend her for promotion.

{Grievant} filed a grievance with the Department in February 1995, alleging the following errors: {name 2}'s 1992 Selection Board participation, the absence from her file of her 1994 Meritorious Honor Award, and the existence of flaws in the appearance of several EERs in her file. Among other relief, she requested retroactive promotion.

2. The Department notice is not in the Record of Proceedings, and its date of circulation is not known to the Board. Grievant, however, does not dispute that it was promulgated in timely fashion. Rather, she contends it was not distributed to her workplace.

3. Appendix A sets the precepts for the selection boards, and Part III concerns briefings and materials for the boards.

The Department's decision of June 29, 1995 declined to direct a promotion, but it provided for the placement of the award documentation in her file, and the file's review by a 1994 evidentiary FP-04 Selection Board. (4) It also provided for the correction of two of several alleged flaws in the appearance of the EERs. Grievant appealed to this Board in August 1995. She sought discovery, and in compliance with the Board's Order of November 29, 1995, the Department provided her with the responses to interrogatories, concerning {name 2}'s participation, from four members of the 1992 Selection Board. Her appeal seeks a directed promotion, as well as further correction of alleged flaws in the appearance of the EERs. (5)

III. POSITIONS OF THE PARTIES

The Grievant

Grievant contends that she had no notice of {name 2}'s appointment to the 1992 Selection Board. The Department notice announcing it was not delivered to the office in which she worked. Her colleagues in that office have stated that the office in which she worked. Her colleagues in that office have stated that

4. An evidentiary board of this type is frequently referred to as a "reconstituted" board. Its relative ranking of a grievant provides a basis for determining what a previous board would have done, if it had not been presented with a flawed file. Grievant's board met and ranked her sixth of six candidates for promotion.

5. The Board denied grievant's request of April 17, 1996 to reopen the Record of Proceedings to include allegations of error concerning materials unrelated to those that are the subject of this appeal.

Department notices frequently were not received, and one said that he did not recall having seen or having received the notice in question. Accordingly, grievant argues that she had neither actual nor constructive notice of {name 2}'s appointment and cannot be estopped from protesting {name 2}'s participation after the 1992 Selection Board had met.

Grievant argues that {name 2} had a duty to recuse himself from participation in the review of her file. The Department's precepts, grievant says, require that selection board members withdraw from participation in the consideration of an individual, when they believe they "cannot render a fair and unbiased judgment." (See Precepts, III.C.3f.) It must be concluded that {name 2} knew of grievant's complaints about him. He was the subject of three separate grievances filed by grievant in 1990. Moreover, he had been accused of retaliating against her. He sought her curtailment from post.

Given their stormy relationship in {post 2} and {name 2}'s extremely negative view of grievant's performance, the stage was set for a biased review of her file in 1992. He could not honestly have believed that he could render a fair and unbiased judgment about her in 1992. {name 2}'s mere presence during the discussion of grievant's file by the panel constituted "consideration" of grievant, under circumstances where he was obligated to withdraw.

Grievant contends that instead of recusing himself, {name 2} did in fact participate in the review of her file to the prejudice of her candidacy for promotion. She cites the responses to interrogatories of two selection board members, {name 3} and {name 4}. {name 3} said that {name 2} ranked grievant low and that she gave more weight to his comments when they related to anyone in his specialty (*i.e.*, grievant). She recalled his comment about how difficult grievant was; however, she stated that his comment occurred after promotion recommendations had been written down. Grievant says that {name 4} recalled that {name 2} participated in the discussion of grievant, but {name 4} could not remember specifics.

{Name 2}'s participation was clearly fatal, grievant argues. Other Board members were naturally and disproportionately influenced by his views, and the negative attitude he displayed towards her during the review dictated the outcome. His vote to rank her low, says grievant, no doubt was interpreted as confirmation of her damaging EERs. Given his knowledge of matters deleted from grievant's folder (the expunged EERs authored by him), his participation invalidated the proceedings. *Gaiduk v. United States*, (D.C.D.C., C.A. 86-2703, August 13, 1987).

A reconstituted 1992 Selection Board could not provide an evidentiary basis for concluding that grievant would not have been promoted in 1992, if {name 2} had not participated in the review of her file. Her record has been too adversely

affected by a long series of administrative errors, including the expunction of her flawed 1991 EER-which would have been the most current EER for overseas service during the 1992 review.

As to deficiencies in the appearance of EERs in her file, grievant asserts that page 4 of her redacted 1990 EER should have been retyped in its entirety. Several dates appear oddly situated, and the page shows more than one typeface. In addition, a "white out" of a sentence from her 1988 EER was ineffective; one can still read the deleted comment, which is negative. Finally, although the date of the 1993 gap memo concerning the absence from her file of her 1991 EER was, as she requested, deleted by the Department pursuant to its June 29, 1995 grievance decision, the date presumably was seen by selection boards prior to the deletion-to grievant's prejudice.

The Agency

The Department contends that the statements of the members of the 1992 Selection Board provide no evidence that {name 2} spoke or acted improperly during the review of her file. It notes the recollection of one member that {name 2} made a comment about grievant only after her "group" was discussed and reviewed, and promotion recommendations had been made in writing. The member, it said, was alert to whether {name 2} would comment on the EERs he had written, but {name 2} remained silent "until the vote was in." It was proper

for {name 2} to remain silent, because if he volunteered information not of record, he would have violated the selection board's instructions.

The Department believes the *Gaiduk* decision is inapposite, and distinguishes it on its facts. The regulations allow the participation of a former supervisor of a candidate, even where a poor relationship existed, unless the candidate seeks his exclusion. Grievant did not request that {name 2} be excluded from consideration of her file.

The Department argues that grievant is estopped from protesting {name 2}'s presence on her selection board, since she failed to move to exclude him when his appointment was made public. Her claim of lack of notice of his appointment should not be accepted, because she was a career personnel specialist, and as such had a responsibility to learn of selection board composition and inform others.

The Department is silent with respect to grievant's allegations of flaws in the appearance of EERs in her file.

IV. DISCUSSION AND FINDINGS

The principal issue presented by this grievance concerns {name 2}'s conduct during the review of grievant's file by the selection board of which he was a member. Our review of the pertinent evidence persuades us that he did not act improperly.

{Name 2} clearly was present during the selection board's consideration of grievant's file. He did not withdraw from consideration of grievant's candidacy. Instead, he reviewed her file and cast a vote. In this sense, he clearly participated in her review. The weight of the evidence indicates, however, that he remained silent while he and his fellow members individually reviewed grievant's file. It is not clear whether there was a discussion of the files in grievant's group in the first instance, although the responses from the members suggest that some discussion took place. (6) In any event, if there was any discussion of grievant's file before the taking of a vote, the evidence indicates that {name 2} said nothing.(7) Only after the board had reached a conclusion, *i.e.*, not to promote grievant, did {name 2} make a comment. But the votes were in and counted, and his remark in no way influenced the decision of his fellow board members.

To be sure, to the extent that during the course of board membership his colleagues found him to be credible and sensible, their view of the EERs he had written on grievant would likely be influenced. But that is a circumstance which is

6. Grievant obtained responses from board members to the question: "Did {name 2} participate in the Board's discussion of {Grievant}?" The question assumed that there was a discussion, but did not seek to prove it. It is the general practice of boards to discuss files after a vote has been taken, and files are divided into categories. The responses, therefore, do not conclusively establish that there was, in fact, a discussion before a vote.

7. One member, observing that {name 2} had written EERs on grievant, "waited to see if [he] would comment on the EERs but he did not until the vote was in." A second member was similarly alert to whether {name 2} would say something, but recalled no "unusual discussion." A third member had the impression that {name 2} excused himself from the review of grievant's file--which was the board's practice where an EER had been prepared by a member.

inherent in the selection board process and is not an uncommon occurrence. More important, it is not a circumstance that is prohibited by law or regulation. What is prohibited is a board member's introduction of information not of record into the decision-making process in a manner other than as prescribed in the precepts. But, as stated, {name 2} did not do so. (8)

The regulations clearly contemplate the participation of past supervisors in the consideration of an individual's file, and {name 2} was not compelled to withdraw from the consideration of grievant's file-although there was ample reason for him to have concluded that it would be the wiser course. Part III.C.3g of the Precepts provides for the withdrawal by a member who believes that he cannot be fair and impartial in the review of a file. It is a matter of the member's discretion and judgment, which the regulation says shall be respected. Even if this Board were prepared to review {name 2}'s exercise of discretion in 1992, and were disposed to disagree with it, we would not thereupon find harmful error, since his silent participation did not prejudice the deliberations of the selection board. (9)

8. It is the Board's experience that selection board members are particularly alert to the introduction into their deliberations of improper information and take their instructions very seriously. The presumption of honesty and integrity of selection board members is especially pertinent in this regard. See G-94-38 (August 23, 1995).

9. Even had {name 2} recused himself, the critical comments he wrote about grievant would have remained. He simply would not have reviewed her file or voted on her. The vote of the board members not to promote her was, it appears, unanimous. In this sense, {name 2}'s silent participation in the consideration of her file would appear to have had the same impact on the outcome that a recusal would have had.

Gaiduk v. United States, supra, does not require a contrary conclusion. In *Gaiduk*, the employee had been denied a regular assignment in violation of 3 FAM 143. Indeed, he had been denied a permanent overseas assignment on twelve occasions. Facing selection out in consequence of a record of performance that could not demonstrate a broad range of experience and responsibility, he grieved. His grievance was upheld, and in due course three reconstituted selection boards were convened, according to the District Court, “to review the findings of the Grievance Board.” Judge Richey held that their reviews were not free from the possibility of bias, for the following reasons: One, the “file” had large gaps, and had not been retyped after an offending Inspector's Evaluation Report, critical of Gaiduk, had been removed. This would reveal to reconstituted selection board members that Gaiduk was the grievant who had necessitated their creation. Two, a member of one of the reconstituted boards knew of the IER, and this knowledge undermined “the impartiality that the Foreign Service Act guarantees to grievants in the adjudication of their claims.” *Id.* at 7. (As authority for this proposition, the District Court cited that section of the Foreign Service Act that lists the qualifications of Grievance Board members, not selection board members). Three, the reconstituted boards compared Gaiduk only with officers who had been promoted, rather than with a mix of those who had and had not been promoted.

Given these several denials of procedural safeguards, Gaiduk was entitled to a remedy, which the Court directed the Grievance Board to fashion.

The circumstances in the matter before us are substantially distinguishable from those in *Gaiduk*. In *Gaiduk*, there were multiple concerns with procedural errors, only one of which concerned the knowledge by a member of a reconstituted board of damaging material that had been expunged from the employee's file. Here, there is only one concern: {name 2}'s personal experience with grievant, reflected, of course, in the material he had authored which was deleted from grievant's file. Second, in *Gaiduk*, one of the errors that undergirded the Court's decision was the consideration by the reconstituted boards solely of promoted officers, along with Gaiduk's file. But here, grievant's file was reviewed along with all others in her class; she was not competing against a selected group. (10) Three, the record before us is clear that {name 2}'s personal knowledge of and experiences with grievant did not corrupt or in any manner affect the deliberative process of the selection board. In *Gaiduk*, however, there is no indication-as there is here-that the personal knowledge of one member had no impact on the deliberations of the board; the District Court could not foreclose the possibility that the process had not been tainted. Finally, *Gaiduk* should not be construed to hold

10. The Department has advised us that reconstituted boards now see files of employees above and below the promotion cutoff line. Agency submission dated September 21, 1994 in G-93-69 (1994).

that a selection board member with personal knowledge of information adversely reflecting on an employee but which is not in the record, may not for that reason alone participate in the Board's consideration of the file. Such an interpretation would put the decision in conflict with the Precepts, which prescribe the parameters of such participation. (11) *Gaiduk*, of course, made no claim that the regulatory framework governing the selection board process was flawed.

We note also that the Court of Appeals in *Harter v. United States*, 871 F.2d 1140 (D.C.Cir. 1989) upheld the use of a reconstituted board that compared the employee's file to those “of the lowest qualified candidates who were promoted in Harter’s class.” The court heard and rejected the employee’s argument that the files of six officers who had been promoted were not an appropriate {name 3} section of his class, holding that it went to the evidentiary weight to be given to the ranking of the board, rather than to its admissibility. Thus, *Harter* declined to endorse the *Gaiduk* conclusion with regard to the composition of reconstituted boards and, thereby, narrows *Gaiduk's* value as precedent. (12)

11. While *Gaiduk* concerns the knowledge by a member of material deleted from the file (and therefore, certifiably prejudicial) we think that situation is essentially indistinguishable from one where a member knows of circumstances clearly adverse to the employee's interest whether or not ever recorded in an EER. The key question in both instances is whether the information was improperly introduced into the deliberative process and thereby corrupted it.

12. We note also some apparent confusion in *Gaiduk* with respect to roles of reconstituted boards and the Grievance Board. The District Court apparently thought that reconstituted boards review the findings of this Board which, of course, is not their role. Second, in discussing the right of an employee to an impartial consideration of his candidacy for promotion by a selection board, the District Court cited that section of the Foreign Service Act that lists the necessary qualifications for Grievance Board membership.

The remaining issue concerns the perceived flaws in the appearance of two EERs, specifically, page 4 of grievant's 1990 EER and a page with a line "whited out" in her 1988 EER. The possible prejudicial impact upon selection boards in 1994, and possibly 1995, of seeing a date on a gap memo concerning her 1991 EER is also raised. Grievant contends that these errors, taken together with others over the years, prejudiced her advancement in the Foreign Service and require her directed promotion.

In our view, the 1990 EER redaction to page 4 was effected satisfactorily. The concerns with the 1988 EER were not raised in a timely fashion. In any event, we note that grievant was promoted to class 4 in 1988, and presumably the 1988 EER was a significant influence on the decision. The gap memo date was presumably not seen by the reconstituted 1994 board and may not have been seen by the 1995 board either, since the Department agreed to its deletion in its decision of June 29, 1995. In any event, we think the presence of the date on the memo did not constitute prejudicial error.

Accordingly, there is no basis for directing grievant's promotion or providing other relief.

V. DECISION

The grievance is denied.