

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[REDACTED]
Grievant

Record of Proceedings
FSGB No. 2003-034C

And

July 30, 2010

Department of State

**DECISION AND ORDER ON
REMAND
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Ira F. Jaffe

Board Members:

James E. Blanford
Garber Davidson

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Bridget R. Mugane, P.C.

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: On remand from the United States Court of Appeals for the District of Columbia Circuit, the Board reaffirmed its earlier holding that grievant's 2000 and 2001 EERs contained material and prejudicial omissions (undiagnosed mental illness that contributed to much of his critical performance and conduct during the rating periods in question) and were violative of Section 1101(a)(1) of the Foreign Service Act. Additional actions that were predicated upon and resulted from those invalid EERs – being low ranked, being referred to a Performance Standards Board, being recommended for separation, and being advised of separation from service – were found to similarly violate Section 1101(a)(1) of the Act. The basis for the holding, however, changed following the Court of Appeals' decision. In light of an Order bifurcating the merits and relief issues, no determination of the scope of appropriate relief was made by the Board at this time.

OVERVIEW

Grievant received EERs in 2000 and 2001 that resulted in his being low-ranked and, ultimately, contributed to his being selected out of the Service. Although those challenges were the subject of separate grievances and separate appeals to the Board, the issues raised and decided were substantially the same.

Grievant complained that his 2000 and 2001 EERs were of a falsely prejudicial character since they failed to note that he was suffering from undiagnosed mental illness that could explain to a large degree certain aspects of his performance that were criticized in the EERs. The relief sought by grievant included expungement of the EERs and full reinstatement in the Service. The Department denied his grievance, relying upon examinations by its own medical personnel, including the regional psychiatrist, and the fact that at the time that the EERs were prepared the Department lacked knowledge of the grievant's mental illness.

After being diagnosed by his own psychiatrist as having Obsessive Compulsive Disorder and Acute Adjustment Disorder during the 1999-2000 and 2000-2001 rating periods, grievant was evaluated and treated.

Grievant appealed to the Board, which initially found that the EERs were of a falsely prejudicial character because the rater and reviewer prejudicially characterized behaviors in his evaluations, impliedly representing them as performance issues when, in fact, they were shown to have been manifestations in significant part of his illness.

The Department appealed the decision to the United State District Court for the District of Columbia which affirmed the Board's decisions.

On further appeal to the United States Court of Appeals for the District of Columbia Circuit, the decision of the District Court was reversed. The Court of Appeals vacated the Orders of the Board and remanded the cases for further consideration. The Court of Appeals held that the Board had improperly determined that the EERs were of a

falsely prejudicial character. The Court of Appeals held that material cannot be found to be of a falsely prejudicial character, if the material itself was not untrue. The Court of Appeals ordered the Board to reconsider its interpretation of 22 U.S.C. §§4131(a)(1)(A) and (E) and to review the part of its order that directed the Department to reinstate grievant into the Foreign Service unless medically disqualified, stating that there were issues that the Board had not resolved and needed to resolve with respect to the relationship between the Rehabilitation Act and the Foreign Service Act (FSA).

On remand, the Board reaffirmed its original decisions regarding the fact that the 2000 and 2001 EERs were violative of Section 1101 of the Act and that the subsequent chain of events that was grounded in the improper inclusion of those EERs in grievant's official personnel record also violated Section 1101 of the Act.

Having bifurcated the merits and remedy issues on remand, however, the question of the appropriate remedy was remanded to the parties for discussion and possible resolution. Failing such resolution, a conference will be held to discuss the most appropriate way to present evidence and arguments with respect to the relief in this case and any discovery that may be needed with respect to the appropriate remedy.

DECISION AND ORDER ON REMAND

I. THE GRIEVANCES

The grievant, [REDACTED] joined the Department in 1990 and subsequently served in a number of posts as a Consular Officer, General Services Officer, and International Relations Officer.

In July 1998 he was assigned to an FS-3 "stretch" position as both Administrative and Consular Officer at the U. S. Consulate General in [REDACTED]. In addition, he served as Security Officer and Personnel Officer at [REDACTED]

Grievant's 1999 Employee Evaluation Report (EER) noted some shortcomings, but said, "these pale in light of the immense work he takes on." Both rating and reviewing officers recommended his promotion. His 2000 EER, however, contained numerous criticisms and did not recommend his promotion; he was low-ranked and his performance file was referred to a Performance Standards Board (PSB). The PSB, drawing heavily on the 2000 EER, designated him for selection out. The Director General set his separation for May 11, 2001.

In February 2001, grievant accepted an offer to meet with the Regional Medical Officer, who was visiting [REDACTED] from [REDACTED]. He subsequently met with the Regional Psychiatrist in [REDACTED] on March 5, 2001. The Regional Psychiatrist concluded grievant had no discernible pathology and found that no psychiatric medication was indicated, but he recommended that grievant seek counseling/psychotherapy and offered him a book to read on anger management.

Grievant filed a grievance over his 2000 EER and selection out on March 26, 2001, and the Department stayed his separation while it considered his grievance.

Grievant amended his grievance on May 21, adding an affidavit from a board-certified psychiatrist, [REDACTED], M.D., who also had significant foreign service experience having served as the Chief Psychiatrist and Chief Psychiatric Consultant for the Peace Corps from 1969 to 1975. Dr. [REDACTED] diagnosed grievant as suffering from Obsessive-Compulsive Personality Disorder (OCD) and exhibiting symptoms of Acute Adjustment Disorder (AAD) for the period covered by the 2000 EER and found, after a series of sessions that: 1) grievant's high stress working environment led grievant to increase reliance on a system of rigid defenses, exacerbating his negative interactions with his superiors and others; and 2) grievant should have been referred for psychiatric evaluation and prescribed medication earlier when he was observed having emotional outbursts with visa applicants and friction with staff. The Board's decision quoted from various reports of Dr. [REDACTED] and Dr. [REDACTED] relative to the medical evidence regarding grievant's condition.

The Board, in a split (2 to 1) Decision, found that grievant had shown through a preponderance of the evidence that Dr. [REDACTED] opinion was entitled to greater weight than that of Dr. [REDACTED] the Department's Regional Psychiatrist; and that grievant demonstrated that he suffered from undetected and untreated OCD and AAD that seriously and adversely affected his performance during the period covered by his 2000 EER. In accordance with Board precedents, we found that this EER was invalid because it described poor performance that was the result of an acute illness and, therefore, was deemed to be material of a falsely prejudicial character, the inclusion of which in the grievant's official personnel record was found violative of Section 1101(a)(1)(E) of the Foreign Service Act (Act), 22 U.S.C. §4131(a)(1)(E). Further, the separation of grievant

from employment based upon this falsely prejudicial information was found violative of Section 1101(a)(1)(A) of the Act.

The Board ordered the 2000 EER, the 2000 low ranking, and the referral to the PSB expunged and the proposed separation from the Service rescinded. FSGB Case No. 2001-034 (January 27, 2003). The 2000 EER was not remanded for inclusion of the missing medical explanation for grievant's performance for several reasons. First, the Board does not typically rewrite EERs or have raters and reviewers do so. Rather, the customary treatment of challenges to those reports is to either excise reference to inappropriately referenced comments or to require that the reports be removed completely from the official personnel record if the removal of the falsely prejudicial material would leave the EER so incomplete or unbalanced as to be inappropriate to use for reviews by Selection Boards, Tenure Boards, and the like. Second, in this case, the Board determined that the inclusion of material that was critical of grievant's conduct or performance in areas that were largely the result of medical conditions, rather than voluntary conduct on the part of grievant, would be inherently falsely prejudicial. The Board quoted with favor the Director of M/MED for the Department who stated that "[a]n EER for performance during a treatable illness cannot provide a fair basis for personnel review."

The Board declined to order a reconstituted PSB process because the Board concluded that such a process was unnecessary in light of the fact that in 1999 – the immediately preceding year – the Selection Board, utilizing the same or substantially identical Precepts, found that grievant's record did not warrant being recommended for possible selection out. The Board concluded that the only meaningful difference in 2000

was the existence of the 2000 EER which the Board ordered removed from grievant's official personnel record.

A variety of other claims raised by grievant were denied by the Board.

By way of relief, the Board in FSGB Case No. 2001-034 ordered that: 1) the Department rescind the proposed separation of grievant from the Service; 2) the 2000 EER be expunged from grievant's official personnel record; 3) a standard gap memorandum be placed in grievant's official personnel record for the 1999-2000 rating period; 4) the records relating to the 2000 low ranking and referral to the PSB and the designation for selection out be expunged from grievant's official personnel record; 5) grievant be granted a one-year extension of single and multiple time-in-class to compete for promotion; 6) grievant be assigned to an appropriate regular assignment "unless medically disqualified"; and 7) grievant be permitted to petition for reasonable attorneys fees and costs in accord with the Board's regulations and the applicable provisions of the Foreign Service Act.

The Department moved for reconsideration in FSGB Case No. 2001-034. That Motion for Reconsideration was denied, with the panel split on the same basis as the original decision. The majority found no material injustice or other basis to change the original ruling and noted further that:

. . . [T]he Department argues that the Board's decision puts the Department in an "untenable" position with regard to evaluating underperforming employees. As pointed out by grievant, there has been no "flood" of grievances emanating from [an earlier Board decision] which held that an EER was falsely prejudicial due to the existence of a treatable medical condition. The need to protect the integrity of the evaluation system is enhanced and not diminished by identifying and taking into account a treatable medical condition of an officer at the time of his or her evaluation. . . .

(July 15, 2003 Decision at 9).

A second grievance appeal (FSGB Case No. 2003-034) was processed before a different panel of the Board.¹ That second grievance appeal challenged the 2001 EER, which covered the period of performance from April 2000 to April 2001 of grievant in [REDACTED]. The Board upheld the grievance appeal, finding the holding of the majority of the Panel in FSGB Case No. 2001-034 persuasive. In FSGB Case No. 2003-034, the Board ordered that: 1) the 2001 EER be expunged in its entirety from grievant's official personnel record and a standard gap memorandum inserted in its stead; 2) any adverse actions based in whole or in part on the 2001 EER be rescinded; and 3) grievant be granted a one year extension of single and multiple time in class.

The Department appealed the Board's rulings to the United States District Court for the District of Columbia. Judge Ricardo M. Urbina affirmed the Board's decisions on March 3, 2006. U.S. Department of State v. Coombs, 417 F. Supp. 2d 10 (D.D.C. 2006). However, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court's decision and ordered the decisions of the Board vacated. U.S. Department of State v. Coombs, 375 U.S. App. D.C. 485, 482 F.3d 577 (2007). The Court of Appeals vacated the Orders of the Board and remanded the cases for further consideration. The Court of Appeals held that the Board had improperly determined that the EERs were of a falsely prejudicial character. The Court of Appeals held that material cannot be found to be of a falsely prejudicial character, if the material itself was not untrue. The Court of Appeals ordered the Board to reconsider its interpretation of 22 U.S.C. §§4131(a)(1)(A) and (E) and to review the part of its order that directed the

¹ One member from the panel in FSGB Case No. 2001-034 also served on the panel in FSGB Case No. 2003-034. The remaining two panel members in FSGB Case No. 2003-034 had not previously served as members of the panel that heard and decided FSGB Case No. 2001-034.

Department to reinstate grievant into the Foreign Service unless medically disqualified, stating that there were issues that the Board had not resolved and needed to resolve with respect to the relationship between the Rehabilitation Act and the Foreign Service Act (FSA).

The matter is now before this Board on remand.

On October 4, 2007, both parties filed briefs on remand. Both cases were consolidated for purposes of remand as FSGB Case No. 2003-034C. On October 19, 2007, the Board issued an Order reopening the ROP and permitting limited discovery. The Board also instructed the Department to furnish various policies regarding medical standards and clearance procedures. The parties' stipulation as to grievant's medical clearances and assignments during the relevant period obviated the Board's information request and, on January 4, 2008, the Board issued an Order permitting bifurcation of the merits and remedy analyses, deferring discovery until the Board rules on the merits, and requesting reply briefs. On March 3, the Department filed its Reply Brief on Remand; grievant advised that it would not file a reply brief but would respond to the Department brief. On March 27, 2008, grievant filed a response to the Department's Reply Brief on Remand.

II. POSITIONS OF THE PARTIES

GRIEVANT

Grievant contends that there are several alternative bases for invalidating the EERs: error, omission, violation of regulations requiring fairness, and the legal doctrine of fundamental fairness.

Error

The grievant states that “error,” as included at 22 U.S.C. §4131(a)(1)(E) as a grievable matter, is “a mistaken judgment or incorrect belief as to the existence or effect of matters of fact,” as defined in Black’s Law Dictionary (1990 ed.) and substantiated in Hunter v. Bryant, 502 U.S. 224, 229 (1991). Applying this definition to his case, the grievant states that the rater’s and reviewer’s views of grievant’s performance constituted a mistaken judgment and an incorrect belief due to their lack of medical information, squarely within the definition of “error.” EERs based on mistaken judgments and incorrect beliefs would defeat the purpose of the evaluation system.

Omission

Grievant states that the rater and reviewer failed to evaluate his performance in light of the circumstances, particularly his illness, and to interpret it correctly because of their ignorance. This, he contends, was an unintentional failure and an omission which made the EERs misleading and allows the Board to grant relief. The omission is subject to the control of the Secretary and within the jurisdiction of the Board as the Secretary has control of the issuance or removal of EERs, selection board reviews, PSB reviews, and separations.

Department Policies Require Fairness

Grievant points out that the Department’s Procedural Precepts for Selection Boards (the Precepts) and EER Instructions require fairness. Grievant states that he was not compared and judged solely on merit because his performance was misinterpreted. The Board held that his illness was unrecognized and his performance was misinterpreted and further that the Director of M/MED stated on the record that, “An EER for

performance during a treatable illness cannot provide a fair basis for personnel review.” He claims he is entitled to his remedies under 22 U.S.C. §4131(a)(1)(A), which prohibits separation of the member “contrary to laws or regulations”; and 22 U.S.C. §4131(a)(1)(B), which prohibits “other violation, misinterpretation, or misapplication of applicable laws, regulations or published policy affecting the terms and conditions of the employment or career status of the member.”

Fundamental Fairness

Grievant contends that personnel decisions based on incomplete or misleading information are invalid under the doctrine of fundamental fairness. Grievant points out that for many years the courts, the Merit Systems Protection Board, and this Board have utilized the well-established doctrine of fundamental fairness in administrative proceedings to invalidate personnel actions.

Remedy and Retention

Grievant argues that the Board’s Order requiring the Department to retain grievant was appropriate. The record contained grievant’s psychiatrist’s finding that grievant was well after treatment, that he was currently performing well in his Foreign Service assignment, and that he could continue to do so in future. Grievant points out that he has performed the essential functions of his regular Foreign Service positions in a fully satisfactory manner since his treatment and recovery in late 2001, meeting the standard of the Rehabilitation Act. The parties stipulated that he held Class 1 and 2 medical clearances from 1998-2007 and that “[t]enured officers do not have to have a Class 1 medical clearance at all times during their careers.” As of the date of the filings

in this matter, grievant had a Class 1 clearance and had been approved for assignment to [REDACTED], a hardship post.

Grievant contends that the omissions and errors in the EERs cannot be remedied by any means except removal of the EERs. Because the psychiatric condition was unknown at the time, and treatment was not made available, it would not be accurate to put in new text explaining the effects of the condition. Moreover, the rater and reviewer could not be expected to have such psychiatric expertise to identify how the condition affected performance.

Grievant claims that he is entitled to supplemental remedies² as his record makes it appear that he has been passed over for promotion for years. Consequently, he is not competitive with other candidates in grade FS-4. Therefore, grievant requests discovery to obtain further evidence in support of the remedy of a retroactive promotion.

THE DEPARTMENT

The Department's position is that the Board should dismiss the grievance and thereby allow the Department to effect the 2000 PSB designation for separation forthwith. The Department claims that there is no need to reach the legal issues left unresolved by the Court of Appeals. The Department maintains its position that the Rehabilitation Act provides the exclusive form of relief for a Foreign Service Officer seeking an expunction of his EERs based on a medical condition.

² 1. The same promotions as those received by a majority of those FS-4 officers tenured in 1998 with him, with back pay, interest, service credit and any other benefits.
2. An extension of single and multiple time-in-class commensurate with the number of years from 2000 until all remedies are effectuated.
3. Rescind all low rankings and PSB determinations after 2000; substitute mid-rankings.
4. Rescind and expunge all other adverse decisions and personnel records based on the grieved EERs.
5. Attorney's fees and costs for these FSGB remand proceedings.
6. Such other remedies as may be deemed just and proper.

Omission

With regard to grievant's claim of an "omission" in his record, the Department submits that the lack of any reference to the grievant's medical condition was outside the control of the Secretary, pursuant to 22 USC 4131(a)(1), because by all admissions it was unknown to anyone, including grievant. Further, the lack of any reference to grievant's medical condition is not in violation of any law, regulation, or policy.

Inaccurate or Erroneous

The Department urges that, as a legal matter, and most significantly, the EERs documentation of grievant's poor performance is not "inaccurate" or "erroneous" if it is not "untrue," to use the phrasing adopted by the Court of Appeals. 482 F.3d, at 580. "[N]othing in either EER is contrary to fact in that sense." *Id.* According to the Department, the Board should find that the 2000 and 2001 EERs are neither inaccurate nor erroneous for the same reason: they are true.

Unfair

The Department claims there is no independent statutory basis in the Foreign Service Act or implementing regulations to allege that a "true" EER, free of agency error, is "unfair" and should be expunged merely because the employee had a medical condition that might have affected his performance. According to the Department, if the Board were to create such a cause of action based on "unfairness," the floodgates would open to the filing of new grievances on any conceivable theory of unfairness.

Remedy and Retention

The Department contends that, given no breach of duty by M/MED, the rater, or the reviewer in the instant case, there is no support for the expunction of grievant's EERs.

The Department contends that the question of “reinstatement” relief can not be looked at separate and apart from the Rehabilitation Act. Under this analysis, the EERs stand and the grievant should be separated from the Foreign Service on the basis of relative performance.

With regard to whether it is reasonable to reinstate grievant in light of the demands of the Foreign Service, the Department states that a medically cleared member of the Service must be held accountable for his or her performance. Unless that member can demonstrate, through the Rehabilitation Act, that an accommodation to his or her EER or employment status is unreasonable, he or she must be held to the same standards of performance as other members of the Service. Although the Department is not taking the position that grievant is medically not cleared for the Foreign Service, it contends that it does not follow that grievant is entitled to remain in the Service when his relative performance is worse than that of his peers. The Department states that neither an assignment in Washington, D.C. nor an assignment in the Consulate in [REDACTED] is stressful in the nature and manner that grievant ascribed to his posting in [REDACTED]. Grievant is available for world-wide assignment to many stressful positions where there is war or civil unrest.

III. DISCUSSION AND FINDINGS

The “Falsely Prejudicial” Standard

The Board’s initial decisions were grounded in a finding that the 2000 and 2001 EERs issued to grievant were of a “falsely prejudicial character” and, therefore, could not be included in grievant’s official personnel record and could not be used in their then present forms as a basis for his being low ranked and for his being selected out.

The phrase “falsely prejudicial character” is part of Section 1101(a)(1)(A) and (E) of the Foreign Service Act, 22 U.S.C. §§4131(a)(1)(A) and (E). Those provisions read in their entirety as follows:

§4131. Definitions and applicability

(a) (1) Except as provided in subsection (b), for purposes of this chapter, the term “grievance” means any act, omission or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States . . . of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including –

(A) separation of the member allegedly contrary to laws or regulations, or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member;

(B) other alleged violation, misinterpretation, or misapplication of applicable laws, regulations, or published policy affecting the terms and conditions of the employment or career status of the member;

(C) allegedly wrongful disciplinary action against the member;

...

(E) alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member;

...

(H) any discrimination prohibited by –

...

(iii) section 501 of the Rehabilitation Act of 1973

...

The provisions of Section 1101(b), 22 U.S.C. §4131(b), exclude from the definition of a grievance “the judgment of a selection board established under section 6-2, a tenure board established under section 306(b), or any other equivalent body established

by laws or regulations which similarly evaluates the performance of members of the Service on a comparative basis.” 22 U.S.C. §4131(b)(2) There is a proviso in Section 1101(b), however, that specifically reaffirms that acts of alleged discrimination identified in Section 1101(a)(1)(H), which includes claims of violation of Section 501 of the Rehabilitation Act, 29 U.S.C. §791, are grievable.

The decisions of the Board for many years have applied the provisions of Section 1101, including Sections 1101 (a)(1)(A) and (E), as a whole, rather than attempting to separately apply each of the component parts. There is no indication that Congress intended each subpart of Section 1101 to be exclusive. Nor has that provision of the Foreign Service Act been so applied by the Board or the courts. To the contrary, particular conduct that is the subject of a grievance may fall under more than one subsection of Section 1101 or more than one category within a subsection of Section 1101.³ The parties who have litigated cases before the Board have referred simply to whether information is of a falsely prejudicial character in most cases (often using the “falsely prejudicial” shortening of the phrase), rather than attempting to identify further the challenged information as an inaccuracy or an error or an omission. In fact, it is unclear whether information that is false – meaning untrue – would always qualify as an inaccuracy as well as an error. The phrase has been interpreted, not as one entailing redundancy, but rather was interpreted as a whole and in a fashion that focused upon two components: 1) did the particular EER or other information present an unbalanced or

³ For example, action to terminate a member’s employment alleged to be grounded in inaccurate or erroneous facts could be covered by Section 1101(a)(1)(A), (B), (C), and (E), among others, and might also include coverage under (F) and (G) in the case of a termination of employment for reprisal for voicing concerns over racial discrimination. Similarly, a material inaccuracy could be the result of an omission and would likely be deemed (whether or not resulting from an omission) to be an error and to be information of a falsely prejudicial character.

misleading picture of the performance or conduct in question; and 2) did that false picture of the performance or conduct prejudice the employee in a meaningful way. Most of the cases did not attempt to determine whether information was both inaccurate and in error, as well as of a falsely prejudicial character, or attempt to distinguish between an “inaccuracy,” an “error,” an “omission,” and other information that might be deemed to be of “falsely prejudicial character.” Nor was there evidence that Congress envisioned that the Board would do so. In fact, the language of Section 1101(a)(1)(E) contains reference to the requirement that the information must be prejudicial to the member in two places – once in the phrase “falsely prejudicial character of information” and again in the requirement that this misinformation “is or could be prejudicial to the member.”

The Legislative History of the Foreign Service Act itself also appears to support interpreting the falsely prejudicial character phrase in a fashion that focuses upon the effect upon the member and whether the challenged information is misleading in nature. The Report of the Hearings before the Subcommittee on International Operations of the Committee on Foreign Affairs and the Subcommittee on Civil Service of the Committee on Post office and Civil Service, House of Representatives, 96th Cong., 1st Sess., held on H.R. 4674, contained a Section-by-Section Analysis of the then proposed Foreign Service Act by the American Foreign Service Association, which noted in pertinent part that:

Chapter 11 – Grievance

...

Section 1101(a)1) (p.152, line 2) – After “prejudicial” insert “character of ***”

Comment: The revised wording is clearer and more closely adheres to that in the present legislation. It is the character of the information which

can be so onerous if “falsely prejudicial,” rather than the information itself.

(Report at p.133) The insertion of the word character to Sections 1101(a)(1)(A) and (E) thus suggests an intent to address the situation of the practical effect of the particular challenged misinformation upon the employee’s career, rather than limit the inquiry in grievance appeals to the truth or falsity of the information itself.

The Board’s initial decisions in this matter simply referred to the falsely prejudicial character of the information contained in the 2000 and 2001 EERs and further concluded in accordance with established Board precedent that the Board would not rewrite the EERs in question and that, if the EERs could not be corrected by the mere deletion of language, then they would be ordered expunged from the official personnel record and a “gap” EER inserted in their place. These decisions made no attempt to determine whether the particular problems identified with the 2000 and 2001 EERs also qualified as an “inaccuracy” or an “error” or an “omission” as those terms are used in Sections 1101(A) and (E) of the Act.

The Court of Appeals reversed the Board’s findings in this regard, based upon its finding that “false” meant, at a minimum, “untrue.” The Court appears to have focused upon whether the information was false, not whether the information was of a falsely prejudicial character. There are any number of situations where information in an EER or other documents that is not untrue may nevertheless be misleading.⁴

⁴ Two simplified examples may suffice. If an EER notes that a Diplomatic Security Agent discharged his firearm and that a civilian died as a result, without mentioning the circumstances surrounding that action, the comment, even though true, may impliedly suggest that the DS Agent’s conduct was improper without explicitly so stating. A balanced explanation of the facts of the situation, however, may reveal that the employee did nothing wrong and may even have acted in an exemplary fashion. This example presumably may be cured by adding the omitted additional facts. But what of the inclusion of a comment that says that an employee is to be commended for not losing his temper with subordinates excessively during the rating

The Court of Appeals also indicated that it was “puzzled” by the failure to have treated the information in the EERs in question as a prejudicial omission. The reason that we did not analyze the issue in terms of omission initially is because for decades we have simply applied the entirety of Section 1101(a)(1)(E) as a whole under the label of the information being of a falsely prejudicial character. In most cases, no attempt was made to determine if the failure of the EER to depict the employee’s performance in an accurate and balanced fashion was an error, an omission, an inaccuracy, or another type of misleading information of a falsely prejudicial nature. This approach has not only been utilized by the Board, but also by the parties who present grievance appeals to us for determination, whose grievance appeals and responses often simply label or object to labeling a particular EER or other information as falsely prejudicial in nature.

We accept, however, the Court of Appeals ruling and interpretation of the falsely prejudicial language of the Act in this case, despite harboring concerns about the interpretation and application of that language in the Act in future cases, and address the question of whether the EERs in question were violative of Section 1101(a)(1)(E) of the Act and whether the selection out of grievant violated Sections 1101(a)(1)(A) and (E) of the Act.

period, but in fact the employee never engaged in such conduct? Or a comment that indicates that the employee met the minimum standards for a particular action (e.g., timely processing visa requests) when, in fact, the employee far exceeded them? Don’t these comments, even though true, imply that there were instances (albeit not an excessive number) in which the employee did act inappropriately with subordinates or imply that the employee’s performance was lower than it actually was? They would seem to be neither untrue in the strict sense nor inaccurate, nor necessarily the product of an error or omission. In our cases prior to the Court of Appeals decision, we would have simply labeled these misleading statements, that portrayed an inaccurate picture of the situation, as “falsely prejudicial” and violative of Sections 1101(a)(1)(A) and (E) of the Act.

Whether the EERs Suffered from a Prejudicial Omission

The Board finds that the grievant's 2000 EER and 2001 EER omitted any reference of his medical conditions of OCD and AAD that likely contributed to the poor performance referenced in those EERs in the areas of interpersonal interaction. There also can be no question that this omission was of a prejudicial nature since the 2000 SB and 2001 SB low ranked grievant after reviewing and relying upon those critical EERs and the 2000 FSB recommended the grievant's separation from service.

There is no reason to revisit the fact finding made by the earlier Board panels relative to the conflicting medical opinions provided in these cases.

Nor can there be any serious question that the omission of the impact of the medical condition upon the performance of grievant was prejudicial in character. Absent some plausible explanation, the implication was that the interaction of grievant with others was the product of intentional behavior on his part. If the Selection Board initially, or the Performance Standards Board thereafter, or even the Director General, had been aware of the total situation, it is likely that the low ranking, selection out, and separation decisions would never have taken place initially. It is clear that in 1999, when the poor 2000 and 2001 EERs were not considered, while the Selection Board low-ranked grievant, the Performance Standards Board did not propose the selection out of grievant and no action was taken by the Department to separate him from employment. Similarly, in years after 2001, when the 2000 and 2001 EERs were not included in grievant's file, no PSB recommended that grievant be selected out.

The question is presented as to whether Section 1101(a) of the Foreign Service Act contemplates that the only prejudicial omissions that may affect the validity of an

EER or other entry in the official personnel record are omissions as to facts that are known to the Department at the date on which the EER or other entry was prepared. After careful consideration of the matter, we find that Section 1101(a) is not so limited. Of course, any grievance must be filed within the time limits contained in Section 1104 of the Act, 22 U.S.C. §4134. No allegation was made in this case that the grievance initially filed by grievant in this case was untimely or that the appeal taken to this Board failed to comply with Section 1104(b).

The Department's argument that the general language of Section 1101(a), describing an "act, omission, or condition subject to the control of the Secretary" requires that the Secretary have knowledge of the omission at the time that the EER or other entry is prepared is rejected. The policy precluding the inclusion in employee official personnel records of prejudicially inaccurate, incomplete, erroneous, or false information is to ensure that personnel decisions are made on the basis of balanced, accurate information. The effects of allowing inaccuracies, omissions, errors, or other information of a falsely prejudicial character to remain in employee official personnel records in the Foreign Service is to undermine the promotion, assignment, selection, and separation processes which occur in the context of a highly competitive system in which peer review of EERs and other documents in the official personnel record form the basis of such major decisions as to whether to grant tenure, whether to grant promotion, where officers will be assigned, whether officers will be low-ranked, and whether officers will be disciplined, selected out of the service, or separated. The system only functions as intended when officers are evaluated, whether for promotion, for tenure, or for separation or selection out, based upon accurate, balanced descriptions of their performance and

accomplishments. Similarly, disciplinary or adverse actions are designed to be imposed based upon accurate, balanced descriptions of employee conduct/alleged misconduct. Congress intended that the members of the Foreign Service be provided the “fullest measure of due process” in connection with these types of decisions. 22 U.S.C. §3901(b)(4). Interpretation of the provisions of Section 1101(a) that furthers these goals and ensures that, when discovered or when adjudicated, these significant actions proceed on the basis of accurate facts, rather than on the basis of prejudicial errors, false information, inaccuracies, or documents containing material omissions is consistent with these goals. The issue is not one of punishment of the Department for intentional misstatements, but rather one of ensuring that personnel and career status actions take place on the basis of reviewing accurate information in employee official personnel records. In numerous cases, the Board has recognized that while an EER need not be perfect, the crucial test is whether it “fairly and accurately describes and assesses performance and potential with adequate clarity and documentation to constitute a reasonable, discernible, objective and balanced appraisal.” See, e.g., FSGB Case No. 95-35 (March 14, 1996).

Thus, whether or not the Department’s supervisors and managers appreciated, or were even aware, of the errors, inaccuracies, omissions, or falsely prejudicial character of information at the time that it was entered into the employee’s official personnel record and thereafter reviewed and relied upon by others is not dispositive. The “act, omission, or condition subject to the control of the Secretary” refers to the action taken in reliance upon the misinformation, not the information itself. The EER itself is a matter subject to the control of the Secretary and her designees. The decision to promote or not to promote

grievant, to low-rank or not to low-rank him, to select him out or not, and to separate him or not, are all actions that are acts, omissions, or conditions subject to the control of the Secretary, and are matters that have been grieved over the years and were properly the subject of the grievance of Mr. [REDACTED]

The question of the timing of discovery of the error, omission, inaccuracy, or falsely prejudicial character of the information may bear upon both timeliness in certain cases and upon the appropriate remedy in certain others. In still others it may have no effect upon the ability to pursue the grievance or the relief to be granted if the grievance is sustained.

We are not persuaded that the discovery of the omission in this case was so late that it could not be raised by grievant with respect to his 2000 and 2001 EERs. A number of facts support that conclusion in this case.

First, the record reveals that the Department was aware of the possible medical issues affecting grievant's performance months prior to the initial date determined for his separation from service. This is unlike a situation, therefore, where after an officer's employment has been terminated, the officer raises issues that might have affected the separation if it had been known to the Department. In fact, once the initial grievance was filed with the Department, the separation action was held in abeyance. The question is thus presented as to whether there exists any reason why, in the face of a timely filed grievance, the claim should be rejected simply because neither the grievant nor the Department was aware of the medical issues that contributed significantly to the performance problems of grievant prior to his being selected out and his receipt of notification from the Director General of his separation from service date. If the grievant

and the Department were each aware of the medical issues prior to the EERs being written, there would be no question that the grievance could still have been timely filed in late March 2001. The fact that neither the grievant nor the Department appreciated the full extent of the medical problems of the grievant until that date or even slightly later did not render the matter temporally beyond the date on which it was required to be corrected.

Second, the record reflects that grievant raised the issue promptly after he first learned that he likely suffered from one or more conditions that affected his prior performance.

Third, the record revealed that, while the Board found that the Department did not breach any obligations to grievant relative to his medical treatment, the likelihood that some medical condition contributed to grievant's behavior had not escaped the notice of grievant's coworkers, who suggested on their own initiative to the Regional Medical Officer in late February 2001 that he evaluate grievant for that purpose. The result was a referral by the RMO to a Regional Psychiatrist who acknowledged that the grievant's problems were sufficiently serious that counseling and/or psychotherapy was recommended when grievant returned to a location where those services could be provided. The nature of the conditions themselves were such that grievant may well have been unable to recognize their existence or effect prior to being evaluated and treated by expert psychiatrists.

Fourth, in the few prior cases in which grievances were filed by grievants complaining that the existence of medical reasons that contributed to the conduct or performance issues rendered the EER or resulting actions taken on the basis of the EERs

falsely prejudicial in character, the fact that the Department was unaware of those omissions or inaccurate or misleading or unbalanced descriptions of the employee's performance did not operate to bar the grievances from proceeding or the underlying actions from being appropriately remedied. See, e.g., FSGB Case No. 98-053 (July 11, 2000).

On remand and reconsideration, we remain persuaded and find that the 2000 and 2001 EERs improperly omitted material facts as to the causes of much of the performance problems attributed to grievant. The fact that the Department lacked "confirmed knowledge" of the facts may well have precluded their including those causes at the time that the EERs were initially prepared under applicable regulations.

3 FAM 2815.2-1 Nevertheless, once the Department obtained such knowledge, it could not ignore the material omissions and proceed to separate grievant from service based upon what it then knew was a review by the 2000 and 2001 Selection Boards and Performance Standards Boards that was grounded in inaccurate, misleading, and prejudicial misinformation. As noted, the omissions were of a nature that, absent inclusion of the medical explanations for grievant's performance, the EERs provided an inaccurate and distorted description of grievant's performance and potential.

For all of these reasons, we reaffirm the original holdings of the Board in Case Nos. 2001-034 and 2003-034 that the EERs were violative of Sections 1101(a)(1)(A) and (E) of the Foreign Service Act, 22 U.S.C. §§4131(a)(1)(A) and (E).

The Rehabilitation Act

The Rehabilitation Act has been raised in two different contexts in this remand. The Board's initial Order in Case No. 2001-034 provided in part that:

5. Unless medically disqualified, grievant is to be reassigned to an appropriate regular assignment.

The reason for inclusion of such a provision was not explained, but was included simply to ensure that the Department not be required to return the grievant to work in a position for which he was not medically qualified.

The Court of Appeals decision noted two potential Rehabilitation Act concerns. First, the Court noted the assertion of the Department that the Rehabilitation Act “occupie[d] the field” such that “if the officer cannot make out a cause of action under the Rehabilitation Act itself – either because he or she cannot show discriminatory intent, or because he or she cannot be reasonably accommodated” then there can be no claim under the general grievance language of the Foreign Service Act relative to the treatment of that employee. The Court noted that grievant contended that the Department “had no knowledge of his disability when it created his EER” and that there was “no reason . . . to read a statute banning discrimination as implicitly prohibiting the Board from remedying an incomplete personnel record that became the basis of adverse employment action.”

The Court assumed arguendo, but declined to decide, that grievant’s interpretation was correct, but stated concerns that: 1) the Board’s order directing grievant’s reinstatement unless medically disqualified appeared to place a substantially greater burden upon the Department than the burden imposed by the Rehabilitation Act since: a) the decision failed to discuss how the term “medically disqualified” related to “reasonable accommodation”; b) the decision did not explicitly indicate whether the reinstatement of grievant was required even if he could not perform the essential functions of the job (even with a reasonable accommodation for his disability); and

c) the Board's decision did "not appear to have even considered whether it was reasonable to require reinstatement of such an employee, in light of the demands of the Foreign Service." The Court found that these omissions rendered the Board's initial ruling "arbitrary and capricious."

Based upon Stipulations docketed by the Parties, it is clear that since 2001: 1) the Department has examined grievant medically and has always granted him either a Class 1 or Class 2 medical clearance; and 2) the Department has considered grievant, a tenured officer, medically cleared to work as a Foreign Service Officer at all times from 1998 to the present. Nothing in this Order prevents the Department from applying its usual procedures for determining the medical clearance to be issued to grievant and from applying whatever limiting effects holding less than a Class 1 clearance might have on future assignments. The previous comment was little more than an inartfully phrased attempt to ensure that the assignments provided to grievant did not exceed any restrictions on his ability to work. Any concerns about the Board's original Order requiring the Department to return to service or continue in service an individual who was not qualified based on medical reasons would, therefore, appear to have become moot.

With respect to the Department's argument that the Rehabilitation Act occupied the field so that if the Department's actions are not precluded by the Rehabilitation Act then they must perforce be deemed permissible, we respectfully disagree. The Board appreciates that, under the Rehabilitation Act, there is no requirement to retroactively accommodate an employee's disability after it becomes known. See Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 96 F.3d 1102 (Fed. Cir.

1996). This case, however, does not involve a sustained claim of discrimination in violation of the Rehabilitation Act. The affirmative obligations imposed by the Rehabilitation Act do not, in our view, eliminate the rights and protections applicable to non-disabled Foreign Service Officers to omit from their official personnel records information that is prejudicial and that is deemed to be inaccurate, in error, the product of material omission so as to make the information misleading, or any other information that is of a falsely prejudicial character. This is particularly so given the failure of this case to be tried as a Rehabilitation Act claim. There was not even a finding that grievant suffered from a disability within the meaning of the Rehabilitation Act and the Americans with Disabilities Act.⁵ There was no question raised as to whether he was a qualified individual and no claim made for any reasonable accommodation as such.

In sum, there is no conflict between the Rehabilitation Act and our application of principles and provisions of the Foreign Service Act that are generally applicable. There is no conflict in applying these principles in an even-handed manner to disabled and non-disabled employees alike and to deficiencies in EERs that are related to medical reasons as well as deficiencies for non-medical reasons.

Accordingly, the Department's assertions in this regard are also rejected.

⁵ We do not mean to suggest that Mr. [REDACTED] medical conditions could not have qualified at various times as a disability. Rather, the issue was never alleged and never joined and, accordingly, we make no findings on the matter.

IV. REMEDY

The Board issued an Order following remand that bifurcated the remedy and merits issues and further deferred any discovery with respect to remedy issues until after a ruling on the merits issues had been given.

Accordingly, it would be inappropriate to issue any determination regarding relief until after the parties have had an opportunity confer, consider the matter, and attempt to reach agreement. Failing agreement, a conference will be scheduled to determine an appropriate schedule for the conduct of any necessary discovery and the docketing of arguments to the Board regarding the appropriate remedies for the violations shown in this case.

V. DECISION AND ORDER

The 2000 and 2001 EERs issued to grievant contained material omissions that resulted in those reports of his performance in those two rating periods failing to accurately reflect a balanced view of his performance and potential. The inclusion of those EERs in grievant's official personnel record; his low-ranking based upon the 2000 EER; his subsequent referral to a PSB; and his proposed separation from the Service as a result, all violated Sections 1101(a)(1)(A) and (E) of the Foreign Service Act, 22 U.S.C. §§4131(a)(1)(A) and (E).

This Decision addresses the question of the merits only of the grievance appeal. Pursuant to the Board's earlier Order following Remand, the issue of the appropriate remedy was bifurcated for determination following additional argument and possible additional discovery and submission. Accordingly, the parties are directed to confer, consider the matter, and attempt to reach agreement. Failing agreement, a conference will be scheduled to determine an appropriate schedule for the conduct of any necessary discovery and the docketing of arguments to the Board regarding the appropriate remedies for the violations shown in this case.