

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{Grievant}

Record of Proceeding

Grievant

FSGB No. 2006-011

And

March 7, 2007

Department of State

DECISION - EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Garvin Lee Oliver

Board Members:

Robert J. Bigart
Thomas Jefferson Jr.

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Neera Parikh, Esq.
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to meet his burden of proving that the Department of State erred in not including documentation about training, a letter of commendation, and an award in his Official Personnel File. He also failed to establish, by a preponderance of the evidence, that the Department violated the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

OVERVIEW

Grievant claimed that information about training, a letter of commendation, and an award nomination were not documented in his Official Personnel File (OPF), which caused him harm by making him less competitive before the 2005 S-II Selection Board (SB). He claimed that the Department violated the provisions of USERRA by not extending his Time-in-Class/Service (TIC/TIS) dates, not including military evaluations and awards earned while on active duty, and not instructing promotion boards to consider his military service.

The Board found that grievant failed to meet his burden of proving his claims regarding:

1. Documentation of training he completed in 1997 and 1998 -- The Board accepted the agency's explanation that information about this training is not included in the employee's OPF and is not reviewed by the SB. Grievant failed to show that he was harmed.
2. A letter of commendation from the Consul General of {Blank} -- Grievant provided no evidence that he provided the letter to the agency in time for it to be included in his OPF for review by the 2005 SB, nor did he explain how he was harmed. The Department's explanation, that it had conducted a review of its e-mail records and found no record of the letter, was responsive.
3. Award missing from OPF -- A nomination for a Superior Honor Award (SHA) was downgraded to a Meritorious Honor Award (MHA) and approved after the 2005 SB met. Approved awards – not award nominations – are included in the OPF. There was no error by the agency, and no harm to grievant, since there was no requirement that the nomination for the SHA be included in grievant's OPF.
4. Agency Failure to comply with USERRA policy:
 - a. Extension of his time in class/service date -- The Department is required to extend grievant's TIC/TIS dates for the periods he was on active military duty. The Department was responsive to this matter in acknowledging its intention to complete the required action at some time in the future. Grievant was on active duty when he filed his grievance and remained on active duty until early November 2006. Grievant did not

meet his burden of proving that he had been harmed to date by any action or inaction on the part of the agency.

b. Inclusion of military evaluations and awards in his OPF -- Grievant provided no evidence, documentation, or other proof showing that he provided copies of the evaluations and awards to any person or office in the Department, that the Department failed to comply with any law or its regulations, or that he was harmed.

c. Specific instructions to the promotion board to weigh carefully and consider, to the extent the uniformed service can be deemed relevant, his military service -- The Board found that the 2005 procedural precepts contained these instructions.

The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

{Grievant} (grievant) appealed the January 3, 2006 decision of the Department of State (Department, agency) denying a grievance that he filed on October 3, 2005. He claimed that advanced supervisory training, a letter of commendation, and award nominations that he had received were not documented by the Department in his Official Performance Folder (OPF). He alleges that these errors caused him harm by making him appear less competitive before the 2005 Selection Board (SB). He also claimed that the Department violated the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994¹ (USERRA) by not extending his Time-in-Class/Service dates, not including military evaluations and awards earned while on active and inactive duty, and not specifically instructing promotion boards to “weigh carefully and consider, to the extent the uniformed service can be deemed relevant, an employee’s military service.”

In his grievance to the Department², {Grievant} requested the following relief:

1. Prescriptive relief³ from separation for expiration of time in class during the pendency of this proceeding;
2. Include military evaluations for 2003, 2004 and 2005 in my OPF, along with such statements as I shall provide;
3. Provide reconstituted Selection Boards for 2004 and 2005;
4. If not promoted by either Board, make such promotion retroactive with all applicable back pay and interest;

¹ 38 U.S.C. Section 4301 *et seq.*

² The requested relief is quoted from {Grievant}’s grievance to the Department, which number is AGS 2005-091.

³ Otherwise known as interim relief.

5. If not promoted by either Board, extend my TIC date to reflect my cumulative active and inactive duty military service; and,
6. Any and all other relief deemed just and appropriate.

In his appeal to the Board, grievant requested that “the FSGB grant the remedies contained in my original grievance and any other remedies they deem appropriate.”

II. BACKGROUND

Grievant’s appeal was received by the Board on May 2, 2006. At that time, he was on Leave Without Pay (LWOP) from the Department and serving on active duty in the U.S. Army. On July 14, the Board issued a DECISION: TIMELINESS, which dismissed his appeal on the grounds that it was not timely.⁴ {Grievant} later requested that the Board reconsider its decision. On August 22, the Board issued an ORDER: MOTION TO RECONSIDER, which granted his request and accepted his appeal as timely.

In his August 24 e-mail message, {Grievant} asked the Department for copies of 16 documents. The Department responded to grievant on September 11.

On September 27, {Grievant} sent copies of several e-mail messages to the Board “for the FSGB record.” The Department objected to the inclusion of these messages in the record, contending that they were immaterial and irrelevant, have never been the subject of any grievance presented to the agency, and relate to matters pending before other Department offices. On October 18, 2006, the Board issued an ORDER: MOTION TO STRIKE, which excluded the messages from the Record of Proceedings (ROP).

⁴ 22 CFR Section 903.1 provides that a member of the Foreign Service is entitled to appeal to the Board no later than 60 days after receiving the agency decision. The Board may waive the time limit for good cause. In our decision, we found that {Grievant} had not shown good cause to extend the filing period.

On October 19, 2006, the Department asked the Board to modify its October 18 ORDER: MOTION TO STRIKE, and to also strike from the record an October 11 e-mail message from grievant. The Board granted the Department's request in its December 7 ORDER: MOTION FOR MODIFICATION OF BOARD'S ORDER.

In e-mail messages of October 18 and November 21, 2006, {Grievant} requested a hearing before the Board. The Department opposed his request for a hearing on the grounds that it was untimely and unnecessary. In its December 13 ORDER: HEARING REQUEST, the Board denied grievant's request for a hearing. Grievant was given 20 days to file a supplemental statement. On January 11, 2007, grievant's AFSA representative advised the Board that grievant would not submit a supplemental statement. The ROP was closed on February 9, 2007.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

In his grievance to the agency, {Grievant} grieved "the Department's failure to place certain documents in my official personnel folder as required by Department policy." These documents should have been in his file when it was reviewed by the 2005 promotion board. In addition, the Department failed to comply with its policy regarding the rights of employees recalled for active military service, *i.e.*, the Department failed to "inform me of my rights under its new program of USERRA compliance." These procedural violations prejudiced the SB's review of his file. He asserts that:

These violations have created a file with numerous unexplained gaps, LWOP annotations and a significantly distorted record of my performance in the last three years. I believe that the likelihood of being promoted by the selections boards in 2003, 2004 and 2005 has been significantly decreased by the Department's errors.

We enumerate below grievant's four specific claims that he discussed in his grievance and appeal.

1. Diplomatic Security Training Center (DSTC) enrollment data

The Department failed to transfer student enrollment data for training he completed at DSTC to his Employee Profile (EP) and to his OPF. Thus this data was missing from his OPF when the 2005 promotion panel met and this "egregious procedural error caused me harm by making me less competitive."

2. Letter of commendation

The Department failed to include in his OPF a highly laudatory letter of commendation about his performance from the Consul General of {Blank} to the Deputy Secretary of State; a carbon copy was later placed in his OPF after the 2005 promotion panel met. The Department should have officially endorsed this letter "and/or forwarded it through the chain of command or directly to me so that I could have been given the opportunity to request that it be included in my OPF." This letter was sent to the Department on April 4, 2005 and "mysterious (sic) disappeared," yet "magically arrived in the Miami field office on August 23, 2005." He alleges that the Department "negligently and maliciously failed to make" the letter available to him. "Subsequently," {Grievant} argues, the letter "was not available for review by the 2005 Selection Board. This egregious procedural error caused me harm by making me less competitive."

3. Awards missing from OPF

{Grievant} claims that a nomination for a Superior Honor Award (SHA) was "missing/omitted from my OPF." This document, which was "highly laudatory of my performance," should have been available to the 2005 promotion panel. It was not until

well after the 2005 promotion panel met that the award, which was approved and downgraded to a Meritorious Honor award (MHA), was placed into his OPF. Grievant explains:

My point is that the nomination paperwork which preceded the actual award should have been in my OPF and made available to me for the 2005 S-II Selection Board. The award nomination was a Department document, not otherwise available to me, thus I could not provided [sic] it to the 2005 Selection Board or to Mr. {Name} of the Grievance Staff (HR/G) per his request letter dated November 18, 2005. I have been harmed by the omission of the nomination paperwork which was available only to the Department and available way before the [Selection] Board adjourned. The Department's actions are greatly erroneous, extremely suspect and highly improper.

4. Failure to comply with USERRA policy

Grievant claims that “the Department failed to comply with its own policy regarding USERRA compliance and military service.” The Department's procedures, in accordance with Department Announcement 2005-08-078, require:

Extension of Time in Class/Service date...
Inclusion of military evaluations and awards . . .
Specific instructions to promotion Boards to “weigh carefully and consider, to the extent the uniformed service can be deemed relevant, an employee’s military service . . .”

He has been on active and inactive military service on a number of occasions since 2003:

As far as I am aware, the Department has not extended my TIC to reflect this duty. Nor has the Department offered me the opportunity to provide military evaluations for the periods of my service (meaning of course that the promotion board could not "carefully weigh" the contents of such an evaluation). Thus, the Department has not complied with its own policy.

Grievant asserts that the Department “must provide an official document” proving that his TIC/TIS was extended when he served on active duty from January 27 - February 28, 2005 and October 3, 2005 - April 22, 2006. In addition, the Department must be

ordered by the FSGB to provide proof that his TIC/TIS dates were extended for every day he served on active duty since he entered the Foreign Service in 1987:

By way of an official discovery for this FSGB Appeal -- I request the Department provide documentation as to what date the office responsible for extending TIC/TIS intends to complete the action to extend my TIC/TIS, so that it may be considered by the FSGB in its decision of this appeal.

{Grievant} claims that he has taken all necessary steps to ensure that appropriate actions were taken. He maintained e-mail accessibility with the Bureau of Diplomatic Security (DS) and his Career Development Officer (CDO) and informed them of his active duty status. He submitted copies of his military performance evaluations and awards for inclusion in his OPF. According to the grievant, the Department cannot claim as an excuse for violating the law the fact that the ALDAC telegram, State 151508, was sent out after the 2005 SB adjourned.

THE AGENCY

In its January 3, 2006 letter, the Department addressed each of {Grievant}'s claims.

1. DSTC enrollment data

The Department enclosed a copy of the Notice⁵ which explains how records of an employee's training at DSTC are transferred to the employee's Employee Profile (EP). The notice states that the EP offers "employees the opportunity to view a summary of their career history and, if required, request corrections." The Department stated that the Notice:

never mentions that this profile will be made part of your OPF or be available for review by Foreign Service Selection Boards. I note that your

⁵ Department Notice 2005-07-063, July 18, 2005.

“[A]bbreviated Employee’s Profile⁶” that I have enclosed does contain several courses taken through DSTC. Regardless, this profile as generated from GEMs is different and distinct from the EP. . . . That EP is neither part of the OPF nor reviewed by Selection Boards. Even if, for the sake of argument, all the data related to your DSTC training was not included on this abbreviated profile, I fail to see nor have you demonstrated the harm this alleged procedural error caused. That is, you have not proven with a preponderance of the evidence that a more inclusive and expansive listing of your DSTC training would have made you any more competitive.

2. Letter of commendation

Agency procedures at 3 FAH-1 H-2812.2-2 stipulate that the employee may submit material such as the letter of commendation to HR/PE with a request that it be included in the employee’s OPF. The “letter indicates that it was faxed from the Miami Field office on August 23, 2005,” after the 2005 Selection Board completed its work. The agency deciding official, Linda S. Taglialatela,⁷ concluded that “again, for the sake of argument, I fail to see how the inclusion of this letter would have made you any more competitive in that 2005 review for promotion.”

3. Awards missing from OPF

In its letter to grievant, the Department enclosed copies of personnel actions concerning two awards: 1) an “individual cash award” dated March 3, 2005, and 2) a “non-monetary Award” dated August 16, 2005. The Department explained that when an employee of the grievance staff (HR/G) noted that the nominations/certificates of the awards were not in grievant’s OPF, he wrote to grievant on November 18, 2005, asking for copies of the nominations/certificates, specifically for the Meritorious Honor Award (MHA). Taglialatela informed grievant that:

⁶ The agency footnote refers to the “2005 Selection Board precepts, page 15, for material available to the Board.”

⁷ Deputy Assistant Secretary, Bureau of Human Resources.

No response has been received to date. Without additional information, I cannot determine that you have been harmed by this alleged omission. In accordance with [FSGB] precedent, in non-disciplinary cases, the grievant is responsible for identifying both the agency's erroneous or improper action and the harm the action caused (see FSGB No. 97-98). You have done neither. As far as the Non-Monetary Award, it was effective on August 16, 2005, after the S-II Selection Board adjourned.

4. Failure to comply with USERRA policy

The Department responded to grievant's allegations that it failed to comply with USERRA as follows:

First, regarding the claim that the Department did not follow its procedures in ALDAC cable State 151508, this cable was sent on August 16, 2005, after the SB adjourned.

Second, grievant has provided no proof that his TIC/TIS dates were not extended for the period he served on active duty or that the office responsible for TIC/TIS dates does not intend to complete this action when his active duty is completed.

"Third, and most importantly, STATE 151508 . . . indicates" that it is the "employee's responsibility to ensure" that "applicable actions are taken."

Specifically, it requires that the employee stay in touch with their [CDO] to inform them of the status of their active duty, and "encourages employees to submit a copy of any military performance evaluations and award nominations to the CDO for inclusion in the OPF. Mr. {Name} in his letter of November 18, 2005, asked you to provide copies of any military evaluations or awards. You did not respond. You have provided no proof to allow me to determine that you were disadvantaged by the omission of such evaluations or awards.

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.⁸

We provide our analysis and findings on the matters appealed by grievant here in the same order as enumerated in the preceding section.

1. DSTC enrollment data

In his appeal, grievant included a copy of a letter⁹ indicating that he had “successfully completed” two training courses in the Federal Law Enforcement Training Center (FLETC)¹⁰ Advanced Training Program. The courses were completed on September 19, 1997 and August 28, 1998. He claimed that this information was not annotated on his EP and never made available for review by the 2005 SB. He asserts that this was “an egregious procedural error” that caused him harm by making him less competitive.

We find that his claim lacks merit as he has failed to show that he was harmed. First, we accept the agency’s explanation that the EP is not included in the employee’s OPF and is not reviewed by the SBs. According to the Department’s instructions to SBs contained in the 2005 Procedural Precepts, an “Abbreviated Employee Profile”¹¹ is included in information provided to SBs. The precepts instruct Selection Board members to “[o]bserve caution that information on Employee profile sheets may not be fully

⁸ 22 CFR Section 905.1(a)

⁹ Letter “To whom it may concern,” February 14, 2006 from Stephan W. Brooks, Registrar, FLETC, Glynco, Georgia.

¹⁰ In his agency level grievance, {Grievant} identified the training he completed as being from “the Diplomatic Security Training Center (DSTC).”

¹¹ Neither party provided this board with a copy of any document identified as an “Abbreviated Employee Profile.”

accurate and that the sole official source of information to be weighed by the board is the member's Performance File."

Second, we find that grievant's reliance on Department Notice 2005-07-063¹² to show that the agency erred and that he was harmed is without foundation. The Notice, which describes how training dates for courses completed at the DSTC are transferred to HR for inclusion on the EP, states that "[t]raining for years prior to fiscal year 1999 and all non-core training courses will not appear on the EP." (italics in original).

2. Letter of commendation

We find that grievant's claim concerning the letter of commendation from the Consul General of {Blank} is without merit. While he asserts that the "letter was sent to the Department on April 4, 2005 and mysterious (sic) disappeared," he provided no evidence to support his assertion, nor has he explained how he was harmed. We find also that the Department's explanation¹³ to grievant about this was responsive: "The Department notes that a review of its accountable mail records . . . for April 2005 was conducted and no record . . . pertaining to the letter of commendation was found."

Agency procedures¹⁴ provide that an employee "may at any time submit unclassified material related to performance to HR/PE with a request that it be included in the member's OPF." Such material may include letters from persons commending a member of the Foreign Service for a particular act of which the writer has personal knowledge. In his appeal to the Board, {Grievant} said that he complied with these procedures by submitting the letter to HR/PE, yet he provided no evidence that he

¹² Grievant included a copy of this Notice, dated July 18, 2005, in his agency grievance.

¹³ Agency response September 11, 2006 to grievant's August 24, 2006 request for documents.

¹⁴ 3 FAH-1 H-2812.2-2

provided the letter to the agency in time for it to be included in his OPF for review by the 2005 SB. It is {Grievant}, not the Department, who is at fault.

3. Awards missing from OPF

{Grievant} complained that a “nomination for a Non-monetary Superior Honor Award (SHA)” was missing from his OPF. He explained that the award nomination had been downgraded to a Meritorious Honor Award (MHA) and approved “well after the 2005 SB met.” He is correct on this and in fact acknowledged that the award was “effected August 16, 2005.”¹⁵ Thus it is clear that a copy of the approved MHA could not have been available to the 2005 SB.¹⁶

His claim appears to be that the agency erred because it failed to include a copy of the paperwork for the original nomination -- an SHA -- in his OPF. We find no merit to his claim. There is nothing in the record to indicate that “nominations” for awards are included in an employee’s OPF until after they are approved. Agency procedures at 3 FAH 1 H-4812.2 and H-4816.2 do provide that “*approved* award nominations” (italics added for emphasis) are to be included in the OPF. Thus we find no error by the agency, and no harm to grievant, as there was no requirement that the nomination for the SHA be included in grievant’s OPF.

4. Failure to comply with USERRA policy

We discuss now our findings concerning grievant’s allegations that the Department failed to comply with USERRA.

a. Extension of his time in class/service date

¹⁵ In its letter denying the grievance, the agency provided grievant a copy of the August 16, 2005, Notification of Personnel Action.

¹⁶ The SB convened on June 7 and adjourned on July 29.

{Grievant} requests that the Department provide him an official document proving that his TIC/TIS dates were extended for the periods he served in the military in 2005 and 2006, as well as for “every day” that he served on active duty since he entered the Foreign Service in 1987.

In denying the grievance, the agency informed grievant that he had not provided proof that his TIC/TIS had not been extended for the 30 days he was on LWOP for active duty in 2005, or that the office responsible for extending TIC/TIS did not intend to complete this action when his active duty (which started in October 2005) was completed.

The Department’s policy¹⁷ concerning compliance with USERRA provides that:

Individuals will continue to be reviewed for tenure and compete for promotion while they are serving on active military duty. *When the employee concludes active duty service and comes off LWOP* (italics added for emphasis), the TIC/TIS date and/or LCA date is extended by the exact amount of time served on active duty if the employee was not promoted and/or tenured while on LWOP for military service.

In {Grievant}’s case, this simply means that the Department is required to extend his TIC/TIS dates for the periods he was on active military duty.¹⁸ In order to ensure that his rights under USERRA are upheld, we hold that {Grievant} is entitled to confirmation from the agency that it has taken action to extend his TIC/TIS dates as required. Yet, in our view the Department’s reply to grievant is responsive in the sense that it acknowledged its intention to complete the required action at some time in the future. Grievant was on active duty when he filed his grievance and appeal and remained on active duty until early November 2006. We have no reason to believe that the agency

¹⁷ Department Announcement 2005-08-078, August 22, 2005.

¹⁸ Unless he was promoted during the time he was on LWOP; there is nothing in the record to indicate that he was promoted during the time when he was on LWOP.

will not complete action to extend grievant's TIC/TIS in a timely manner. If the Department does not extend grievant's TIC/TIS dates as required, he can raise the matter again with this Board.

The record does not provide this Board with information as to what specific steps need to be taken at this time by either grievant or the agency to ensure that grievant's TIC/TIS is extended. Thus we find that grievant has not met his burden of proving that he has been harmed as of this date by any action or inaction on the part of the agency.

b. Inclusion of military evaluations and awards in his OPF

{Grievant} claimed that the Department had not offered him the opportunity to provide military evaluations so that promotion boards could "carefully weigh" their contents; he has "submitted copies of military performance evaluations and awards for inclusion in my OPF and have tenured [sic] endless proof that I was disadvantaged by numerous omissions of such military evaluations . . . and awards."

The agency's policy in this matter is contained in the August 22, 2005 Department Announcement¹⁹ which explains that "An individual OPF should include any official military performance appraisals (and any military award nominations)" as well as "any statement by the returning employees regarding his/her uniformed service." The Announcement describes the actions that the employee should take. Employees are encouraged to "submit a copy of any military evaluations and award nominations to the CDO for inclusion in the OPF."

We find that his claim in this matter has no merit, for he has presented no evidence, documentation or other proof showing that he provided copies of the

¹⁹ The Announcement repeated the text of the cable, State 151508, which was transmitted to all posts on August 16, 2005.

evaluations and awards to his CDO or to any other person or office in the Department, that the Department failed to comply with any law or its regulations, or that he was harmed.

- c. Specific instructions to the promotion board to weigh carefully and consider, to the extent the uniformed service can be deemed relevant, his military service

Grievant's argument on this appears to be that the Department's policy on USERRA compliance announced in the ALDAC cable and the Announcement was sent after the SB adjourned. He claims that "the Department can not use their [sic] tardiness to instruct the S-II [S]election Board as their [sic] rationale for failing to abide by the law under USERRA."²⁰ Yet he also acknowledged that "the 2005 procedural precepts were amended according to the policy announced by the Department."²¹

We have reviewed the 2005 Procedural precepts and find that they include the following:

Boards are advised that [USERRA] provides that members called to military service are entitled to "the additional seniority and rights and benefits that such persons would have attained if the person had remained continuously employed" at the Department. In light of this mandate, Boards are instructed to weigh carefully and consider military evaluation reports and award nominations provided by a member in connection with the period of time during which such member was on active military duty. In this regard, Boards should review carefully any statement submitted by a member concerning the relevance of their military service to their work in the Foreign Service.

In light of this circumstance, we find no merit in grievant's claim that the 2005 Selection Board was not properly instructed concerning its obligations under USERRA.

²⁰ Appeal, page 3.

²¹ Grievance, page 2.

As grievant has failed to establish, by a preponderance of the evidence, any of the claims set forth in his appeal, the appeal is denied.

V. DECISION

The grievance appeal is denied.