

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]

Record of Proceeding
FSGB No. 2009-003

And

Date: October 13, 2009

Department

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Alfred O. Haynes
Nancy M. Serpa

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Department committed procedural error by failure to include grievant's 2005-2006 EER in materials presented to the 2006 Selection Board considering her for possible promotion. Despite the relatively low percentage of employees chosen for promotion, the Department failed to meet its burden of proving that, despite a material procedural error which might have been a substantial factor in grievant's failure to be promoted in 2006, she would not have been promoted even if the error had not occurred.

OVERVIEW

Grievant contends that the absence of her 2005-2006 EER in her Official Performance File (OPF) when the file was reviewed by the 2006 Selection Board was a significant factor in her failure to be promoted that year. She also raises, for the first time in her appeal to the FSGB, the complaint that its absence also may have denied her a Meritorious Service Increase (MSI) in 2006.

The Department, while admitting that the lack of a timely 2005-2006 EER was a procedural error for which grievant was not responsible, denied that she would have been promoted even if the EER had been included in the OPF when the 2006 Selection Board considered her for promotion but mid-ranked her instead. The Board found that a material procedural error occurred that may have been a substantial factor in her failure to be promoted in 2006, and that the Department thereafter did not meet its shifting burden of proving by a preponderance of the evidence that grievant would not have been promoted even if the procedural error had not occurred. The Board rejected the Department's reliance on a statistical analysis showing that only 23 of the 163 eligible Office Management Specialists were promoted that year, and its argument that two subsequent SBs also mid-ranked grievant rather than recommending her for promotion.

The grievance was sustained and the matter remanded to the Department with directions to convene a reconstituted 2006 Selection Board to determine whether the grievant would have been promoted or received an MSI.

DECISION

I. THE GRIEVANCE

[Grievant], an FS-5 Office Management Specialist (OMS) with the Department of State (Department, agency), filed a grievance with the Department on October 14, 2008. She claimed that the 2006 Selection Board reviewed her Official Performance File (OPF) without her 2005-2006 Employee Evaluation Report (EER) in her OPF, and issued “a warning counseling statement” to her “directly addressing the missing evaluation.” For relief, she asked that the 2006 Selection Board be reconstituted to consider her complete OPF with the missing 2005-2006 EER included, and any other relief deemed just and proper.

The Department denied her grievance on November 20, 2008, and on January 23, 2009, [Grievant] appealed that decision to the Foreign Service Grievance Board (FSGB).

II. BACKGROUND

[Grievant] was hired by the Department in 1999 as an untenured FP-8 OMS. She was promoted to FP-7 in May 2000 and to FP-6 in 2001. She was tenured in November 2001, and in October 2004 she was promoted to FS-5, her current grade.

In late 2003, [Grievant] was assigned to the office of [Specific Office Named], and served as staff assistant to Ambassador [Named Person #1], the President’s [Specific Title #1] Coordinator. In late 2005, [Grievant] was paneled to an overseas OMS position in [Named Post #1]. In January 2006, [Named Person #1] was nominated to be [Specific Title #2], and shortly thereafter he was nominated to serve concurrently as the [Specific Title #3]. In response to [Named Person #1]’s request, [Grievant] broke her assignment to [Named Post #1] and stayed on as one of four employees helping [Named Person #1] establish his new office.

When the rating period ended on April 15, 2006, [Named Person #1] was preparing for his confirmation hearings before the Senate, and was still engaged in setting up his new office. Despite repeated requests and reminders from [Grievant], he maintained that he was too busy to complete her EER for the 2005-2006 rating period before the annual May 15 deadline. Throughout the summer, [Grievant] reminded her supervisor of the need to complete her EER, but he did not address the matter. In an effort to save time, [Grievant] even drafted an EER addressing her performance during the rating period and presented it to the Ambassador's Senior Adviser, who reviewed it on September 8.

Meanwhile, the 2006 SB that considered the performance files of employees in [Grievant]'s grade and skill code convened on August 7, 2006. [Grievant]'s file was considered by the SB, but without the still-unwritten 2005-2006 [Named Person #1] EER contained therein. The 2006 SB mid-ranked [Grievant] rather than recommending her for promotion. On September 12, 2006, the SB that considered [Grievant]'s file was dismissed, having completed its work. In its findings, the SB included the following Counseling Statement addressed to [Grievant]:

The file of [Grievant] contains an extremely strong series of EERs and a record of quick promotions, most recently in 2004. In the spirit of providing additional feedback that might be useful to her, the 2006 Selection Board which reviewed the documents wishes to share with her our perspective relative to the contents of that file.

Though not a negative in itself, the absence of an EER for the most recent 2005-2006 rating period made it difficult for the Board to make a fully informed judgment of [Grievant]'s strengths. In order that her good work be fully recognized, the Board urges [Grievant] to ensure that her performance during the most recent year is fully documented by making sure that an EER covering that period is submitted, even belatedly. She should also do everything she can to ensure that next year's performance is recorded in an EER that is on time and available for consideration by the 2007 Selection Board.

On October 30, 2006, [Grievant]'s 2005-2006 EER was submitted to the appropriate Executive Office, and on October 31 the EER was forwarded to Human Resources for inclusion in her OPF.

[Grievant] was not promoted by the 2006 Selection Board. On October 14, 2008, she filed a grievance with the Department. The Department denied that grievance on November 20, 2008. [Grievant] appealed the Department's decision to this Board on January 23, 2009, and filed a "supplemental submission" on February 20, 2009. Except to the extent set forth hereafter, the Department notified the Board by memo dated April 2, 2009, that it had "nothing further to add to what has already been stated in the decision letter." On April 3, grievant filed a "clarification" purporting to rebut the Department's April 2 statement. The Record of Proceedings (ROP) was closed on June 18, 2009.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant contends that the Department erred in several areas in denying her grievance. First, she contends that her 2005-2006 EER, "undeniably a strong one, would likely have pushed me over the edge to promotion by the Board."

Second, she contends that the Department erred in asserting that the issuance of a Counseling Statement by the Selection Board was not harmful to her. In this regard she claims that, because the counseling statement criticized the lack of a 2005-06 EER in her OPF, it "implies that the Board likely would have made a different decision regarding how it ranked me had it been rightfully afforded a full picture of my performance." She also avers that the Department "misses the point" when it contends that the statement played no role in the decisions of the 2007 and 2008 selection boards not to recommend her for promotion, since the

statement is clear evidence that the missing EER harmed her chances for promotion in 2006, the year on which the primary thrust of her grievance is based.

Third, grievant objects to the Department's reference to the "very competitive nature" of OMS promotions, without referring to whether the missing 2005-2006 EER was a substantial factor in her not having been promoted by the 2006 Selection Board.

Fourth, grievant contends that the Department's decision letter implies that she is inappropriately challenging the judgment of the 2006 Selection Board not to recommend her for promotion, and argues that she is not. Rather, she is grieving that a clear procedural error has substantially harmed her.

Fifth, grievant argues that she has met her burden of proof (under 22 CFR 905.1(a)) that the grievance is meritorious, but that the Department then failed to meet its burden of showing that even though a procedural error "may have been a substantial factor" in her non-promotion, she still would have been mid-ranked by the 2006 Selection Board even if the missing EER had been included in her file. Grievant claims that her 2005-2006 EER is "truly superlative in nature," arguing that she may have been promoted by the 2006 Board if it had been included in her OPF in 2006.

Finally, [Grievant] contends that the Department has provided only "negligible analysis" as to why she might not have been promoted in 2006 even if the missing EER had been included in her file, and provided "no analysis whatsoever with respect to the possibility" of grievant having been awarded a Meritorious Step Increase (MSI) for that year.

The Department

Except for its brief response to [Grievant]'s supplemental submission, in which it objected to grievant's use of the phrase "recommended for promotion but not reached" and

provided grievant's "scorecard" showing that she was mid-ranked rather than "recommended but not reached" in 2006 and subsequent years, the Department relied in this grievance appeal solely on the grounds set forth in its November 20, 2008 decision letter. The Department admits that the failure of grievant's rating officer to submit a timely EER for her in 2006 was a procedural error that was not her fault, but it disagrees that grievant's career was harmed by this error.

First, the Department notes that the counseling letter written by the 2006 Selection Board was never placed in her performance file, and therefore could not have played any role in the decisions of subsequent selection boards.

The Department also argues that the 2006 Selection Board, without a 2005-2006 EER for the grievant, was required by the precepts to evaluate her performance on the basis of the previous EERs in her OPF. The Department further argues that the 2007 and 2008 Selection Boards, both of which had access to her complete OPF, including the tardy 2005-2006 EER, also mid-ranked the grievant.

The Department points to the very competitive nature of promotions from FS-5 to FS-4 in the OMS specialty, noting that in 2006, only 14% (23) of those eligible to compete for promotion were actually promoted, and that in 2007, only 12.8% of eligibles were promoted.

Finally, the Department notes the "presumption of regularity" to which the Department's Selection Board process is entitled.

In conclusion, the Department argues that in the absence of findings either that the 2006 Selection Board failed to follow its precepts or that the missing EER was a substantial factor in the grievant not having been promoted by the 2006 Selection Board, it cannot grant [Grievant]'s request for a reconstituted 2006 Selection Board.

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 (22 CFR 905.1(a)). As applicable to the circumstances of this case, grievant must demonstrate that a material procedural error occurred that may have been a substantial factor in the denial of her promotion. If grievant establishes such a procedural error, then under 22 CFR 905.1(c), the burden of proof shifts to the agency to show, by a preponderance of the evidence, that it would have taken the same action even if the error had not occurred. *See* FSGB Case No. 2008-009 (February 23, 2009).

There is no dispute between the parties that the failure of grievant's rating officer, Ambassador [Named Person #1], to prepare and submit grievant's 2005-2006 EER in a timely manner was a procedural error for which the grievant was in no way responsible. Grievant is not required to prove that she *would* have been promoted, only that she *might* have been promoted, in order to shift the evidentiary burden to the Department. We agree with grievant. We find that the absence of the complimentary EER ultimately prepared and submitted for [Grievant] months after the 2006 SB completed its review of the candidates' OPFs *may* have been a substantial factor in denying her a promotion. Additionally, we find that, by virtue of the fact that the 2006 SB found the lack of a current EER serious enough that it took the time to write a counseling statement about it (albeit a statement in which the SB was careful to note that the absence of such an EER was "not a negative in and of itself"), grievant has met the evidentiary threshold and shown that the procedural error may have been a substantial factor in her failure to be promoted.

Given that the grievant has shown both that a procedural error occurred and that the error may have been a substantial factor in her not having been promoted, the burden of proof then

shifted to the Department to show, by a preponderance of the evidence, that the 2006 Selection Board would have taken the same action even if the procedural error (i.e., lack of the 2005-2006 EER in her OPF) had not occurred. We find that the Department has not met that burden herein.

As noted above, the Department relied to a significant degree on the fact that grievant is at a very competitive grade level (FS-5) for her skill code, so that of the 163 FS-5 OMSs eligible for promotion to FS-4 in 2006, only 39 were recommended for promotion by the 2006 SB and only 23 were actually promoted. The average time in grade for those promoted was 4.7 years.

While it is true that, statistically, the odds were not in [Grievant]'s favor in terms of receiving a promotion that year, the difficulty with the Department's reliance on such a statistical argument is that there is no empirical way of determining whether or not she would have been among those selected. Stated differently, even if only 14% of the eligibles were recommended for promotion, we cannot conclude that the grievant would not have been viewed by the SB as in that group. There is no way to know what the 2006 SB would have done absent the procedural error and, other than the fact that grievant was not recommended for promotion, the record does not reveal whether or not she was considered by the 2006 SB close to those recommended for promotion.

We know for certain that the 2006 SB viewed [Grievant] as a worthy candidate with an excellent performance record and rapid promotions in the past. We know this because the SB took the time to tell grievant just that in its Counseling Statement before completing its duties on September 12, 2006. We also know, from that same Counseling Statement, that due to the absence of her 2005 EER, the 2006 SB could "not make a fully informed judgment of

[Grievant]’s strengths” vis-à-vis the other applicants. The SB urged [Grievant] to ensure that her most recent EER was included in her OPF henceforth “in order that her good work be fully recognized”

We, of course, cannot conclude that grievant would have been promoted in 2006, but that is not the test. We can, and do, conclude that the Department has not met its burden of proving that she *would not* have been promoted under any circumstances. As between the grievant who was completely blameless for any uncertainty caused by the absence of her then-current EER and the Department which caused the uncertainty to arise due to the failure of Ambassador [Named Person #1] to prepare the EER in a timely manner, the latter cannot be given the benefit of the doubt based on this record.

In so concluding, we reject two additional and related arguments raised by the Department: that the Counseling Statement referred to above was not placed in [Grievant]’s OPF and therefore could not have influenced the 2007 and 2008 Selection Boards, and that those SBs independently mid-ranked grievant rather than recommending her for promotion despite having considered her 2005 EER as part of her OPF in those subsequent years.

As the grievant correctly argues, the key issue in this proceeding is whether the 2006 SB might have recommended her for promotion if the 2005 EER were available for consideration in comparison with all of the other candidates that year. It is irrelevant that the subsequent two SBs did not know that the 2005 EER had been missing from her OPF in 2006, or that they (a different group of SB members each year) also independently mid-ranked her in comparison with a different pool of promotion eligibles in 2007 and 2008. The subsequent decision of the Department to promote or not to promote the grievant in future years neither increases nor

decreases the likelihood that she would have been promoted in 2006 absent the proven procedural error.

In view of the foregoing, we find that grievant has produced preponderant evidence to establish that a procedural error occurred and that this error may have been a substantial factor in the Department's decision regarding her promotion in 2006. The Department has failed to establish by a preponderance of the evidence that it would have taken the same action had the procedural error not occurred. (22 CFR 905.1(c).)

Accordingly, the grievance is sustained. This matter is remanded to the Department with direction to reconstitute the 2006 Selection Board for the purpose of reviewing grievant's OPF with Ambassador [Named Person #1]'s 2005 EER properly included therein.

The claim that, even if not promoted, [Grievant] might have been granted a Meritorious Step Increase (MSI) by the 2006 SB and that the procedural error caused that loss was not explicitly raised to the Department prior to the proceedings before this Board. The Board views the question of receipt of an MSI as a question of the harm that flowed from the procedural error, rather than a new claim. No new facts other than those already considered by the Department and the Board are material to the resolution of that claim (which becomes moot if the grievant is found entitled to promotion during the Recon Board process). The Board returns to the Department the alternative damage claim of loss of an MSI and leaves to the Department the question of whether it addresses the promotion and MSI issues before a single Recon Board or opts to address the MSI issue via a second Recon Board only if the results of the first Recon Board establishes that the grievant would not have been promoted.

V. DECISION

The grievance is sustained. The Department is directed to reconstitute a 2006 Selection Board to review grievant's OPF with her 2005-2006 EER prepared by Ambassador [Named Person #1] included. The Department is further directed to report promptly the findings of the reconstituted SB to grievant and to this Board.

For the Foreign Service Grievance Board:

Arthur A. Horowitz
Presiding Member

Alfred O. Haynes
Member

DISSENT

I disagree with my colleagues' conclusion that the Department failed to meet its burden to show that the 2006 Selection Board would have taken the same action even if the procedural error committed in this grievance had not occurred. I believe the Department presented sufficient evidence to demonstrate that, even if [Grievant]'s 2005-2006 EER had been included in her file in time to be reviewed by the 2006 Selection Board, she would not have been promoted by that Board.

First, I put more credence than did my colleagues in the fact that the grievant is in an extremely competitive grade in the Office Management Specialist (OMS) skill code. In that senior grade in the OMS skill group, [Grievant] would have been competing with OMSs to Ambassadors, DCMs, Office Directors and Assistant Secretaries, most of whom would have had more experience than she did. Moreover, the record shows that, in 2006, she was competing for promotion as an FS-5 for the first time, after less than two years in grade, in a skill group where the average promotee that year had 4.7 years in grade. While it is of course true, as my colleagues' decision states, that there is "no empirical way of determining whether or not she would have been among those selected" for promotion, I believe the more salient fact is that "statistically the odds were not in [Grievant]'s favor in terms of receiving a promotion that year." On the basis of these facts alone, I believe the Department has shown that the grievant would not have been promoted in 2006.

Secondly, the Department presents as evidence the fact that the grievant was neither promoted nor recommended for promotion in either 2007 or 2008, when her performance file was complete, and contained two additional strong EERs. I disagree with both the grievant and my colleagues that it is "irrelevant that the subsequent two SB's... (a different group of SB members each year) independently mid-ranked her in comparison with a different pool of promotion eligibles in 2007 and 2008." In my view, that evidence is both relevant and persuasive, for the reasons outlined below.

Yes, the 2007 and 2008 Selection Boards were composed of a different group of members. But they worked under identical precepts and deliberative procedures as the 2006 Board, so it is reasonable to assume they would arrive at similar conclusions. Moreover, while my colleagues note that the grievant was competing in 2007 and 2008 against a "different pool of promotion eligibles," I would argue that the changes in the competition pools all worked to grievant's advantage, not against her, and should have made her more likely to be promoted in 2007 or 2008. First, 2007's competition pool did not contain the 23 FS-5 OMSs who were promoted to FS-4 in 2006, presumably the most competitive promotion candidates. Likewise, 2007's promotees were deleted from the 2008 pool of eligibles. And files being added to the competition pools were those of employees "junior" to the grievant -- i.e., those promoted after the grievant to grade FS-5. In the meantime, grievant was gaining an additional one or two years' experience (with very strong EERs) in grade FS-5, making her file more competitive relative to

the pool of eligibles. For these reasons, I believe [Grievant]'s failure to have been promoted or recommended for promotion in 2007 and 2008 show it to be even less likely that she would have been promoted by the 2006 Selection Board.

For the above reasons I believe the Department has shown in this case that the 2006 Selection Board would have taken the same action with respect to [Grievant] even if the procedural error had not occurred. I disagree with the decision to sustain the grievance.

Nancy M. Serpa
Member