

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

{ Grievant }  
Grievant

Record of Proceeding  
FSGB No. 2009-005

And

Date: September 22, 2009

Department

**DECISION**  
**EXCISION**

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For the Foreign Service Grievance Board:

Presiding Member:

Arline Pacht

Board Members:

James E. Blanford  
Alfred O. Haynes

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:** Grievant produced preponderant evidence showing that the Department's failure to include an Assistant Secretary's laudatory Performance Memorandum in the OPF to be considered by the Selection Board may have been a substantial factor in his failure to be promoted. The Department failed to prove that, notwithstanding the absence of the Assistant Secretary's letter, the grievant still would not have been promoted. The matter was remanded to the Department to establish a reconstituted Selection Board to review grievant's file with the Supplemental Performance Memorandum properly included therein.

## **OVERVIEW**

A Selection Board that was convened on June 10 and dismissed on July 8 of the evaluation year considered the grievant's timely-filed EER that referenced a letter from an Assistant Secretary. The Assistant Secretary, who was not the grievant's rater or reviewer, prepared a laudatory Supplemental Performance Memorandum and submitted it to the Office of Performance Evaluation for inclusion in grievant's OPF. However, the Memorandum was not placed in his OPF until June 27.

By the time the Performance Memorandum reached grievant's file, the Selection Board had only five work days remaining to complete its rank ordering, prepare its comments and recommendations and submit the entire package to the Director General in advance of the formal dismissal ceremony. The Board concluded that there was no showing that the Assistant Secretary's Performance Memorandum, providing an important perspective on the grievant's accomplishments, was considered by the Selection Board.

Therefore, the matter was remanded to the Department for further consideration by a reconstituted Selection Board.

## DECISION

### I. THE GRIEVANCE

{Grievant} (grievant), a member of the Foreign Service with the Department of State (Department or Agency), filed a grievance with the Department on September 15, 2008, claiming that a crucial document, a supplemental performance statement, was not filed in his Official Performance Folder (OPF) in sufficient time to be reviewed by the 2008 Senior Foreign Service (SFS) Selection Board (SB), leading to a denial of his promotion. As a remedy, grievant requests that the Department convene a reconstituted SB to review his complete OPF with the performance document included therein.

By letter of December 22, 2008, the Department denied {Grievant}'s grievance. On March 5, 2009, he appealed that decision to the Foreign Service Grievance Board (FSGB).

### II. BACKGROUND

{Grievant} is an FS-01 member of the Foreign Service in his last year of time-in-class. The 2008 SB informed him that he had not been promoted and would have to leave the Service no later than September 30, 2009.

During the 2007-2008 rating period, grievant was serving in an SFS level position as the {title}. He supervised the [REDACTED], two Division Chiefs, five Branch Chiefs and a staff of 40 employees.

On May 5, 2008, [REDACTED], the Deputy Director of [REDACTED] [REDACTED] completed grievant's Employee Evaluation Report (EER) covering the period from April 16, 2007 to April 15, 2008. Mr. [REDACTED] Deputy Assistant Secretary for [REDACTED] was the Reviewing Officer. On April 11, 2008, [REDACTED] the Assistant Secretary for [REDACTED]

and the Department's [REDACTED] ([REDACTED]) prepared a laudatory Supplemental Statement to be included in grievant's OPF. However, the Department acknowledges that the Assistant Secretary's letter was not placed in grievant's OPF until June 27, 2008.

The Selection Board that considered {Grievant}'s OPF was convened for a period beginning on June 10 and ending on July 8, 2008. In September, the Office of Performance Evaluation (HR/PE) informed grievant that he would not be reached for promotion as a result of the SB's conclusions, and consequently, would be separated from the Foreign Service, no later than September 30, 2009.

On September 15, 2008, {Grievant} filed a grievance with the Department challenging the SB's conclusions. The Department issued a decision on December 22, denying the grievance and on March 5, 2009, he appealed that decision to the FSGB.

### **III. POSITIONS OF THE PARTIES**

#### **GRIEVANT**

Grievant contends that the Department committed procedural error by mishandling the performance memorandum. He maintains that when the April 11, 2008 memorandum was submitted to the Office of Performance Evaluation (HR/PE) he made numerous requests to that office to ensure that a copy of the document was part of his OPF to be presented to the SB for its consideration. However, he never received confirmation from HR/PE that the Board received the document. Grievant states when the document finally was placed in his OPF on Friday, June 27, after taking into account weekends and the July 4<sup>th</sup> holiday, the Board had only seven days left to complete its work prior to its conclusion on July 8<sup>1</sup>.

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<sup>1</sup> In fact, the SB had only 5 workdays (June 30, July 1, 2, 3 and 7) after the June 27 date the performance memorandum was received in HR/PE.

Having established that the Department committed procedural error, grievant further submits that this error very likely was a substantial factor in not being reached for promotion. Therefore, the burden shifts to the Department to show by a preponderance of the evidence that he would not have been promoted had the Department's error never occurred. Grievant contends that the Department has not met that burden, offering "no cogent argument in furtherance of meeting its assigned burden" other than citing some promotion statistics.

Grievant rejects the Department's observation that the EERs in his OPF adequately documented his achievements. He points out that while his rating and reviewing officers commented on how he achieved success from a detailed and technical point of view; they did not provide a policy perspective like that presented by [REDACTED]. The Assistant Secretary contributed a high-level seventh floor perspective on the effect that grievant's key contributions had on one of the highest foreign policy priorities of the previous administration. As grievant commented, "[REDACTED]" statement "elevates the accomplishment to another level and ties it to a major foreign policy success".

Finally, Grievant argues that, in the highly competitive Foreign Service promotion system, it is highly likely that the omission of this vital supplemental performance statement may have been a substantial factor in his failure to cross the threshold into the Senior Foreign Service and, thus, constitutes harmful procedural error.

#### **THE DEPARTMENT**

The Department admits that [REDACTED] statement was not placed in grievant's file until June 27, 2008. The Selection Board that considered grievant's OPF convened on June 10 and was in session until July 8, 2008. The Department stated that, as all of the

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internal Board documents are destroyed upon dismissal, it is impossible to determine the specific date in which the Board considered grievant's OPF.

The Department contends that grievant's 2007-2008 EER adequately described his accomplishments during the period covered, including mention of the work he was required to perform in processing payments for North Korea in support of the 6-party talks on dismantling nuclear facilities. It calls attention to the special projects documented in the Work Requirement Statement, grievant's own comments in Section VII where he devoted approximately 25% of the page to discussing how he accomplished that task.

The Department also produced a series of statistics and the Reviewing Officer's comments about this matter. It concludes that on the basis of those statistics and the documentation contained in grievant's EER, the absence of the Assistant Secretary's performance statement was not a substantial factor in his failure to receive a promotion.

#### **IV. DISCUSSION AND FINDINGS**

In all grievances, except those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.<sup>2</sup> In his efforts to meet that burden, Grievant offered two significant arguments that convince the Board that he met this burden.

First, we find that [REDACTED] supplemental performance memorandum added a key performance perspective that went well beyond the laudatory comments articulated by {Grievant}'s EER rating and reviewing officers.

Assistant Secretary [REDACTED] reports directly to the Secretary and the Deputy Secretary on all [REDACTED] management matters relating to the Department's programs and

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<sup>2</sup> 22 CFR 905.1(a)

operations. Thus, it is reasonable to assume that Assistant Secretary [REDACTED] comments that appear in the performance memorandum present a seventh floor policy perspective concerning {Grievant}'s accomplishments as one of the highest foreign policy priorities of the previous administration. In addition, [REDACTED] noted in his memorandum that his, "counter part (sic) in the [REDACTED] personally thanked [him] for {Grievant}'s outstanding work..

Secondly, Grievant correctly pointed out that the failure to include the Assistant Secretary's Supplementary Statement in his OPF until June 27, when the Selection Board had neared the conclusion of its deliberations clearly indicates a procedural or processing error on the part of HR/PE.

The burden rests with the Department to affirmatively establish that the delayed performance memorandum was presented to the Selection Board at the time that it determined whether or not to recommend grievant for promotion. No such evidence was adduced in this case. In fact, the preponderance of the evidence indicates that it was unlikely that the Selection Board reviewed the performance memorandum in question when it evaluated grievant for promotion. The ROP shows that the Selection Boards were scheduled to convene in June. It is reasonable to conclude that in preparation for the forthcoming meetings of the Boards, the HR/PE's primary task was to insure that all performance-related documents it received concerning employees to be considered by the SBs were placed in the OPFs for the Boards' consideration. The Assistant Secretary's performance memorandum was forwarded to HR/PE on or shortly after April 11, 2008, whereas grievant's 2007-2008 EER was sent to HR/PE after May 13, 2008 when the Review Panel Chairperson signed the report. Yet the EER was timely included in the

OPF while the memorandum was not. In short, the memorandum at issue here was lodged somewhere in HR/PE for more than two months before it was placed in grievant's OPF. When the performance memorandum finally was placed into his OPF, only five working days remained before the SB completed its work. Since the SB must take time to complete both its review and the rank ordering process, draft a final report and meet with the Director General for the formal dismissal ceremony, it is fair to infer that more likely than not, the SB did not see the Assistant Secretary's performance memorandum between the date the memorandum was inserted into grievant's OPF and the completion of the tasks outlined above.

Accordingly, we find that grievant has produced preponderant evidence establishing that error occurred and that this error may have been a substantial factor in the Department's decision regarding his promotion. When the burden shifted to the Department, it failed to establish by a preponderance of the evidence that it would have taken the same action had the procedural error not occurred.<sup>3</sup>

## **V. DECISION**

The grievance is sustained. The Department is directed to reconstitute a 2008 SFS-IV Selection Board to review grievant's OPF with the Assistant Secretary's supplemental performance statement properly included in the OPF. The Department is further directed to promptly report the findings of the reconstituted SB to grievant and to this Board.

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<sup>3</sup> 22 CFR 905.1 (c)