

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

And

Department of State

Record of Proceedings

FSGB No. 2009-022

May 25, 2010

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arline Pacht

Board Members:

Alfred O. Haynes
Garber A. Davidson

Special Assistant:

Margaret C. Sula

Representative for the Grievant:

Pro se

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

HELD

A Criticism Statement a Selection Board issued to the grievant regarding an Employee Evaluation Report he prepared on a rated employee should be removed from his OPF since it omitted an important fact and contained errors and inaccuracies that, when taken together, were highly prejudicial to the grievant. Accordingly, the grievance was sustained.

OVERVIEW

Grievant contested the placement of a Criticism Statement in his OPF by a Selection Board (SB) that found the interim Employee Evaluation Report (EER) he prepared on a subordinate failed to provide specific examples of the rated employee's accomplishments. The employee, an FS-05 Office Management Specialist (OMS), was assigned to the position of OMS for the Deputy Chief of Mission (DCM) on arriving at the post.

In August 2007, shortly before the rated employee's arrival, the DCM abruptly departed the post. Designated Acting DCM (A/DCM) by the Ambassador, grievant continued to perform his responsibilities as the post's Political, Economic and Commercial Officer as well. As A/DCM, grievant supervised the OMS and, as her rater, completed her interim EER covering a five-month period from September 12, 2007 to February 21, 2008.

The crux of the SB's critique was that the EER failed to capture the OMS' more substantive duties beyond entry level skills, that examples of achievements were vague and meaningless and lacked specific examples. In support of its contention, the SB identified three comments in the EER that it claimed were not sufficiently specific.

On assessing the SB's criticism of grievant's first challenged comment in the interim EER, the Board pointed out that the SB apparently read only one of two sentences bearing on the rated employee's performance. When read together, the Board found that these sentences provided an adequate example of the rated employee's accomplishment. The Board also found with respect to the other two criticisms that the grievant offered sufficiently specific examples of the rated employee's achievements when measured by the precepts governing the preparation of an interim EER. Lastly, the Board noted that the SB failed to mention and apparently did not take into account that the EER was an interim evaluation covering a five-month period.

Consequently, the Board concluded that the SB committed procedural error in issuing the Criticism Statement. Observing that the precepts require the placement of a Criticism Statement in the rater's official personnel file, the Board pointed out that §1101 of the Foreign Service Act provides that such statements are grievable where inaccuracy, omission, or error, could be "falsely prejudicial" to an officer.

Finding that the SB omitted a highly relevant fact and included comments in its Criticism Statement that contained inaccuracies and errors, the Board found that taken together, the SB's errors were prejudicial to the grievant. Accordingly the grievance was sustained.

DECISION

I. THE GRIEVANCE

██████████ (grievant) filed a grievance with the Department of State (the Department, agency) on March 11, 2009 contesting the placement of a Criticism Statement in his Official Personnel Folder (OPF) by a 2008 Office Management Specialists (OMS) Selection Board. As relief, grievant seeks to have the Criticism Statement and cover letter expunged from his OPF and other files. In addition, he asks that he be considered by a reconstituted board in the event a 2009 SB reviews his OPF containing the disputed materials and fails to recommend his promotion.

In its decision letter of May 5, 2009, the Department denied the grievance in its entirety and on June 22, grievant then filed an appeal to this Board.

II. BACKGROUND

The circumstances giving rise to the grievance occurred while grievant served as the Political, Economic and Commercial Counselor (his assigned position) and as the Acting Deputy Chief of Mission (A/DCM) at the United States Embassy in ██████████ ██████████. In August 2007, the assigned Deputy Chief of Mission unexpectedly left post, and the Ambassador designated grievant to serve as A/DCM. Although taking on these additional duties, grievant was required to continue performing his regular duties as the Embassy's Political, Economic and Commercial Counselor.

Shortly after the DCM's abrupt departure, ██████████ ██████████ an FS-05 Office Management Specialist (OMS), arrived at post and was assigned as Office Management Specialist (OMS) for the DCM. As Acting DCM, grievant was responsible for supervising Ms. McDermott and writing her Employee Evaluation Report (EER) as her rating officer.

On March 11, 2008 grievant completed an interim EER on [REDACTED] covering a five-month period from September 12, 2007 through February 21, 2008 in which he recommended her for promotion from FS 05 to FS 04.¹ As her reviewing officer, the Ambassador endorsed grievant's recommendation and added his own positive comments to the EER.

The 2008 SB that considered Office Management Specialists in classes FO-03 to FO-05 was convened in the summer of 2008. After reviewing [REDACTED] OPF, it issued a Criticism Statement of the five-month interim EER that was placed in grievant's OPF. In this statement, the SB wrote that grievant failed to provide specific examples of the OMS' performance in her EER, thereby limiting her competitiveness.

III. POSITIONS OF THE PARTIES

The Grievant

The grievant alleges that the OMS SB committed procedural error in issuing the Criticism Statement because it unjustly failed to recognize his compliance with the core precepts that guide the preparation of an interim EER. He further avers that in its May 5 decision letter, the Department failed to address the following key points that he raised in his grievance:

- a. The agency's decision letter fails to mention why the Reviewing Officer (Ambassador), the Embassy's Review Panel, the rated employee and the Office of the Inspector General inspectors had no problem with the EER;
- b. The agency's position that grievant had not sufficiently described the electronic Country Clearance (eCC) system so that the SB could comprehend it demonstrates HR's failure to understand the inherent and widespread difficulties encountered in such "fully automatic" programs;

¹ The replacement for the abruptly departed DCM arrived at post in February 2008 and assumed the supervisory and rating officer responsibilities for [REDACTED]. At that time, grievant relinquished the A/DCM duties and returned full time to his position as the Political, Economic and Commercial counselor.

c. The Department failed to recognize that an interim 5-month EER differs from an annual EER that would reflect more of the rated employee's accomplishments.

d. The grievant adds that understanding the special circumstances that obtained at post is important, and that [REDACTED] EER accurately depicts her performance in a job that was inherently logistical and supportive, with few opportunities for stand-alone accomplishments.

He maintains that he complied fully with the core precepts and the EER instructions, and for the Selection Board to issue a letter of criticism constitutes procedural error.

The Department

The Department chose not to respond to the grievant's appeal to this Board and instead, relies upon its May 5 decision letter. In that decision, the Department agreed with the SB's conclusion that the EER did not provide "specific examples of performance and explain their significance." It cites the instructions for the preparation of EERs that define examples as "incidents exemplifying performance and potential, substantiate laudatory or critical comments and support the overall ratings." Department's Decision Letter, May 5, 2009, p. 2. The Department then endorsed the SB's criticism that grievant's comments in the EER regarding [REDACTED] adept handling of the electronic Country Clearance Program were "meaningless" without specific examples of what the OMS did beyond the capabilities of the program. Noting that in his grievance, [REDACTED] explained why the OMS' use of the Program was important, and the difficulty she faced in implementing it, the Department observed that "[t]his is the very kind of discussion that the Board's criticism found was lacking in the EER."

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). If the grievant establishes that a procedural error occurred which is of such a nature that it may have been a substantial factor in an agency action affecting the grievant, the burden shifts to the agency to prove that it would have taken the same action had the procedural error not occurred. 22 CFR § 905.1(c).

Section 1101(b)(2) of the Foreign Service Act excludes from the definition of a grievance “the judgment of a selection board established under section 602,” except that, as in the instant grievance, alleged procedural violations of law, regulation or collective bargaining agreement or prohibited personnel practices are grievable. 22 CFR § 901.18(c)(2), 3 FAM 4412(d)(2).

The issue before the Board is whether the SB committed a procedural error in issuing grievant a Criticism Statement that was placed in his OPF, and if so, what remedy would be appropriate. Since the Department has endorsed the SB’s actions, it assumes full responsibility for the grievance. A determination of whether procedural error was committed begins with an analysis of whether the SB adhered to the precepts that govern its issuance of such Criticism Statements. The Procedural Precepts for the 2008 Selection Boards state in pertinent part²:

Boards will identify rating and reviewing officers and inspectors who merit commendation or criticism for the quality of evaluations they prepared in the most recent rating period. . . . Boards should take special care to identify reports in which recommendations for promotion are not adequately supported by the narrative statement. . . . In each case where a member is criticized, the Board will prepare a written official statement citing deficiencies. A Board’s statement of criticism will be placed in the member’s Performance Folder. . . [to] remain in the member’s Performance Folder for one year.

Since the precepts provide that the Criticism Letter must be placed in the member’s performance folder, the appropriate section of the Foreign Service Act providing the definition of a grievance is applicable. Section 1101(a) provides in part:

² Part III B4(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....

(E) *alleged inaccuracy, omission, error, or falsely prejudicial character or information in the official personnel record of the member which is or could be prejudicial to the member. . . .* (emphasis supplied)

The SB’s general criticism of the EER was that while grievant recommended [REDACTED] promotion, the evaluation “failed to capture more substantive duties and responsibilities beyond entry level skills. Examples of achievement were vague, often to the point of being meaningless.” In other words, the SB found that grievant’s failure to provide specific examples of performance and explain their significance weakened the evaluation. In support of its contention, the SB cited three specific areas of the EER that it considered deficient in citing examples. We review the comments of the SB to determine if those comments were shown to be inaccurate, to have omitted material information, to be in error, or to be of a falsely prejudicial character.

(1) **EER:** [The employee] “quickly set out an action plan to prioritize work while seeking other ways to improve the office.”

SB: “But it offers no explanation of what specific actions she took to achieve those goals.”

Significantly, the SB omits from its critique the preceding sentence of the EER that states: “Immediately upon her arrival in [REDACTED] [REDACTED] saw a need to reorganize her office since it had been managed by a series of temporary rovers well before the abrupt departure of the DCM in August 2007.” While grievant did not elaborate on the action plan mentioned by the SB, later in the narrative he pointed to the impact of her organizational efforts, stating that [the

OMS] was a “tremendous help to me as A/DCM, since I was required to remain substantially engaged in my ‘regular’ job as Political/Economic Counselor.” We find this portion of the EER sufficiently specific to provide the SB with a clear indication of her achievement. FSGB Case No. 2006-039 (February 7, 2007). Consequently, we find that the SB criticism of the EER for its alleged lack of specificity to be inaccurate and of a falsely prejudicial character.

(2) EER: “Among her most important duties, which she carried out perfectly, was to track all incoming and outgoing ECCs so that we could plan for the numerous visits and events that occurred during the year.”

SB: “Given that the software has a built-in tracking function, this example is meaningless without specific examples of what she did beyond the capabilities of the program.”

The grievant countered that the ECC system is “notorious for not working in the field,” and that effective operation is necessary in order that the Ambassador and DCM “have a grasp on official visitors to their country. . .” The thrust of the statement is clear: planning for visits and events was the crucial factor of the evaluative phrase. Since the SB seemed to have knowledge of the internal workings of the system, the grievant was justified in assuming that the complexities and difficulties of its operation would be taken into account. We find the statement is sufficiently specific, and that the SB misinterpreted the requirements of the precepts in lodging its criticism. We find that here, too, the SB’s criticism that the EER did not provide specific examples of the rated employee’s performance was inaccurate and of a falsely prejudicial character.

(3) EER: “For instance, keeping track of diplomatic notes was problematic until she established a tracking system.”

SB: Preparation and filing of diplomatic notes is outlined in 5 FAH-1. The example neither explains the nature of the problem nor what [REDACTED] [REDACTED] [sic] did to resolve it beyond Department instructions.

Here, the grievant clearly indicated that prior to [REDACTED] arrival at the [REDACTED] Embassy, keeping track of diplomatic notes was problematic. He pointed out that the OMS resolved that problem by establishing a system that effectively tracked the documents. The SB apparently assumed that all systems are consistently managed in accordance with “Department instructions,” but this was not the case in the [REDACTED] Embassy since, as the grievant explained, “her office was managed by a series of rovers well before the abrupt departure of the DCM. ...” Thus, [REDACTED] made it clear that not until [REDACTED] arrived on the scene and took remedial action was the problem resolved. His statement was quite specific in this regard and plainly complies with the EER preparation instructions as well as prior FSGB interpretation. *Id.* Therefore, we find the SB’s criticism of grievant for failing to cite an example was inaccurate and of a falsely prejudicial nature.

In addition, we note that the SB failed to mention and apparently did not take into account that the EER was an interim evaluation covering a period of only five months. We find that this is a significant omission that bars the criticism from being included in the Grievant’s OPF pursuant to Section 1101(a)(1)(E) of the Act.

In sum, we conclude that the SB’s inclusion of the Criticism Statement in grievant’s official personnel record violated §1101 of the Foreign Service Act. The grievance is, therefore, sustained.

V. DECISION AND ORDER

The grievance is sustained. The Department is ordered to remove and expunge the Criticism Statement of December 11, 2008 as well as the accompanying letter of the same date from grievant's OPF and any other personnel files or records. In addition, the Department is directed to reconstitute a 2009 Selection Board in the event the grievant was not promoted by an SB that reviewed his file containing the Criticism Statement.