

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB No. 2009-027

November 1, 2013

**ORDER: MOTION TO
RECONSIDER**

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Jeanne L. Schulz
Nancy M. Serpa

Special Assistant:

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Thomas M. Lipovski
Attorney Advisor, HR/G

Employee Exclusive Representative:

American Foreign Service Association

ORDER: MOTION TO RECONSIDER

I. BACKGROUND

This order addresses grievant's motion, dated April 2, 2013, requesting that the Board reconsider parts of its decision dated January 10, 2013, on her discipline/EER¹ grievance. In our decision on the discipline portion of the appeal, we found that the Department had met its burden of proof with respect to grievant's misconduct, but that, given the relatively minor nature of that misconduct, it had failed to prove that a five-day suspension was justified. We mitigated the penalty to a letter of reprimand. In the EER portion of the appeal, we ordered expunction of certain comments from the Reviewing Officer's statement in grievant's 2007 EER, but denied grievant's request for reconstituted tenure and selection boards on the grounds that the changes we ordered were unlikely to have made a difference in Board findings.

Grievant filed a motion to reconsider parts of the Board's decision on April 2, 2013, and the Department filed a response to that motion on April 12, 2013. Grievant replied to the Agency's response on April 22, 2013.

II. POSITIONS OF THE PARTIES

A. The Grievant

In her Motion to Reconsider, grievant asks the Board to reconsider the following issues:

1. Expunging additional verbiage in the Review Statement of her 2007 EER

Grievant seeks amendment of certain phrases in the Reviewing Officer's statement. First, she seeks deletion of the word "serious" when referring to her misconduct. She avers that the adjective is at odds with the Board's finding that her transgressions were "relatively minor." She

¹ Employee Evaluation Report

asks the Board to strike reference to the role of the Regional Security Officer (RSO) in having brought the information to the reviewing officer's attention, contending that "sheer mention of the Regional Security Office elevates the seriousness of the matter in the eyes of anyone reading the statement." And finally, she asks that we modify the title of the FSN local investigator (she asserts that his job title was "FSN Supervisor" and not "Chief Local Investigator").

2. Allowing revision of her rated officer's statement in the same EER

Grievant contends that her use of the phrase "on two or three occasions" in the rated officer's statement was written to counter directly the reviewer's statement that she had checked the visa database "multiple times," and that her describing the musician as "my friend" was directly related to the reviewer's reference to the person "with whom she had a continuing personal relationship." Since the latter phrasing was ruled inadmissible by the Board, her reference thereto in her own statement needs to be modified to prevent manifest injustice.

3. Reconstituted tenure and promotion boards

Grievant posits that the Board may have assumed that, since she had already been tenured when it considered her appeal, her request for a reconstituted 2007 Commissioning and Tenure Board (CTB) was no longer an issue. She counters that assumption by noting that: A) she was tenured despite the Department's admitted error of having placed the earlier (five-day) discipline letter in her file without her knowledge; and B) with the amended wording of her EER, it is possible she could have been tenured in the fall of 2007, thus making her eligible for promotion by the 2008 Selection Board (SB), and possibly creating a domino effect in her subsequent promotion timeline.

She also argues that the Board erred in not shifting the burden of proof to the Department to establish that, even without these errors, she would not have been tenured by the 2007 CTB, or

promoted by the 2008 SB or subsequent years' SBs. Finally, in her reply to the agency's response to her Motion to Reconsider, grievant asks, since she believes she cannot place faith in the agency's Human Resources Bureau, that AFSA be allowed to supervise any reconstituted boards.

4. Reconstituted 2009 Selection Board

Irrespective of the Board's decision about reconstituted tenure and selection boards in response to request No. 3 (above), grievant points out that the Board neglected to address the additional independent request in her grievance appeal for a reconstituted 2009 SB to make up for the agency's admitted procedural error in having placed her five-day-suspension discipline letter into her official personnel file (OPF), and its having been seen by the 2009 SB. In her reply to the agency's response to her Motion to Reconsider, grievant maintains she is entitled to two reconstituted 2009 SBs, one as a remedy in her discipline grievance, and a second as a remedy in her EER appeal.

5. Amendment of all subsequent EERs if any of above relief is granted

If the Board grants any reconstituted boards, and if any positive results (earlier tenure or promotion) emerge from them, grievant seeks to amend any inappropriate verbiage in her EERs subsequent to any such change. As an example, she cites a notation in her 2012 EER that she was serving in a stretch² FS-03 assignment. Were she to be promoted by a reconstituted SB effective prior to 2012, that statement would no longer be accurate.

6. Overturning the 2010 low ranking

² The Foreign Service is a rank-in-person system, with grades assigned both to employees and to positions. An employee serving in a position graded higher than his/her personal grade is said to be serving in a "stretch" assignment.

Because some of the inadmissible language ordered excised by the Board from her 2007 EER was cited in the 2010 Low Ranking Statement grievant received, she seeks to have that statement expunged from the Department's records.

7. Deleting irrelevant/prejudicial language from the final discipline letter

Grievant asks that the Board order the removal from her final discipline letter of any charges or statements not substantiated by the Board. She appended to her Motion to Reconsider a draft letter of reprimand prepared by the Department, which she characterized as "basically the five-day-suspension letter with the aggravating factors removed." Given that this letter will be made a permanent part of her employee record, it would be "manifestly unjust" to allow it to contain language and allegations that are not substantiated.

8. Reconsideration of merits and possible mitigation of penalty

Grievant requests reconsideration by the Board of her charge of "harmful error," arguing that the Board appears to have accepted the Department's assertion that provision of a *Kalkines* warning at her March 20, 2007 interview in Washington cured the agency's failure to have provided the required *Garrity* warning at her February interviews at post. She also argues that the Board made a series of other errors in its decision (detailed on page 24 of her motion to reconsider). With respect to Charge 1 she asserts, among other things, that contrary to the Board's decision her system access was authorized. With respect to Charge 2, she asserts that the Board erred in referring to [REDACTED] as an investigator, and in describing his authority, as well as in its description of how the dinner meeting was arranged. With respect to the Board's decision on the penalty, she asserts the Board erred in stating that "need to know" warnings for accessing the PIERS data were added in 2009. She also urges the Board to reconsider like cases

– and specifically a TECS case – in determining penalty. Finally, she seeks seven minor factual corrections in the Board’s decision.

B. The Agency

The Department argues that grievant’s Motion to Reconsider was not timely filed, as it was submitted on April 2, 2013, nearly three months after the Board rendered its decision in her case. In support of this argument, the Department cites FSGB Policies and Procedures, which state that “a motion to reconsider must be filed within a reasonable period of time.”

Even had the motion been timely filed, the Department contends the Board’s authority to reconsider its decisions is limited to instances in which 1) there has been an intervening change in controlling law; 2) newly discovered evidence becomes available; or 3) it is necessary to correct clear error or prevent manifest injustice. Although “clear error” is a potential ground for reconsideration, such reconsideration is not warranted if the error does not affect the outcome of the decision. FSGB Case No. 2009-024 (Order dated July 6, 2010). Further, citing FSGB Case No 2007-049 (Order dated January 31, 2011), the Department contends that “reconsideration is limited to matters encompassed in the decision of the merits, not to what might have been argued. It is not intended to provide grievant with an additional chance to argue his cause.” Moreover, “[a]bsent extraordinary circumstances, revisiting the issues already addressed is not the purpose of a motion to reconsider.” FSBG Case No. 2009-024 (Order dated July 6, 2010).

The agency argues that grievant’s motion does not include any newly discovered or previously unavailable material evidence. It also fails to establish the existence of clear error that would affect the outcome of the case, or prove that the Board’s decision will result in manifest injustice if not altered. It is instead, according to the Department, an attempt by the grievant to revisit issues that have already been addressed by the Board, and she should not be

permitted to re-argue her case, having been fully heard in her many lengthy submissions during grievance appeal consideration. The Motion to Reconsider should be denied.³

III. DISCUSSION AND FINDINGS

The Board rejects the Department's contention that the Motion to Reconsider was not timely. Under all the facts and circumstances of this case, including the protracted proceedings to date, the multiple issues involved, the volume of the ROP and the length of the parties' filings and the Board's decision, we do not find the three month period that elapsed from the date of the decision to the date of the filing of the motion to be unreasonable.

With respect to the merits of Grievant's motion, under Section § 1106(9) of the Foreign Service Act, 22 U.S.C. § 4136(9) and 22 CFR § 910.1, "[t]he Board may reconsider any decision upon presentation of newly discovered or previously unavailable material evidence." The Board has further expanded the scope of reconsideration to comport with statutory and regulatory standards operative in the courts. Under this expanded scope of review, the Board will reconsider a decision based upon: (1) an intervening change in controlling law, (2) the availability of newly discovered evidence, or (3) a need to correct clear error or prevent manifest injustice. FSGB Case No. 2002-055 (Order of November 10, 2004).

In the instant case, grievant has presented no newly-discovered or previously unavailable material evidence, nor has she shown that there has been a change in controlling law. Thus, we consider whether there is a need to correct a clear error or to prevent manifest injustice. We shall

³In its reply, the Department stated that it was not specifically addressing the merits of each of the arguments in grievant's motion because of the extensive briefing that has already taken place in this case, and because, in its view, grievant failed to establish that reconsideration is warranted. But it asked for an opportunity to brief its position if "the Board sees any potential merit in any arguments presented by the Motion and determines that it would be appropriate to consider them." Because the Department had full opportunity to respond in its Reply to any of Grievant's arguments, the Board denies this request.

consider the issues involved in the order in which grievant presented them in her Motion to Reconsider.

A. Expunging additional wording from the reviewing officer's statement in grievant's 2007 EER

The Board agrees with grievant that given the finding in our decision that grievant's misconduct was relatively minor, we erred in not ordering expunged from the Reviewing Officer's statement the word "serious" in characterizing the misconduct in the first sentence of the paragraph beginning "[REDACTED] record of fine performance..." We now order that the word "serious" be expunged from the statement. The Board disagrees with grievant's argument that the mere mention of the "Regional Security Office" (twice) in the review statement is in and of itself cause for a reader to gain the impression that her misconduct was serious or nefarious. We decline to order removal of those terms.

Grievant's request to delete the phrase "to determine visa eligibility" from the reviewing officer's evaluation is denied because it is apparent from the ROP, including grievant's own statements, that she ran the names of the members of her friend's band through the database to determine if there was any derogatory information on the members that might affect his visa. Accordingly the statement is not inaccurate, and the Board's decision not to order this language expunged does not constitute "clear error" or "manifest injustice."

We reject grievant's request to change the title used for FSN [REDACTED] by the reviewing officer in the 2007 EER from "Chief Local Investigator" to "FSN Supervisor." Grievant's argument that her reviewer's description of [REDACTED] position would make a reader assume that he had "investigative or police-type training, specialty, authority or role" is without merit, in that "FSN investigators" in fraud prevention units in consular sections are common throughout the Foreign Service. Thus, [REDACTED] position in the consular section would likely be known to the

majority of those reading her file (i.e., Foreign Service officers serving on SBs). We also find her suggested new title, “FSN Supervisor,” technically inaccurate, when his full title, as shown in the screen shot (from the Department’s global address list) she produced, is “FPU [Fraud Prevention Unit] FSN Supervisor.” Including that full title in her EER would, in our view, give the reader more pause than would leaving the text as the reviewing officer drafted it. We decline to order the requested change of FSN [REDACTED] title.

B. Request to edit grievant’s rated officer’s statement in her 2007 EER

The Board denies grievant’s request to amend her rated officer’s statement in the 2007 EER. Even assuming that grievant wrote these phrases in direct reference to portions of the reviewing officer’s statement we have ordered expunged, they are not inaccurate or falsely prejudicial, and their inclusion does not constitute “clear error” or “manifest injustice.” Accordingly, Grievant’s motion to reconsider on this point is denied.

C. Reconstituted tenure and promotion boards

Grievant is correct in surmising that the Board overlooked her request for a reconstituted Fall 2007 CTB because she was tenured during the pendency of her grievance appeal. Because the inclusion in the EER of the statements we have ordered expunged (in the original decision and in this decision) may have been a substantial factor in her not being tenured in 2007, to prevent injustice we now order a reconstituted Fall 2007 CTB to consider grievant for tenure with her amended 2007 EER. Further, because grievant would have been eligible for promotion by the summer of 2008 had she been tenured in 2007, we order that if the reconstituted 2007 CTB recommends grievant for tenure, she be considered for promotion by a reconstituted 2008 SB. If she is promoted to FS-03 by a reconstituted 2008 SB, she shall be reviewed again for promotion, when she would next have been eligible, by a reconstituted SB or SBs.

Grievant's request that AFSA, not HR, be allowed to supervise reconstituted CTBs and/or SBs is denied as being unnecessary and, in any event, beyond the Board's remedial authority.

D. Request for reconstituted 2009 Selection Board

If the grievant is reviewed by and not promoted by a reconstituted 2008 SB, her amended OPF shall nonetheless be reviewed by a reconstituted 2009 SB to correct the agency's admitted error in having included her discipline letter (which pursuant to the Board's decision in this case must be revised) in her OPF for review by the 2009 SB. Should she be promoted by that reconstituted SB to FS-03, she shall be reviewed when first eligible for promotion to FS-02 (if necessary by additional reconstituted SBs).

Grievant's request for two reconstituted SBs for 2009 is denied on the grounds that it would be duplicative.

E. Amendment of subsequent EERs

Should the reconstituted CTB and possible SBs result in either earlier tenure or promotion, the Board assumes the Department will modify the cover sheets of her subsequent EERs to show her correct grade. We also direct that grievant be allowed to modify her own statements in those subsequent EERs, to the extent that they relate to "wrong grade" and tenured/untenued issues, such as (but not limited to) serving in a stretch assignment.

F. Overturning the 2010 Low Ranking Statement

Because the 2010 Low Ranking Statement relies heavily on the reviewing officer's statement in the 2007 EER, we order that it, as well as any other reference to grievant's low ranking (such as her scorecard), be expunged from the Department's personnel records.

G. Deleting irrelevant/prejudicial language from the final discipline letter

According to the grievant's motion, the parties are currently negotiating the terms of the final discipline letter. It is premature at this juncture to rule on grievant's request to expunge various statements from the Department's draft revised letter of reprimand. We anticipate that the parties will reach agreement on the wording of the final discipline letter that is consistent with the Board's decisions in this case and the deletions it has ordered. Failing agreement, an appropriate motion may be filed with the Board.

H. Reconsideration of merits and possible mitigation of penalty

With respect to grievant's request for reconsideration of the merits of her case and possible further mitigation of the penalty imposed, we find that grievant has presented no new evidence that would lead the Board to modify its original finding in this regard. Since it is well established that a motion to reconsider is not a forum for re-arguing issues raised in the original grievance appeal, we deny grievant's request that we reconsider the merits of her case or mitigate the penalty imposed.

Finally, with respect to grievant's request for seven minor factual corrections⁴ to this Board's decision of January 10, 2013, the Board declines to make those corrections because the alleged errors are inconsequential, and they neither affected the outcome of the decision nor prejudiced grievant; they clearly do not constitute clear error or manifest injustice.

IV. ORDER

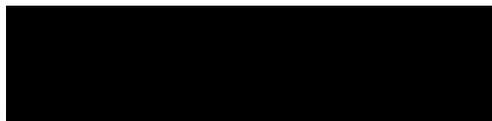
The Motion for Reconsideration is granted in part and denied in part, as stated above.

⁴ Grievant requested correction of the length of suspension (six days) in the Department's original suspension proposal; correction of the title of the official who checked database usage; correction of the participants in an interview at post; addition of the word "sooner" to the phrase "failure to report her relationship"; and correction of certain dates; and asked that the Board add a notation that the use of the word "confidential" in 9 FAM 40.4 does not refer to a security classification.

For the Foreign Service Grievance Board:



Elliot H. Shaller
Presiding Member



Jeanne L. Schulz
Member



Nancy M. Serpa
Member