

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB No. 2009-043

January 11, 2011

DECISION
EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Jeanne L. Schulz
Richard J. Shinnick

Senior Advisor

Joseph Pastic

Representative for the Grievant

Bridget R. Mugane, P.C.

Representative for the Department/Agency:

Joanne M. Lishman
Director, Grievance Staff
Bureau of Human Resources

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to prove that his April 16 – November 20, 2008 EER was procedurally defective or falsely prejudicial.

OVERVIEW

Grievant, an FS-04 specialist career candidate in the Office of Diplomatic Security (DS), Department of State (Department, agency), appealed the agency's decision denying his grievance which alleged that his 2008 EER was procedurally defective and falsely prejudicial, thereby resulting in his failure to receive tenure. In his first overseas posting, grievant was serving in his second rating period when his supervisor, the Regional Security Officer (RSO), departed post. Grievant was designated as Acting RSO from August 1 until October 13, 2008, when the new RSO arrived. The previous RSO did not complete a voluntary EER for grievant and the Deputy Chief of Mission (DCM), his reviewing officer (also performing as Charge), became his rating officer.

At some point, the Tenure Board denied grievant tenure on his second review, but granted him another six months to have his performance evaluated before receiving a third tenure review. While in [REDACTED] in early November 2008, the DCM asked Human Resources when grievant's next EER was due and learned that it was November 20 and that she was his rater. She obtained an extension and drafted the EER. Grievant contends that she based her evaluation of his performance only on the 75 days that she directly supervised him; had not appropriately counseled him; referred to alleged security infractions attributed to him as more serious security violations; and faulted him for shredding two infractions that had been determined by the previous RSO to be invalid.

Grievant maintained that he and the RSO office had a poor relationship with the Marine Security Guard Detachment, and that two infraction notices issued to him by the same Marine Sergeant after grievant had erroneously given the codes to all the safes in his controlled access area to the Marine Detachment were setups. He further claimed that the infraction notices had not been sent forward to DS because they were still under his investigation, and that the DCM's counseling certification constituted harmful error because it was directed at his having mistakenly invited the press to a function and did not include an overall performance discussion with cited examples as required by the counseling form. He contended that the Department's offer to delete the paragraph referring to security violations and shredding was insufficient as a remedy, because the DCM had checked the box that "Candidate is likely to serve effectively but judgment is contingent on additional evaluated experience"; that he had been held to a higher performance standard and evaluated as a tenured FS-03 rather than the untenured FS-04 he was; that no comprehensive, timely counseling took place; and that his EER was limited to the 75 days during which the DCM supervised him, rather than the seven months covered by his EER.

The Board found that grievant failed to carry the burden of proving that he was denied any procedural protections under applicable agency regulations or was held to an improperly high performance standard, or that the EER contained falsely prejudicial statements requiring a re-evaluation. Accordingly, the grievance appeal was denied.

DECISION

I. THE GRIEVANCE

██████████ (grievant) is an FS-04 specialist career candidate in the Office of Diplomatic Security of the Department of State (Department, agency). He is appealing the agency's denial of his grievance alleging that his April 16, 2008 – November 20, 2008 Employee Evaluation Report (EER) is procedurally and factually defective, resulting in his failure to receive tenure in his third review. Grievant requested interim relief from separation, the Department advised that it did not oppose and the Board granted interim relief until December 14, 2010, or until a decision is reached, whichever comes first, and was again extended to March 14, 2011, or until a decision is reached, whichever comes first. For relief in this appeal, grievant requests that the EER and the January 2009 Tenure Board Decision be expunged, that he be granted tenure, or in the alternative, a tenure review after an additional one-year extension of time in class for evaluation in a suitable at-grade position, review for promotion after the tenure review, attorney's fees and costs, and other relief deemed just and proper.

II. BACKGROUND

In his first overseas assignment, grievant was serving in his second abbreviated rating period as the Assistant Regional Security Officer (ARSO) at the U.S. Embassy in ██████████ when he received the EER at issue. His prior EER, covering the period September 27, 2007 – April 15, 2008 was very positive and his rating officer, ██████████, recommended him for tenure and promotion at the earliest possibility. His reviewing officer, Deputy Chief of Mission (DCM) ██████████, attested to grievant's "fine performance."

Approximately three and a half months later, on August 1, 2008, ██████████ departed post for onward assignment. His replacement would not arrive until October 12, and grievant

was designated Acting RSO, as provided in his work requirements statement. Because the period from April 16 – August 1 totaled 108 days, [REDACTED] was not required to write an EER for [REDACTED] and he did not do so.¹

The RSO's office had a difficult relationship with the Marine Security Guard detachment both before [REDACTED] left and afterwards, when grievant was Acting RSO. Two Notices of Security Incident (for security infractions) were issued against grievant in February and March 2008. [REDACTED], who stated that he had ultimate responsibility for their resolutions, found that the allegation contained in the first notice did not constitute a violation or infraction, and grievant shredded the OF 117 notice at that time. The second notice involved the same document as the first one; [REDACTED] again found no violation, and grievant then shredded it as well.

On July 18, 2008, grievant received a notice of security infraction which [REDACTED] sent to the Department on an OF 118. Grievant received another notice on August 18, which he had not sent forward, explaining to the new RSO that it was still under his investigation. He retained the OF 117. Grievant received another notice on September 11, which also was not sent forward as it was still under his investigation. The validity of two of the three infractions is currently the subject of a separate grievance appeal.²

Grievant was Acting RSO for 75 days, until just after the new RSO arrived at post on October 12 or 13, 2008. Thereafter, on November 21, grievant received an e-mail from Human Resources advising that DCM [REDACTED] had come into the office inquiring as to whether [REDACTED] “needed an EER from April to now for your tenure review . . . and you do.” At some point, the June 2008 Specialist Promotion and Tenuring Board (SPTB) had recommended [REDACTED] for a third tenure review. The Tenure Board noted that grievant's 2007 EER cited communication and

¹ DS 1829i, p.3: “If a change in rating officer . . . occurs during the regular rating period, an interim report must be prepared for periods of 120 days or more for all FS employees.”

² FSGB Case No. 2010-011.

management skills as areas needing improvement, and urged him to keep supervisors informed of the decisions he makes that could have serious impact on the post's operations and to increase his sensitivity. His 2008 EER from [REDACTED], while very positive, also cited management skills and communication as areas for improvement: "[REDACTED] would be better served with further consultation with Mission staff before implementing new procedures."

[REDACTED] was given a time extension and drafted an EER, which she signed on December 1, 2008, covering the period April 16 – November 20, 2008. Her critical comments in the EER include the following:

[D]evelopments at the end of this abbreviated rating period revealed tendencies demonstrating that [REDACTED] needs to be more receptive to supervisory direction intended to situate his tasks within overall USG mission priorities in [REDACTED], as well as to recognize that as the enforcer of our institution's rules, he is exceptionally bound to be the foremost defender of them.

...

As an RSO, [REDACTED] is both the manager of the security program and the bearer of special responsibility to uphold strict principles in ensuring the proper safeguarding of classified information. I was therefore chagrined to learn following the arrival of the new RSO that [REDACTED] had failed to appropriately respond to several security violations issued by our Marine Security Guards during his tenure as Acting RSO, and had in fact shredded copies of violations that he disputed. These unfortunate responses are being pursued in other channels, but I can only underscore my disappointment with his irregular handling of this issue.

Candidate is likely to serve effectively but judgment is contingent on additional evaluated experience.

Despite the many fine qualities that [REDACTED] demonstrates, recent incidents in which he clearly devalued supervisory input have shaken my confidence in his suitability for tenure. I believe that his enthusiasm for the service might yet lead him to successfully redress these issues, and regret the short timeline of overseas service that forms the basis for his tenure decision offers him little time to respond to the performance challenges of an overseas environment. I would ask the tenure panel's consideration in offering [REDACTED] the opportunity to do so.

Leadership: [REDACTED] is laudably enthusiastic about DS training objectives, but in this fervor has at times overstepped the boundaries of his authority. When the

conclusion of a highly successful ATA³ course coincided with preparations for a cabinet visit, [REDACTED] ignored my instructions to craft his schedule to ensure he could attend the final countdown meeting, requiring an awkward last-minute reshuffle of the formal ATA program to correct his error. More recently, he briefly continued administrative preparations for a follow-on training course past cautions from me and the new RSO that it might not match highest mission program priorities.

Managerial: [REDACTED] needs to be more attentive to the finer points of resource management. He was presented a lesson in proper contracting when procedures followed by the [RSO Office] resulted in several unfunded commitments. While the expenditures were appropriate, their mechanisms were not, and [REDACTED] was slow in completing required action to report and validate the expenditures to the Department.

Interpersonal: [REDACTED]'s formidable contact work and powers of persuasion have been highlighted by his very successful efforts in facilitating high level visits and training courses. He needs, however, to be more sensitive to supervisory input. Having bypassed the Public Affairs Officer to invite media to a law enforcement reception, he compounded his error by ignoring my explicit instruction to allow the PAO to handle the request. He instead instructed the journalists to depart before the PAO arrived, requiring her to make amends with a valued contact.

Area for Improvement: Interpersonal/Managerial

Our organization is structured to ensure new officers benefit from the experience of those above them and situate assigned tasks in the context of mission goals. [REDACTED] needs to understand that his many talents must be channeled in a way that appreciates those realities, maximizing his contributions and his considerable potential for success.

[REDACTED] filed a grievance with the agency on July 6, 2009. The Department denied his grievance on December 2, and he appealed to this Board on December 14, 2009. After Discovery and additional submissions, the Record of Proceeding (ROP) was closed on August 31, 2010.

³ Anti Terrorism Assistance.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant observes that while in his first overseas assignment, the summer 2008 Tenure Board deferred a decision in order to allow him six additional months of experience and an additional EER for a third tenure review. During those months he had three different rating officers and no reviewing officer. The EER purportedly covers just over seven months, but in fact only addresses his performance during the 75 days in which he was the Acting RSO in an FSO-03 position. He contends that he was judged by a higher standard, as a tenured FS-03 rather than as the untenured FS-04 that he is. He disputes that he was appropriately counseled in that he received none from his supervisor, [REDACTED], during the 108 days after his previous EER and [REDACTED]'s departure from post, and [REDACTED]'s counseling certification, dated November 8, was only 12 days before the end of his rating period. He further disputes [REDACTED]'s assertion that she counseled him on August 21, claiming that was the date on which one of their weekly RSO/DCM Thursday meetings was held.

On page one of [REDACTED]'s EER, [REDACTED] listed a single counseling date of August 18, 2008, which grievant states he does not recall. He claims that prior to the November 8 counseling certification:

Ms. [REDACTED] issued one Counseling Certification, but it was not for a valid performance review. Rather, she was displeased with Grievant concerning his mistakenly inviting the press to a function [and] she upbraided him for this on or about October 16, 2008. She issued a Counseling Certification reflecting this was the only topic of discussion; therefore Grievant did not sign the form nor did he sign the EER Certification. . . . The October meeting, concerning one event, did not constitute a full performance discussion within the meaning of the Counseling Certification form, DS-1974, which provides as follows:

The purpose of this form is twofold: to serve as a record that a thorough performance discussion occurred, and to help ensure that the rating officer and

rated employee have a compatible view of the outcome. Notations . . . should aim to highlight major points of the discussion of performance. . . .

DISCUSSION OF OVERALL PERFORMANCE: The rating officer should briefly characterize the rated employee's overall performance and cite examples as appropriate. The following items should be components in each discussion:

Are work requirements being met

Should the work requirements be changed? If so, how?

Is there appropriate supervision and guidance?

General discussion of performance.

AREAS FOR IMPROVEMENT: Note aspects of performance that need to be improved to better meet the requirements of current assignment as well as to enhance the employee's potential for assuming greater authority.

Grievant concludes from the foregoing that there was no bona fide counseling during the entire rating period, which he claims constitutes harmful error, invalidating the EER and January 2009 tenure review. He also contends that the denial of tenure cannot be based on performance for the 75 days during which he acted in a more senior position. The Specialist Board Precepts state: "The sole criterion . . . will be the . . . demonstrated ability to perform satisfactorily . . . in the occupational category in which the applicant is serving and the potential, assuming normal growth and career development, to serve effectively . . . at higher levels with greater responsibilities. . . ." If career candidates are expected to already have performed satisfactorily at higher levels with greater responsibilities, there would be no need to assume normal growth and development if they are expected to already have performed them while "Acting" when being evaluated for tenure. The precepts do not envision that tenure candidates will be held to higher supervisory standards when being reviewed for tenure. Grievant's only previous assignment was as a non-supervisory Special Agent in [REDACTED]. In [REDACTED], he became the

supervisor of four professional staff members, the local guard force, and to some extent the Marine Detachment.

His former rater, [REDACTED], stated that typically a TDY RSO is assigned to cover longer periods of RSO gaps, but after DS advised it had no one to send, grievant was assigned the task. Even if the situation was unavoidable, grievant became a “victim” of this staffing problem, making him vulnerable. He should have been reviewed as an A/RSO in the EER, but there was no evaluation of his performance in the 108 days before he assumed RSO supervisory duties or the 39 days after the new RSO arrived. When [REDACTED] left post, he was unaware that grievant had been granted an additional six months for tenure consideration and therefore did not write a voluntary EER.

Grievant alleges that no timely, comprehensive performance counseling was held during the entire appraisal period. [REDACTED] held none before leaving post. [REDACTED] held none, but issued a counseling certification dated November 8 referring to a discussion of two matters on 8/21/08, covering the period from August 1 – October 12, having just realized that she would have to be grievant’s rating officer, two weeks before the end of the rating period and with no reviewing officer (the new Ambassador arrived at post in October). This was not the “thorough performance discussion” required by the form. [REDACTED] failed to request performance input from [REDACTED] for the first three and a half months of the rating period. Her claim that she had knowledge of grievant’s performance as the A/RSO stands in contrast to her statements in the EER and statement responding to discovery:

The examples in the EER refer to events across the rating period, 4/15/08 – 11/20/08, not necessarily exclusively to the period when he was acting RSO . . . For example, para three of IV.B specifically states that actions were evident ‘throughout the rating period;’ paragraph two refers specifically to actions as ‘acting RSO.’

The EER's only example in support of "throughout the rating period" referred to an event when grievant was Acting RSO – "[redacted]'s excellent . . . liaison with [redacted] security . . . was evident throughout the rating period, but never more so than during the recent visit of the law enforcement training team." The omission of evaluative material from the first half of grievant's rating period in his position as A/RSO itself should invalidate the entire EER.

He claims that [redacted]'s statement concerning guard uniforms erroneously refers to multiple shirts when in fact only one white shirt vice burgundy was involved and it occurred in his previous rating period. Grievant contends that [redacted] negligently failed to ascertain the facts before criticizing him in the EER for alleged security violations. She also erroneously referred to all of the incidents as "security violations" rather than as the less serious "security infractions" they are alleged to be.⁴

When asked in discovery to confirm the dates of the "several security violations" [redacted] replied: "I cannot conclusively reply. Those were three security violations of which I became aware, but by the time the rating was written there were allegations of shredded violations." [redacted]'s devastating comment was made without any investigation of the facts, despite her acknowledgement that the Marines had previously retaliated against [redacted].

Regarding the single AFI criticism in grievant's November 8 counseling certification, which was repeated in his EER, [redacted] criticized him for ignoring her ". . . instructions to craft his schedule to ensure that he could attend the final countdown meeting [for a cabinet visit], requiring an awkward last-minute reshuffle of the formal ATA program to correct his error."

Grievant responds:

⁴ A security infraction is a security incident that in DS's judgment does not result in actual or possible compromise of classified information. A security violation is a security incident that in DS's judgment results in actual or possible compromise of classified information. 12 FAM 551.2b,c.

When the DCM called for a count down meeting that would coincide with the ATA graduation luncheon, I tried to explain that the security for the secretary's visit was already in place, but was told I still needed to attend the count down meeting. After discussing the situation further, the DCM agreed that I should depart the luncheon after presenting the appreciation plaque provided by ATA to the Minister of Security. The plaque presentation was scheduled forty minutes into the luncheon program, which would have put my arrival time at the count down meeting one hour after the start time.

The agency's offer to remove one paragraph from the grieved EER with another tenure board review thereafter is insufficient as a remedy because the DCM checked the box "Candidate is likely to serve effectively but judgment is contingent on additional evaluated experience" which effectively precludes tenure.

Because the EER is seriously flawed it should be expunged in its entirety. And because of the unusual circumstances in this case, grievant received no EER for the balance of his service in [REDACTED] and has been in various temporary assignments since then. He needs the remedy of a Board-ordered tenure due to the likely three-year gap in his Official Performance Folder from 4/15/08 until he benefits from a favorable Board decision and receives a new assignment. The June 2008 Tenure Board found that grievant had tenure potential and data provided during discovery shows that tenure is "customarily granted to virtually all career candidates in DS." Both provide a strong foundation for grievant's request of outright tenure from this Board. At the very least, grievant deserves an opportunity to perform and be evaluated, followed by another tenure review.

THE DEPARTMENT

The Department maintains that the SPTB decision to deny tenure was based on four EERs by four different rating officers and each EER contained essentially the same areas for improvement: difficulty accepting supervisory guidance and matching his priorities with those of management. The agency observes that the SPTB twice deferred tenure due to concerns about

grievant's communication and management skills. It provided him an additional six months of evaluated work experience to allow him to demonstrate his ability to perform satisfactorily and the potential to serve effectively at higher levels with greater responsibility. It was entirely normal for grievant to be named Acting RSO as an untenured junior officer in his first overseas assignment. It was one of his WRS' continuing responsibilities, as it is in the WRS' of many other career candidates.

The agency acknowledges that grievant had three sequential supervisors in the seven months covered by the EER, but denies that this resulted in a failure to provide consistent supervision and guidance. While the former RSO did not draft a voluntary EER, no gap occurred in the rating process. DCM/Charge ██████ became grievant's rating officer and her evaluation covered both positive and negative aspects of grievant's performance. There is no reason to assume that, if ██████ had written a voluntary EER, it would have been more positive than ██████'s, or even if it were, that tenure would have been granted.

As to grievant's contentions that the EER violates regulations because ██████ appointed herself as the rating officer at the end of the rating period, that there was no reviewing officer, and that the EER contains falsely prejudicial statements, the Department responds that Leonard was grievant's first and second line supervisor throughout the rating period; no one else at post was in a position to comment more authoritatively on grievant's performance than she. She met with him almost every Thursday to discuss his performance and at times his resistance to her instructions, e.g., regarding competing obligations on August 14. ██████ had instructed grievant to organize his participation at the ATA closing luncheon to ensure his return to the Embassy in time for the mid-day countdown meeting for the imminent visit of the Secretary of HHS. Her counseling certificate dated November 8 was based on a conversation she had with

grievant on August 21 and a counseling session on September 18 (during the RSO weekly meeting) according to her handwritten note on the counseling form. The AFI section of the counseling form (being more attentive to supervisory guidance) is consistent with the AFI section of grievant's EER. Grievant submitted his comments on November 19 and did not dispute that counseling had taken place.

The Department denies that grievant's EER is falsely prejudicial or biased. Grievant's differences regarding priorities and different interpretations of events do not demonstrate falsity. Rating officers are required to provide honest assessments of an employee's performance.

██████████ acknowledged in the EER that she was conflicted.

Grievant questions ██████████'s credibility in criticizing him for shredding two OF-117 security incident notices because her comment was "... based on false and inaccurate information that she did not investigate." The agency maintains that only security officers are trained to conduct investigations of this kind. ██████████'s criticism was based on the new RSO's discussion with grievant in November 2008 during which he admitted to shredding the two notices. In doing so he failed to follow the procedure on the back of the form (12 FAM 553) and the RSO reported this to DS. The Department later agreed to expunge the EER paragraph criticizing grievant for destroying the forms.⁵

Contrary to grievant's claim that the SPTB lacked a valid EER to support its denial of tenure, ██████████ "scrupulously" followed the precepts in drafting the EER. She included a balanced discussion of grievant's strengths and shortcomings, the required competency groups were addressed, and many examples of his performance were provided, with special attention given to the 75 days as Acting RSO – addressing his potential for advancement.

⁵ Response to Grievant's Amended Supplemental Submission, p 2, July 15, 2010.

Grievant falsely claims that the period covered in the rating period was really only based on the 75 days he served as Acting RSO. [REDACTED] observed his performance from April 16 to November 20, and the reference in the EER addressing grievant's groundwork in dealing with [REDACTED] counterparts clearly deals with his liaising over the entire rating period – contacts are not made over the period of a few days prior to a high-profile visit. [REDACTED] also stated that she chose to highlight examples of grievant's performance as Acting RSO in her rating statement because these addressed his ability to perform at a higher level.

IV. DISCUSSION AND FINDINGS

In grievances other than those involving 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). In this appeal we find that grievant has failed to meet his burden of proving that his April 16 – November 20, 2008 EER is procedurally defective or falsely prejudicial.

At the time that RSO [REDACTED] departed post on August 1, 2008, no one at post knew whether grievant had been granted tenure or not. The record does not reflect when grievant was notified that he had been granted an additional six months of performance evaluation before being reconsidered for tenure. Grievant stated that he thought he would be reviewed for a third time in the spring of 2009 and the agency has not disputed this. It is obvious that until some unknown date in November 2008, no one at post knew when grievant's EER was due.

[REDACTED] at some point in early November, learned of the tenure review EER deadline, and she later stated to the Grievance Staff:

During my summer as Charge, I had erroneously recalled that the date of [REDACTED]'s last EER as ending with [REDACTED]'s August 1] departure vice April 15, and counted less than the minimum required number of days between [REDACTED]'s departure and the arrival of [REDACTED] [REDACTED], the new RSO]. I had therefore

mentally (erroneously) registered that I would be acting as reviewer, and not rater
...⁶

If [REDACTED] had actually written an EER covering the period from April 16 to August 1, surely [REDACTED] should have recalled whether she drafted a reviewing statement for that same period. However, under the EER section entitled “special circumstances influencing the work program” she stated: “As the previous and current [RSOs] have overlapped with [REDACTED] for periods too short to require or merit separate evaluations by them, the Deputy Chief of Mission has elected to act as rater for the entire period since his last EER; there is no applicable reviewer.” [REDACTED]’s admitted error in thinking that [REDACTED] had rated grievant’s performance for the period from April 2008 to August 1 (when [REDACTED] left post) does not demonstrate that a procedural violation occurred. For the reasons set forth below, we conclude that grievant has failed to prove that harmful error resulted from [REDACTED]’s preparation of an EER for the entire re-evaluation period.

First, as previously noted, applicable regulations require an immediate supervisor such as [REDACTED] in this case to prepare an EER for a subordinate such as grievant only where the direct supervision during the rating period covers 120 days or more. [REDACTED] supervised grievant for less than 120 days during the applicable rating period and thus had no duty by regulation to prepare an interim EER before leaving post on August 1, 2008. While [REDACTED] could have prepared an interim EER for grievant voluntarily, the latter had no legal right to demand one and therefore has failed to establish that it was procedural error not to have received one. Similarly, grievant has failed to establish that [REDACTED] violated applicable regulations and thus committed harmful procedural error by neglecting to seek and obtain input from [REDACTED] concerning grievant’s performance during part of the six-month re-evaluation period. Moreover,

⁶ [REDACTED]’s confusion in this regard is further emphasized by her statement that she had “agreed to write one EER covering the period April 15 to November 20 [2008].”

the record reflects that ██████ had observed and routinely commented upon grievant's job performance throughout the rating period, and acted as his immediate and only supervisor after ██████ left post on August 1 until ██████, the new RSO, arrived in mid-October. Under the circumstances, ██████ was in the best position to rate grievant's performance during the six-month re-evaluation period.

Grievant further claims that it was procedural error for ██████ to retroactively "appoint herself" as his rating official at the end of the rating period, and for grievant not to have had the benefit of a separate reviewing official to critique his performance at such a critical juncture in his career. However, grievant has not pointed to any regulation that requires both a rating and a reviewing official whenever an EER must be prepared. What the regulations require is an adequate explanation as to why there was no reviewing officer,⁷ and we find that ██████ satisfied this requirement, as indicated above. Nobody but ██████ was available to rate and review grievant's job performance for the entire rating period.

Department regulations specify the role of rating and reviewing officers.

3 FAH-1 H-2251.3 provides:

- a. The immediate rating and reviewing officers of specialist candidates will be responsible for their supervision and for the development of work-related skills that can be learned through experience on the job.
- b. Rating and reviewing officers are also responsible for conscientious evaluation of specialist candidates' performance – including establishing work requirements, periodically counseling on performance, and annually completing formal evaluations – to support their professional growth and to provide the Tenuring Board with the information needed to decide whether a candidate should be offered career status.

██████ therefore shared equal responsibility with ██████ and later ██████ to supervise and counsel grievant. We find that she did so. Their weekly meetings were not just about grievant's view of discussion-worthy events of the past week or of up-coming events.

⁷ See 3 FAH-1 H2813.1b and c.

They included [REDACTED]'s criticism of some of grievant's actions, especially those taken in contravention of her instructions. Grievant does not deny that she talked to him about all of the incidents mentioned in her evaluation. He has cited no regulation that was violated by [REDACTED]'s having drafted his counseling certification on November 8, almost three months after the actual counseling date. Grievant submitted his comments and excuse on November 19 and plainly did not dispute that counseling had taken place or what had been discussed. [REDACTED]'s delay in drafting and certifying the counseling session based on her notes is understandable, given that she had not consciously registered at the time that she would be his rating officer. That doesn't change the fact that she was supervising grievant and that counseling took place. As we held in FSGB Case No. 2006-041 (September 25, 2007), citing FSGB Case No. 2005-073 (October 11, 2006):

[An employee] has a procedural right to be notified of where his performance has been deficient and a substantive right to an opportunity to improve (emphasis added). Because it is a procedural right, the notice or counseling need not be rigid. It may take forms other than in writing. To be sure, the employee must be fairly informed, and we have commented that the supervisor should be aware of risks involved in not memorializing the counseling in writing.

We have no doubt that grievant was counseled informally during his weekly meetings with [REDACTED] and that he was made fully aware throughout the rating period of the deficiencies that Leonard perceived in his performance. Grievant cannot claim that he was surprised by the content of his belated counseling certification, or that he was thereby deprived of an opportunity to improve his performance in those areas. We note that those same perceived deficiencies had been identified and discussed in the Areas for Improvement (AFI) section of grievant's immediately preceding EERs, as indicated below.

For example, in his 9/27/2007 to 4/15/2008 EER, RSO [REDACTED] wrote a very positive evaluation of grievant's performance and recommended him for tenure, but in the AFI section

under the “Managerial” skill code he noted: “[REDACTED] is very proactive in implementing new ideas to improve security. While improvements are always welcome and often needed, [REDACTED] would be better served with further consultation with Mission staff before implementing new procedures.”

Grievant’s second tenure board, in recommending him for the third review, stated:

[T]he Board also found problem areas, specifically in communication and management skills. The Board noted in his evaluation . . . in 2007, the rater indicated that [REDACTED] is urged to adhere to regulations and keep supervisors informed of decisions that may have serious impact, as well as increasing sensitivity. Because the rater stated that counseling on these and other issues were conducted more than once during the rating period, the Board expressed concern when it noted [REDACTED]’s personal statement and perceived some resistance to counseling in his statement.

In grievant’s 4/15/2008 to 11/20/2008 EER at issue here, [REDACTED], inter alia, noted:

[REDACTED] needs to be more receptive to supervisory direction intended to situate his tasks within the overall USG mission priorities

[R]ecent incidents in which he clearly devalued supervisory input have shaken my confidence in his suitability for tenure

[In] preparations for a cabinet visit, [REDACTED] ignored my instructions to craft his schedule to ensure that he could attend the final countdown meeting His AFI section reads: “Our organization is structured to ensure new officers benefit from the experience of those above them and situate assigned tasks in the context of mission goals. [REDACTED] needs to understand that his many talents must be channeled in a way that appreciates those realities”

Grievant’s third tenure board review, denying tenure, is not included in the ROP.

While there are minor errors in the EER prepared by [REDACTED], such as her statement that she counseled grievant only on August 18, and not also on August 21 and September 21 as stated on the counseling form; her referral to security “violations” instead of “infractions;” and the shredding incident, we do not find these critical to our decision. Grievant can hardly claim to have been prejudiced by the fact that [REDACTED] had counseled him on more occasions during the applicable rating period than she specified in his EER. As to [REDACTED]’s inaccurate use of the term “violation” instead of the proper term “infraction,” we note that such error appears to have

been inadvertent and that [REDACTED] had the opportunity to correct the record in that regard before the 2008 Tenure Board had his file before them for consideration. Regarding [REDACTED]'s reference to the "shredding" by grievant of two infraction notices that [REDACTED] found to have contained no classified material and therefore not to have constituted infractions, we have been advised by the Department in its memorandum dated December 9, 2010, and take administrative notice, that it has redacted the paragraph of the disputed EER which discussed "shredding" and security "violations" and presented the redacted EER to a reconstituted Tenure Board, which did not recommend tenure. In these circumstances, we find it unnecessary to address whether the EER containing references to the shredding incidents would have been falsely prejudicial to the grievant. That issue is now moot.

We disagree with grievant that his EER covered only the 75 days in which [REDACTED] directly supervised him. [REDACTED] noted in grievant's EER that:

I am conflicted in setting fingers to keyboard to describe [REDACTED]'s] performance as Assistant RSO in [REDACTED]. On the one hand, [REDACTED] is an officer who excels in the pursuit of adroit contact work with [REDACTED] officials; is operationally effective; and has demonstrated generosity of time and spirit in assisting his colleagues in supporting crisis management planning. He has been attentive to suggestions about how to improve his oral presentation skills and has grown significantly in that regard. On the other hand, developments at the end of abbreviated rating period revealed tendencies demonstrating that [REDACTED] needs to be more receptive to supervisory direction intended to situate his tasks within overall USG mission priorities in [REDACTED]. . . .

That [REDACTED] chose to focus mainly on the 75 days between RSOs does not make the EER invalid. Moreover, grievant has presented no convincing evidence that he was judged by a higher standard applicable to a tenured FS-03 rather than to the untenured FS-04 that he is. Regardless of rank or tenure, employees are expected to follow the instructions of their supervisors. Grievant failed to do so on several occasions and his excuses for having so failed are unpersuasive. His claim that his EER is unbalanced and unfair is not supported by the

record. The Accomplishments and Potential sections of his EER contain six positive and six negative assessments, and the paragraph quoted above includes both.

In view of our decision, we find it unnecessary to address any other issues raised by the parties.

V. DECISION

The grievance appeal is denied.