

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant

Record of Proceedings
FSGB No. 2010-002

And

June 10, 2010

Department

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

John Campbell
Jeanne Schulz

Senior Advisor

Margaret Sula

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 failed to establish that his Employee Evaluation Report (EER) for the rating period ending in April 2009 was inaccurate and falsely prejudicial.

OVERVIEW

Grievant, a diplomatic courier with the Department, appealed the agency's denial of his grievance alleging that his 9/10/{year} - 4/15/{year} EER, faulting him for three incidents that occurred during the rating period, was inaccurate and falsely prejudicial. He alleged that his reviewing officer, the new Duty Director of the {Name} Regional Diplomatic Courier Division (██████████), subjected him to hostile treatment and abusive management, with the implicit or explicit approval of the new Director of (██████████). The Director had been Grievant's reviewing officer in a previous EER, which grievant described as "replete with damaging innuendo, half-truths and outright falsehoods." He grieved that EER and the Department expunged it and placed a gap memo in his file.

Shortly after the arrival in (██████████) of the Deputy and Director, grievant was counseled three times, was taken off diplomatic pouch runs in (██████████) for retraining and assigned to what he claimed were difficult domestic courier runs, and issued a letter of admonishment. He claims that such action was based on: an inaccurate complaint by a courier escort in {city} to the effect that he (grievant) had spoken to him in a harsh manner; a complaint memo from an employee in the Information Processing Center (IPC) in {city} stating that the Embassy had to mend fences with American Airlines (AA) after the courier escort and driver reported that grievant was bellicose when a question about a pouch count arose; and the loss of his diplomatic passport in {city}. Grievant asserts that: he was very professional in expressing his disappointment for the failed pouch run to the courier escort in {city}; the IPC employee in {city} fabricated the statements in his complaint because he bears a grudge against him for a prior incident; and that he was falsely criticized for the {city} incident on the basis that he failed to complete the mission, because he was willing to complete the pouch run with a tourist passport, but his reviewing officer refused to allow it.

The Board found that grievant had failed to persuade by a preponderance of the evidence that his grievance was meritorious. The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

Grievant , an FS-04 Diplomatic Courier with the Department, is appealing the Department's denial of his grievance concerning his 9/10/{year} – 4/15/{year} Employee Evaluation Report (EER), which he alleges is inaccurate and falsely prejudicial in large part. In his appeal to the agency, he requested as relief that the EER be expunged and, if he were low ranked, that the ranking be overturned and his score card be amended to reflect a mid-ranking. He was in fact subsequently low ranked. In his appeal to this Board, grievant changed his requested relief so as to ask that: various statements in the EER be revised or expunged; he be allowed to rewrite his "Rated Employee Statement"; and that his low ranking be overturned and changed to a mid ranking.

II. BACKGROUND

Grievant joined the Foreign Service in August {year}. Since December {year} he has been assigned as a courier in the {city} Regional Diplomatic Courier Division (██████████) responsible for escorting classified diplomatic pouches between {city} and Foreign Service posts in ██████████. He was tenured in {year}.

In July {year}, grievant grieved his October {year} EER claiming it was "replete with damaging innuendo, half-truths and outright falsehoods." {Name} was the reviewing officer for that EER. The agency expunged the EER and placed a gap memo in his personnel file. He subsequently (in April {year}) received a positive EER and memorandum of performance from his supervisors. When he learned in the spring of {year} that {name} was to be the new Director of ██████████ he requested a curtailment of assignment, believing that he "could not get a fair assessment from {name} in light of the history at [their] previous post." He was informed in a

phone conversation with the Courier Director that his request was denied. Grievant claims that commencing with the arrival at ████████ of {name} and his Deputy, {name}, he has been subjected to the same types of hostile treatment and abusive management as he experienced before with {name}. While most of the singling out has been by {name}, grievant alleges that all of his ({name}'s) actions must receive the explicit or implicit approval of {name}.

In the EER at issue, {name}, Courier Operations Officer, was the rating officer and {name} was the reviewing officer. The issues concern communications with pouch escorts in {city} and {city}, as well as a lost diplomatic passport in {city}. The Record of Proceedings (ROP) was closed on May 13, {year}.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Incident in {City 1}

In October {year}, grievant was sent to {city} for a diplomatic pouch pick-up from the Embassy escort. Grievant states that according to the Courier Trip Reporting System (CTS), this escort had been unable to transit the airport with a small hand-carry diplomatic pouch (K-bag) on four earlier occasions. In an attempt to prevent another failed mission, grievant e-mailed the escort prior to departing {city} requesting he double check to ensure that the proper paperwork had been filed. He reminded the escort of this request upon arrival in {city} and again on the morning of his scheduled return to {city}. Despite his efforts, airport security officials advised that the proper paperwork had not been received and grievant could not proceed with the pouch unless it was x-rayed, which would have violated a “fundamental tenet” of pouch security. He returned to {city} empty handed.

Grievant claims that: “In a courteous and professional manner, I let the escort know that I was very disappointed in this outcome. The escort thought the blame was with the airport officials, and indeed there is some merit to that. {Name} ordered the acting desk officer . . . to counsel me on my return for expressing disappointment to the escort.” Grievant alleges that {name} and {name} have used the {city} incident to disparage his reputation and suggest that he is not a good courier.

Incident in {City 2}

On January 21, {year} Embassy {city} had five diplomatic pouches for {city}, two of which were small. Grievant had requested that the Embassy escort bring a “workbag”¹ for the two smaller items. He later placed them in the bag and locked it, thus creating an outside count of four bags. He watched the four pouches enter the aircraft cargo hold and then went upstairs to wait for boarding. While walking on the jet-way, the staff waved him back down to the tarmac where he saw the four pouches back on the loading belt. The escort was on the phone with {name} at the Embassy’s IPC.² The escort informed him that at issue was the discrepancy between the four pieces observed and the five pieces the Embassy had reported to airport officials. Grievant told {name} that he would do his best to get the material on the aircraft. After the grievant opened the workbag and showed security officials the two smaller bags inside, the bags were all reloaded on the plane.

The grievant states that upon boarding the plane, the flight attendant told him that “your people were really going at it.” He did not think much about it until he received a copy of a January 22 e-mail memo from {name} to the Courier Director, which he “understands” {Name} learned of from the Director. {Name} reported the incident based on the oral reports of the

¹ Presumably the same as a “K-bag.”

² Information Processing Center.

Embassy driver and RSO³ local escort staff member, who stated that grievant was excited and confrontational upon being asked to open the workbag, that he had not completed the paperwork necessary for the pouch exchange and, when he did, did not take it with him on boarding, forcing airport authorities to take it to him on the plane. {Name} stated that post's Regional Security and Information Management Offices "have had to 'mend fences' after the courier's 'bellicose' display at the airport where it was reported that he used profanity and acted in a manner not befitting someone in the Diplomatic Corp." (sic)

Grievant avers that the {city 2} incident is completely fabricated and false. He adamantly denies being bellicose, confrontational or disrespectful. He notes that his supervisor, {name}, did not include the {city 2} allegations in her rating of his performance in {year}, because, he alleges, she believed his version of the event. He avers that he never uses profanities and that {name} has repeatedly stated that she has never heard him use foul language or act in a bellicose manner in the nearly one year that she has supervised him. The Embassy's own inquiry of the American Airlines (AA) cargo supervisor and the Embassy's escort driver do not support {name's} memo. The airline cargo supervisor stated that: "... we received 5 PCS of Diplomatic Pouch and requested by grievant to put 1/5 in one due to piece were very small making 4 pieces instead of 5." The Embassy driver stated that the number of pouches on the airway bill did not match the number delivered on board. The security chief ordered the pouches off the plane and summoned the courier. According to the driver:

When the courier was on the tarmac he noticed that the pouches were out of the airplane and he was upset with the way they handled the pouches. He was extremely protective of his cargo. He then decided to open the pouch that contained the two small pouches When the security chief noticed that the five pouches were on the airplane she recommended that in the future the airway bill should not be filled out until they are sure of the

³ Regional Security Officer.

number of pouches and the airway bill reflects the correct amount of pouches.

Grievant states he was “floored” by {name’s} memo and believes that he sent it to the courier director instead of {name} to embarrass him or in retaliation for an incident that occurred in January {year}. At that time, {Name} met him at the airport in {city} with a single, large pouch that he wanted loaded into the plane’s overhead compartment. Grievant expressed concern that it would not fit, would attract attention, and should be loaded in the belly of the plane. {Name} insisted that grievant carry it on board “ostensibly so he could return earlier to the Embassy.” Grievant states that as he was struggling to stuff the bag in the overhead, the aircraft’s captain approached and grievant displayed his courier credentials. The captain was concerned that the pouch had not been screened so grievant asked the captain to join him on the tarmac with {name} to explain. Ultimately the bag was belly-loaded for {city} and grievant was informed by the Courier Deputy Director that {name} was wrong and that he should not let escorts take charge of a situation. It is grievant’s “considered judgment” that {name} was reprimanded for his actions that day, so he then fabricated the {city} incident to “embarrass” grievant or to “get some sort of retaliation.”

Considering that the grievant has denied {name’s} allegations about the incident, that {name} was not at the airport, and that statements obtained by the Embassy from the AA cargo supervisor and the Embassy driver do not support the statements in his memo, the counseling from {name} and Letter of Admonishment from {name} were unfair.

Incident in {City 3}

On February 6, {year} grievant was in {City 3} preparing to return to {city} with diplomatic pouches. At some point after leaving the Embassy, he noticed that his diplomatic passport was missing; grievant acknowledges that it was solely his mistake that the passport was

lost. He and the Embassy escort checked their surroundings without success. The escort called the AA cargo manager to reserve an afternoon flight, thereby allowing time for grievant to return to the embassy and obtain a tourist passport. Because his supervisor, {name}, was out of the office that day, he called Deputy Director {name} to advise that he would be arriving on a later flight. "{name} rejected the idea of traveling with pouches on the tourist passport, telling me abruptly, 'without a dip. pass., as far as I'm concerned, you are not a courier' and hung up."

Grievant contends that the counseling he received for this incident to the effect that he could not complete the mission was not "accurate" because he was willing to complete the mission; it was {name} who blocked him from traveling. The counseling certification that "experienced diplomatic couriers" carry two passports is not true. To the best of his knowledge, none of his colleagues in {city} carry two passports. "The accusation of 'failure' when I tried my best to remedy it is additional evidence of the hostility and unfairness that {name}/{name} direct toward me." Although grievant still had three diplomatic passports and was able to travel, he was removed from the "schedule board," ordered to take remedial training and, because {name} told {name} that he had lost trust in Grievant's ability to do his job, he was assigned back-to-back truck trips from {city} to {city}, accompanying pouches on tractor-trailer runs, 20 hours each way.

Grievant alleges that he has been the victim of disparate treatment. He cites an incident involving a courier who was unable to complete the mission because the courier forgot to retrieve the pouch from the aircraft, a serious security incident. Grievant is certain that had it been him instead, the repercussions would have been severe, but, he claims, this incident was not cited in that individual's EER.

Grievant also cites an incident that occurred on February 19, {year} when he was working at the {city} airport courier vault with {name}. {Name} walked in and loudly berated him for completing timesheets incorrectly – accusing him of stealing from the government by claiming three hours of brief and debrief time (as per the courier handbook). He also accused grievant of fraudulently claiming an expense of \$103 for the tourist passport in {country} and said that he would be referred to the fraud investigation unit. Although to date grievant has heard nothing further about the accusations, this incident illustrates the humiliating, demeaning, unprofessional treatment {name} has directed at him.

Grievant claims that the Area for Improvement (AFI) section of his September 10, {year} – April 15, {year} EER is inaccurate, omits critical evidence, and is not a balanced assessment. The pertinent AFI sentence reads: “grievant will benefit from improving his interpersonal skills to include more diplomacy and tact when interacting with colleagues, Embassy representatives and airline personnel.” Grievant argues that the comment violates the instructions set forth in the Areas for Improvement section and the requirement that the recommended improvement be justified with examples. In support of this argument he cites FSGB Case No. 2001-017 (June 15, 2001), in which the Board stated as follows:

The difference between an example and a general critical statement is a matter of specificity. Specificity is required so that the officer being criticized is given a fair opportunity to answer the criticism or use it as a basis for self-improvement.

Grievant claims that {name}'s comment is vague and ambiguous, and that she had an obligation to cite at least one instance of his alleged problem with interpersonal skills. He alleges that the statements of the Reviewer, {name}, stem from his “aim to derail [his] career” and that his actions “are based on hostility, innuendo, falsehoods and unprofessionalism.”

THE DEPARTMENT

In its decision, the Department concluded that there were no procedural irregularities with respect to the grievant's April {year} EER. The decision states that in view of the prior counseling with respect to the {city 1},{city 2} and {city 3} incidents, the performance criticisms cited in the AFI were previously discussed with the grievant in counseling sessions and were justified by examples.

Incident in {City 1}

Although the grievant maintains that he told the escort of his disappointment regarding the pouch exchange in "a courteous and professional manner," he wrote in the counseling statement that he would write a letter to the escort expressing his regrets. This statement supports the occurrence of the incident and the rater's discussion of the performance deficiency in the counseling statement.

Incident in {City 2}

The agency states that problems arose at the {city 2} airport on January 21, {year} because of a miscommunication between grievant and airport staff regarding the number of pouches being transported. The next day, a memo from the Embassy to the courier director's office stressed the importance of couriers being accommodating to airport staff and security practices. Five pouches were "manifested" by the Embassy to be loaded on to the aircraft. One item of a small size "was placed by grievant into a 'workbag,' reserved for such purposes, which he carried onto the aircraft.⁴ The agency asserts that the problem arose because of a miscommunication between grievant and the airport staff. Grievant clarified the issue, but according to the memo, the Embassy had to "mend fences" following grievant's interaction with

⁴ This is incorrect. Grievant and {name} report that two small items were placed into the bag and it was then loaded, along with the other three pouches, into the cargo section.

the airport staff regarding a misunderstanding over the number of pouches being transferred. Grievant was again counseled by {name} and issued a Letter of Admonishment.

Incident in {City 3}

In February {year} grievant lost his diplomatic passport while in {city 3} and courier management aborted his pouch run back to {city}. Although the grievant claims he could have completed the courier mission by using a tourist passport the Embassy in {country} issued him after he lost this diplomatic passport, management decided otherwise and aborted the trip.

Grievant was again formally counseled by his supervisor, {name}, for failure to meet a continuing responsibility in his work requirements statement (WRS): “100 percent of the time ensures ability to travel at any time by maintaining required documentation (four current diplomatic passports, courier credentials, and an official courier letter) necessary to validate his status as a Diplomatic courier, as well as other documents and passes required per locale.” The AFI section of his counseling certificate stated:

On 2//{year} U.S. Embassy {country} notified ██████ that you lost your diplomatic passport. As a result you were not able to take {country}'s outbound material which resulted in your failure to accomplish your primary mission: movement of classified material across international boundaries. You also didn't have the foresight to carry a backup passport as is common practice for experienced Diplomatic Couriers. As a result of this failure you are hereby reprimanded again for poor performance.

The Department states that the {city} and {city} incidents resulted in his rater's {year} EER AFI assessment that: “Grievant will benefit from improving his interpersonal skills to include more diplomacy and tact when interacting with colleagues, Embassy representatives and airline personnel.” His {year} low-ranking was based on these and the {city} incident. The

Selection Board suggested that grievant strive “for a more disciplined and focused approach to his responsibilities in order to enhance his competitiveness with his peers.”

Grievant challenges his entire EER reviewing officer’s statement, alleging that it is inaccurate because of {name}’s negative bias against him. In pertinent part the review stated:

While grievant usually completed the majority of his duties in a competent manner, there were exceptions. This resulted in erratic performance for which he was informally counseled numerous times, formally counseled on four separate occasions and admonished on another. The most serious incidents involved two separate failures of his continuing responsibility to foster cooperation by dealing effectively with foreign officials, post personnel and transportation agents. After his second serious incident, grievant was admonished by the Director of the {city} Regional Courier Division. Another exception involved grievant losing his Diplomatic Passport which resulted in his inability to meet work requirements and resulted in the Deputy Director of the Courier Service removing grievant from international travel for several weeks for additional training and mentoring.

The Department responds by providing {name}’s response to the grievance staff’s inquiry:

The Director, {name}, and I conferred at length regarding the proper preparation of grievant’s most recent EER. Based on [his] history of contesting counseling statements and filing previous grievances, {name} was duly concerned that grievant receive a completely fair, unbiased efficiency report that highlighted his positive contributions to the organization as well as his demonstrated need for improvement. At no time did {name} ever suggest, insinuate or otherwise influence me to add, delete or otherwise modify my reviewer statement in any way. . . . {name}’s suggestions . . . were strictly limited to ensuring that correct administrative procedures were adhered to at all times. He insisted that I work closely with HR at post to ensure that grievant’s EER was properly prepared, precise and represented only the recorded facts. To the best of my knowledge, I never shared any of my reviewer comments with {name}

Grievant’s claims that he was subjected to “selective enforcement” are also contradicted by his rater’s response to the grievance staff inquiry:

In my opinion grievant has not been treated differently from other couriers. Let me further clarify this statement. Had another courier been in similar situations to grievant's I am certain the other courier would have received the same treatment. Grievant has been counseled numerous times while other couriers have not received the same amount of "attention." This is not caused by any difference in treatment but by the unfortunate number of incidents involving grievant.

IV. DISCUSSION AND FINDINGS

Grievant carries the burden of establishing, by a preponderance of the evidence, that his grievance is meritorious. (22 CFR § 905.1a). In accordance with the following discussion, we find that he has not carried that burden.

Incident in {City 1}

Grievant states that when he took the courier trip to {City 1} he was aware, from the "courier trip reporting system" and the acting Desk Officer, of several failed out-bound missions of couriers with "K-bags" involving the same embassy escort he would be meeting. He refers to a "Fundamental Truth" chart put out by the courier service which, in effect, exhorts couriers to "be all you can be." One of the "truths" is "You must do whatever it takes to achieve the mission." He claims that is what he tried to do – i.e., his focus was on the mission when he e-mailed the escort prior to arrival to double check that the proper paperwork had been filed and reminded him both when he arrived in {City 1} and on the morning of his return to {city}. When airport security officials advised that the proper paperwork had not been received, grievant admits only to expressing to the escort his disappointment at the failed pouch exchange, and claims that he did so in a courteous and professional manner.

If that were the case, we do not believe there would have been a telephone call the next day from the escort's supervisor to ██████ expressing concern that grievant had spoken to the escort in a harsh manner. It is apparent that grievant did not disclose his knowledge of previous

pouch exchange failures to {name} (the officer who counseled him), because she stated in her counseling certification that {City 1} had experienced repeated interference in the dispatch of the diplomatic pouch, but grievant “was *not* aware of this history,” and was being “proactive.” (emphasis added) She further states that in being proactive he “offended the person helping him” and that he “intends to write a letter expressing his regrets to {name}.”

Even though grievant stated that there was “some merit” to the escort’s belief that the blame was with airport officials, he repeatedly blames the escort for the failed mission. He does not address {name}’s comment in the counseling certification that he intended to express his regret to the escort. He does not reveal whether the airport officials claimed that the paperwork had not been received at all or that it was received, but was not properly filled out. Either way, we are not persuaded that grievant’s behavior was professional. The escort would have had no reason to complain absent objectionable behavior on grievant’s part. It appears to the Board that the agency’s courier service found the fault for failed pouch dispatches lay with the {City 1} airport officials.

For these reasons, we find that the grievant has not carried his burden on this issue.

Incident in {City 2}

Grievant avers that the {city 2} “incident” is a complete fabrication, which explains why his rating officer did not raise it in his {year} EER. But he has provided no evidence from {name}, the rating officer, to support this assertion. In fact, she referred to it briefly in her rating officer statement: “Grievant’s approach when dealing with pouch escorts resulted in negative feedback from two posts.” While it is clear that the Department’s description of grievant having taken a small bag onboard the aircraft is incorrect, that error has no effect on the issue to be decided.

On the day of, but prior to Grievant's arrival in {City 2}, he requested a workbag into which he later placed two small pouches. When summoned to the tarmac where the pouches had been deplaned, he claims that he opened the work bag to show that two items made the pouch count equal five rather than four and the count problem was resolved. He speculates that the Embassy escort, fluent in ██████████ had gotten into a dispute with AA when the pouches were taken off the plane.

He claims that written statements by the Embassy's driver and the AA cargo supervisor do not support IPO {name}'s allegations of a confrontational attitude, bellicosity and cursing, and dismisses the Embassy's comment that cultural reasons explain why their written statements were watered down from what was verbally reported to {name}. In fact, the driver did state that grievant was upset and extremely protective of his cargo.

In Grievant's view, {name} wrote the {City 2} memo in retaliation for the incident that occurred in January {year}, when {name} was the Embassy escort in {country}. Upon return to {city}, grievant was reminded not to let escorts take charge of the pouch, and from this, he believes {name} was reprimanded for his actions.

Grievant's suppositions as to {name}'s motivation for writing the memo are not based on competent evidence; nor has he provided evidence to support his claim that {name} maintained repeatedly over a now nearly two-year period in their working relationship that she had never heard him curse. In fact, she stated that her face-time supervision of grievant was limited because he was so often out of the office on courier runs. Regardless of who had responsibility to notify airport staff that two pouches were in one bag, we are satisfied that the {City 2} incident occurred as reported by {name}.

{Name}, grievant's rating officer for the period December 3, {year} to April 3, {year} stated in his EER AFI section under interpersonal skills: "Although grievant has strong communication skills, he needs to augment his interpersonal skills to include more tact and diplomacy when speaking with colleagues, Embassy and airline personnel." {Name}'s September 10, {year} – April 15, {year} AFI statement echoed the criticism: "Grievant will benefit from improving his interpersonal skills to include more diplomacy and tact when interacting with colleagues, Embassy representatives and airline personnel."

While ignoring the comment in his {year} EER, grievant takes issue with virtually the same statement in his next EER, alleging a procedural violation because the AFI criticism was not justified by examples, as required. We disagree. We find that the AFI criticism was sufficiently specific to allow grievant to respond to it and change his behavior, particularly since his shortcomings in this regard were addressed in other sections of the EER and in the formal counseling sessions. Grievant responded to the criticism in his rated employee statement.

Incident in {City 3}

Having lost his diplomatic passport grievant believes that he should have been allowed to continue his mission using the newly acquired tourist passport. He claims he was the subject of disparate treatment in being counseled with respect to this incident when others who lost passports were not. Grievant has provided no evidence of disparate treatment, such as evidence of any instance in which a courier was permitted to travel internationally without his or her diplomatic passport.

One of Grievant's WRS continuing responsibilities was: "100 percent of the time ensures ability to travel by maintaining required documentation (four current diplomatic passports, courier credentials, and an official courier letter) necessary to validate his status as a

Diplomatic Courier, as well as other documents and passes required per locale.” This statement effectively refutes Grievant’s argument that he could have completed the pouch run using a tourist passport. Without a diplomatic passport he lacked the credentials of a diplomatic courier. Whether or not couriers commonly carry two diplomatic passports, grievant was responsible for having a valid diplomatic passport to ensure his ability to travel with the diplomatic pouches. His charges of being subjected to unfairness, hostility, and retaliation from {name}, {name} and others are unsubstantiated.

As grievant has failed to persuade the Board that his EER is inaccurate or falsely prejudicial, it follows that his appeal of his subsequent low ranking also fails.

V. DECISION/ORDER

The grievance appeal is denied.