

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

Record of Proceedings  
FSGB Case No. 2010-037

  
Grievant

September 29, 2011

and

Department of State

**DECISION**

EXCISED

---

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Garber A. Davidson  
Lois E. Hartman

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Melinda P. Chandler  
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Assoc.

## CASE SUMMARY

**HELD:** Grievant appealed an agency level denial of his grievance claiming that his 2009 Employee Evaluation Report (EER) was procedurally flawed due to alleged irregularities in the preparation of the EER as well as inclusion of inadmissible subject matter for the Area for Improvement section. Grievant failed to carry his burden of proof, and the grievance appeal was denied.

## OVERVIEW

Grievant stated three basic claims in appealing the agency's decision on his 2009 EER. He first claimed that his reviewing officer had inappropriately drafted the Area for Improvement section of his rating statement; secondly, he alleged that the subject matter of the AFI, interpersonal skills, was inadmissible because he had not been properly counseled on such skills during the rating period; and finally, he complained that the reviewing officer made changes to the review statement after the EER had been approved by the Mission Review Panel, thereby providing him only two days to amend his rated officer's statement.

The Board reviewed the record submitted on all three of the grievant's claims and concluded that there were no material irregularities in the preparation of his 2009 EER. While there was conflicting evidence regarding the author of the AFI section, the Board found that the rating officer agreed with and ratified the final version, and nothing was deemed to be inaccurate or falsely prejudicial in its content. The subject matter of the AFI, which covered interpersonal skills, was appropriately included since the Board found that grievant had been counseled on such skills during the rating period. Lastly, the Board found that the grievant was provided sufficient time to amend his rated officer statement, given the fact that the reviewing officer only made one change to the review statement, a change that the grievant had earlier persuaded the reviewing officer to include in the review statement. Since the grievant had earlier advocated its inclusion, the Board found that he should have been able to counter its absence with sufficient examples of his performance, etc. within the allotted time period. In addition, the evidence showed that grievant was in large part responsible for the lateness of the EER's preparation, and that the Mission was justified in maintaining its internal deadline for submission of the EER to Washington.

The grievance appeal was denied in its entirety.

## **DECISION**

### **I. THE GRIEVANCE**

██████████, an FS-04 Information Management Specialist assigned to the Embassy in ██████████ (grievant) filed a grievance appeal on August 31, 2010 in which he claimed that his evaluation for August 26, 2008 to April 15, 2009 (the “2009 EER”) was prepared in violation of procedures concerning the Area for Improvement (AFI) and review statements. He further claimed that he was not given sufficient time to prepare the rated officer’s statement. As a result of the procedural violations, the EER contained falsely prejudicial information, was inaccurate and incomplete. Grievant seeks various modifications or deletions to the EER and a review of his revised EER by a reconstituted 2009 and 2010 promotion board in addition to other remedies.

### **II. BACKGROUND**

Grievant contests several components of his 2009 EER. First, he claims the Area for Improvement (AFI) section of his 2009 EER was violative of EER procedures because it addressed interpersonal skills that were not properly a subject for the AFI section. He bases this in part on the assertion that he was not properly counseled regarding his interpersonal skills during the rating period and therefore the subject area was impermissible. Secondly, he claims that the AFI section was written by his reviewing officer, while under EER Instructions for Preparation (DS-1829i) the section should have been completed by his rating officer. Grievant further contends that his review statement was changed after the 2009 EER had already been approved by the Review Panel Chair and was a different version than he had previously agreed upon with his reviewing officer. Because of the last minute changes made to the review

statement, as well as the dispute surrounding the AFI section, grievant alleged that the completed EER was presented to him without sufficient time for him to revise his rated officer statement.

Grievant seeks as remedy changes and/or substitutions regarding his AFI statement and the review statement or, in the alternative, redaction of both sections; that his completed, revised 2009 EER be reviewed by a reconstituted 2009 and 2010 promotion board; that if granted promotion, he be awarded back pay with interest (effective the same date as similarly situated colleagues who were promoted); if denied promotion, an additional two years time-in-class; and in the event of low ranking for 2010, that the low ranking be expunged; and all other relief deemed just and proper.

On January 14, 2010 grievant filed an agency level grievance that was denied in its entirety by the agency in its decision letter dated June 30, 2010. Grievant filed a grievance appeal to this Board on August 31, 2010 and filed his first request for discovery on September 17, 2010. The Department responded to grievant's first discovery request on October 19, 2010. Subsequently, on November 16, 2010 grievant filed a supplemental submission to his grievance which was followed by the Department's first request for discovery filed on December 3. On January 12, 2011 grievant partially responded to the Department's first discovery request and on January 20, the Department filed a motion to compel. On January 31, grievant filed his opposition to the Department's motion to compel, and on March 18, 2011 the Board issued an Order: Motion to Compel which directed grievant to respond to specified interrogatories and document requests. On April 13, 2011 grievant responded to the Board Order of March 18.

On May 18, 2011 the Department filed its response to grievant's supplemental submission, and on July 1, 2011 grievant filed his final rebuttal. The Record of Proceedings (ROP) was closed on September 13, 2011.

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

#### **THE GRIEVANT**

Grievant asserts certain misinterpretation and misapplication of the regulations regarding the preparation of EERs led to falsely prejudicial, incomplete and inaccurate information being included in his 2009 EER. He asserts that after he had received the first draft of his EER that contained both a rating and review statement, grievant made the rater aware of several issues he had with the rating portion of the EER. One issue in particular was the drafted Area for Improvement in which the rating officer discussed grievant's interpersonal relations. Grievant claimed that neither the rater nor the reviewer had "mentioned this to me formally or informally during the rating period, and it was never an issue in any of the counseling sessions we conducted." (Grievance Submission for Final Agency Review, January 4, 2010, at 2.) Therefore, since grievant had not been counseled concerning his interpersonal relationships, he asserts that the subject was not appropriate for the AFI. In addition, grievant cites the following language in the rating section of his 2009 EER in which his rating officer comments on his interpersonal skills:

██████ interpersonal skills are excellent. He interacts well with everyone on a professional basis at any level from the Charge d'Affaires to the LES staff. ██████ takes into consideration other's (sic) viewpoints and is a good listener who explains technical problems to the users in language they understand, while going into great technical detail with the Engineers. He freely shares information with everyone and he regularly keeps Management aware of different situations . . . .

Soon after ██████ had received his draft EER, the rating officer left the country for training, and grievant then met with the reviewing officer to discuss the review statement. Grievant submitted suggestions to the reviewing officer, and by April 14, 2009 they had reached agreement on changes to the draft that both found acceptable. Once his rating officer returned to

██████████, grievant and he worked together to draft an AFI that both found acceptable, and on May 3, 2009 grievant's rating officer instructed grievant to take it to the EER Review Panel for review and approval. However, the Chair of the Review Panel rejected the AFI language, which led to two more revisions.

The following day, May 4, grievant's rating officer informed grievant that his reviewing officer wanted to have a meeting to include the grievant, the rating officer, reviewing officer, and the HR officer. According to grievant, the reviewing officer became quite angry with him. He stated that the reviewing officer "berated me for over an hour, angrily questioning my abilities and performance, shouting at me very loudly that I was a complete failure, that I would never get promoted, and other vulgarities." *Grievance Appeal Supplemental Submission, August 31, 2010, Att. 1 at p.3<sup>1</sup>*. Grievant did not want to further inflame the reviewing officer or appear insubordinate, so he remained quiet. The reviewing officer told him that he was very upset that grievant had not come to him to discuss the AFI statement that grievant and his rating officer had agreed to. Grievant explained that it was his position that the AFI was supposed to be drafted by the rating officer, and that after the two of them had agreed on language, grievant passed the AFI to the Review Panel. The reviewing officer then advised grievant in grievant's words that "there would be no more discussion of the matter and that he [the reviewing officer] would be the one to write the statement for my Area for Improvement." *Id.* The grievant then related the following:

My reviewing officer then proceeded to write the statement to be included as my Area for Improvement without comment from either the rating officer or the HR officer. The Reviewer also made additional changes to his Reviewer section in retaliation for not allowing him to initially write the Area for Improvement, even though we had both agreed to the content of

---

<sup>1</sup> Grievant titled his initial grievance appeal "Grievance Appeal Supplemental Submission" dated August 31, 2010; he subsequently filed a "Grievance Appeal Supplemental Submission" on November 16, 2010 which is the accurate supplemental and not to be confused with the initial grievance appeal of August 31, 2010.

the Reviewer section on 04/14/2009. I was then ordered to leave his office. Approximately 2 hrs. later the EER Chair signed the cover sheet and approved of the revised EER without talking to me. She dated her signature on the cover sheet "05/04/2009" even though this was the old cover sheet I had signed with my Rater and Reviewer on April 28, 2009 before it was altered at the last minute on May 4, 2009 and later on May 7, 2009.  
*Grievance Appeal Supplemental Submission August 31, 2010, Att. 1 at 4.*

Grievant attempted to contact his rating officer on May 5 to attempt to have the language of the AFI changed to what they had agreed upon previously. The rating officer, however, refused to discuss the matter. Grievant then contacted the Acting Deputy Chief of Mission (DCM) to see if he could assist in mediating a resolution. On May 7, after the DCM had intervened, the reviewing officer suggested a change to the AFI that according to grievant was "worse" than the previously amended statement. The reviewing officer then sent an email to the Acting DCM, the HR Officer and the rating officer detailing further changes he wanted to make in the previously agreed upon review statement. Grievant asserted that he had agreed (to the Acting DCM) to permit changes to the review statement only so long as the rater, reviewer and grievant could come to "an acceptable agreement with the Area for Improvement." This had not happened, however, since the rating officer had refused to make changes to the AFI.

On the same afternoon of May 7, the reviewer made the last minute changes to the review section despite the fact that the review statement had been previously approved and signed by the EER Review Panel chair. The Post advised grievant that unless it was sent to Washington by May 9, the Review Panel would mark it late and state that grievant bore the responsibility. Grievant asserts that this deadline denied him sufficient time to revise his rated officer statement in view of the last minute changes made to the EER.

## **THE DEPARTMENT**

The Department makes four basic contentions in defense of its denial of grievant's claims: (1) Interpersonal skills were properly included as an AFI in grievant's 2009 EER; (2) grievant failed to prove that he was not counseled on his interpersonal skills during the rating period; (3) grievant failed to prove that his reviewing officer wrote the AFI; and (4) grievant was provided sufficient time to revise the rated employee statement.

Grievant's reliance on a portion of the rating statement that recognizes his "excellent" interpersonal skills does not preclude such skills being the subject of an AFI. There is always room for improvement, as the grievant himself admitted. The Department alleges that grievant engaged in "aggressive lobbying" for language that grievant wanted in his EER, and that the laudatory language cited in the rating statement was "likely" among the statements grievant successfully negotiated into the EER. The Department points to earlier drafts that contained fewer superlatives regarding his interpersonal skills as evidence of this likelihood. The Department cites statements of five officers at post who attested to grievant's lobbying efforts aimed at influencing the content of his 2009 EER. His rating officer asserted that grievant "harassed" other officers into supporting changes he sought, and that he had a tendency to manipulate situations for his own benefit. The Acting DCM, who was attempting to mediate the dispute between grievant and the reviewing officer, stated that after everyone had agreed regarding the EER's content the grievant "renege[d] in bad faith," and as a result, the reviewing officer could not in good conscience keep the language in the review statement that he had previously agreed to. The chair of the Review Panel stated that grievant persisted in writing his own evaluation, even though she told him repeatedly that the AFI statements he drafted were "inadmissible and invalid." The Department maintains that grievant failed to carry his burden to

demonstrate that interpersonal skills was not a proper subject for the AFI section. *See Department's Response to Grievant's Supplemental Submission, May 18, 2011 at 3-4.*

With respect to whether grievant had been counseled on his interpersonal skills, his rating officer stated that he had counseled grievant on such skills formally on two occasions and during several informal discussions. The rating officer stated that the formal sessions involved grievant, the review officer, the HRO representative and himself. When the rating officer attempted to discuss his interpersonal skills, grievant allegedly would give his own opinions and dismiss what was being said regarding his skills.

The Department acknowledges that there are conflicting accounts concerning whether counseling on interpersonal skills took place, with the grievant pointing to inconsistent statements on the part of officers who were in some way involved in counseling and the Department defending its position that counseling on interpersonal skills took place. In the Department's view, grievant failed to carry his burden to show that no such counseling occurred.<sup>2</sup>

Concerning whether the review officer drafted the AFI, the Department states that the rating officer stands behind the fact that he wrote the AFI in question. During the "negotiation" sessions, the review officer made it clear that if the AFI were subsequently changed from the version he had agreed to, he would insert his "original language" into the review statement. When he discovered that grievant had attempted to change the AFI, he instructed that his original review statement be used. The review officer stated that he did not write the AFI, and that he in

---

<sup>2</sup> The Department avers that although interpersonal skills were not listed as an area for improvement in the DS-1974 counseling forms during the rating period, such a listing is not required. The identifying of such skills in the AFI of the EER, where areas of needed improvement are mandatory, is not inconsistent with omitting such skills in the counseling documentation.

fact made clear to the rater that he, the rating officer, should review and approve or disapprove of the wording of the review statement.

Grievant had made two assertions regarding his contention that the reviewing officer had drafted the AFI. First, he averred that his rating officer represented that the reviewer stated that he would be making changes to the EER, and second, that the HR officer stated that during the meeting of May 4, 2009, the reviewing officer informed grievant that he was going to change the AFI that he had written originally. The Department says that first statement is non-specific and does not reflect an intention to change the AFI section; the second statement by grievant ignores the rest of the HRO representative's statement that she did not recall if the reviewing officer actually made such changes during the meeting. This, according to the Department, only represents an "intention to act" but does not prove any action. There is no evidence to overcome the statements by the rater and reviewer that directly addressed the issue. (Id. at 8-9.)

Finally, grievant was provided sufficient time to revise his rated officer statement. Only one change was made in the review statement, i.e., the exclusion of language that grievant "can handle additional responsibilities at a higher level now and he definitely is a valuable employee to the State Department." This language, according to the Department, did not appear in the original draft of the 2009 EER Review Statement. It was requested by grievant nearly one month after the EER was finalized, and its subsequent deletion by the reviewing officer did not materially affect the review statement. Therefore, the Department maintains that grievant had ample time to incorporate additional examples that demonstrated he was ready to serve at the next level (as grievant asserted that he needed to show), or otherwise change the statement as he saw fit.

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

In 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) Grievant brings the instant grievance because of his conviction that the procedural process regarding his 2009 EER was flawed, and the procedural errors that occurred resulted in parts of the 2009 EER being incomplete, inaccurate and containing statements that are falsely prejudicial.

Our reading of the grievance appeal indicates that grievant's primary complaint goes to the methods by which his EER was constructed and, which in his view, resulted in an objectionable evaluation. We will look at the three major issues raised in order to assess whether the grievant has carried his burden of proof: (1) the inclusion of interpersonal skills in the AFI section; (2) whether the reviewing officer authored the AFI section, thereby violating the rules governing preparation of EERs; and (3) whether the circumstances surrounding the final changes made to the reviewing statement provided grievant sufficient time to amend his rated officer's statement.

Grievant contends that the subject matter of the AFI was improper and was therefore prejudicial. He points out that in another portion of the rating statement the rater lauds his interpersonal skills. His dispute is not with the language of the AFI itself, but rather with the subject matter in general. He does not introduce evidence to counter the accuracy or authenticity of the statement, but only contends that the subject of interpersonal relations should not have been the subject of the AFI because he was not properly counseled on that subject during the rating period.

We do not find the grievant's arguments persuasive regarding the AFI. The evidence demonstrates that he was counseled on interpersonal relations during the period leading up to the EER. Not only did the rating and reviewing officers state that they had been involved in such counseling, but this was affirmed by the Acting DCM and the HR officer as well. Grievant's attempt to discredit the statements of his rating and reviewing officers, as well as the Acting DCM and the HR representative, are not backed by credible evidence and therefore do not persuade us that the subject matter of interpersonal relations was not a legitimate topic for the AFI. We agree with the Department that the discussion of interpersonal relations in the rating section of the EER is not inconsistent or somehow contrary to the statement included in the AFI. There are always aspects of any evaluation objective that can be improved upon.

Closely related to grievant's contention that the AFI was inappropriate is his allegation that the reviewing officer and not the rating officer drafted the AFI section. The EER preparation instructions are clear in terms of the rating officer's role, and the AFI is indisputably a part of the rating statement. Grievant's evidence that the reviewing officer improperly drafted that statement is based largely on statements made by the HR officer who reportedly related that in a meeting attended by her, the rating officer, reviewing officer, grievant and the Acting DCM, that the reviewing officer stated that he would be drafting the AFI section. Both the rating officer and the reviewing officer denied this, and both stated that the rating officer drafted the language of the AFI. The reviewing officer acknowledged that after the grievant had allegedly changed the AFI section without informing him, he threatened to reinsert the original reviewing statement that he had drafted (instead of the version subsequently agreed upon by the grievant). The weight of the evidence is that while the HR representative seemed clear about statements made by the reviewing officer, she did not state that she actually witnessed the reviewing officer

drafting or making changes to the AFI section. The statements she reported were never corroborated by another source and were contradicted by the reviewing officer himself. They were also contradicted by the rating officer who attended the meeting and who continued to claim his authorship of the AFI section. In regard to the substitution or change of the review section, we see nothing improper with the reviewing officer altering his statement in response to the grievant's attempted modification of the AFI section.

Grievant does not dispute the allegation by the rating and reviewing officers that he attempted to make changes in the AFI statement after the reviewing and rating officers thought they had an agreement with grievant on the entire EER. Grievant objects to the reviewing officer's modifications to the review statement, but acknowledges that he was still trying to negotiate different language for the AFI with the rating officer. While the parties dispute who authored the AFI section, the record is clear that the rater adopted the views expressed therein as his own, the views were not shown to be falsely prejudicial, the content was shown to have been the subject of prior discussion and counseling with the grievant, and there was no showing of any inappropriate pressure being placed on the rater to adopt those views.

Finally, with respect to the grievant's complaint that he had insufficient time between May 7 and May 9 to revise his rated officer statement, we agree that the time was brief and recognize that it comprised the post's weekend. However, the deletion made in the review statement was one with which grievant was intimately familiar, since it was a sentence that he himself had urged the reviewing officer to include nearly a month before the EER was finalized. The grievant was not at a disadvantage in terms of citing specific accomplishments or professional achievements that would supplant the absence of the reviewing officer's statement, and it would appear that two days would be sufficient to make those changes or additions to his

own statement. Furthermore, the record indicates strongly that it was the grievant who caused the tardiness in the EER's submission, and except for his persistent attempts to renegotiate the AFI section with his rating officer, and obtain support from others in the mission for his position, there would have been more time for him to have submitted his final statement.

In view of the above, we find that the grievant has not offered preponderant evidence to prove his claims.

## **V. DECISION**

The grievance appeal is denied.

For the Foreign Service Grievance Board:

---

John M. Vittone  
Presiding Member

---

Garber A. Davidson  
Member

---

Lois E. Hartman  
Member