BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

And

Department of Commerce

Record of Proceedings
FSGB Case No. 2010-040

September 26, 2011

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Elliot H. Shaller
Board Members:	Jeanne Schulz Nancy Serpa
Senior Advisor	Joseph Pastic
Representative for the Grievant:	*Pro se*
Representative for the Agency:	Laura T. Carroll Office of General Counsel
Employee Exclusive Representative:	American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to prove that the challenged statements in his 2008 and 2009 Performance Assessments (PAs) were inaccurate, falsely prejudicial and in violation of agency procedures.

OVERVIEW

Grievant was an FS-01 Foreign Service Officer with the Foreign Commercial Service posted to the US Consulate in [redacted], [redacted] at the time giving rise to this grievance appeal. He contends that his 2008 PA contained untrue comments about the quality of the draft Country Commercial Guide (CCG) he prepared for his supervisors at the US Embassy in [redacted]. He asserted that his reviewing officer verbally cleared his draft and later reversed that clearance, finding it somehow incomplete, and at a time when he knew grievant was under stressful time constraints concerning another grievance.

Grievant also contends that his 2009 PA contains unsubstantiated allegations regarding a telephone call he made to the Director General's (DG's) office, asking whether a certain person was still the Director General or still an agency employee and to complain about an email sent to agency employees notifying of the death of the spouse of the agency's Human Resources Manager, which he viewed as a violation of Commerce procedures.

The Board found that grievant provided no evidence beyond his assertion that his reviewing officer had verbally cleared his draft CCG. The record also supports the agency's contention that his comportment during the telephone call reflected a failure to improve his interpersonal skills in interacting with others, despite extensive previous counseling. Accordingly, grievant failed to satisfy the burden to prove by a preponderance of evidence that the challenged statements in either the 08 or the 09 PA were inaccurate, falsely prejudicial or violative of agency procedures.

The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

[redacted] (grievant) at the time giving rise to this grievance was an FS-01 Foreign Service Officer with the US Department of Commerce, Foreign Commercial Service (USDOC, Commerce, agency).[1] He was serving as Principal Commercial Officer at the US Consulate in [redacted], [redacted]. He is appealing the agency's denial of his grievance concerning alleged improper procedures and inadmissible comments in his Performance Appraisals (PAs) for 2008 and 2009. For relief he requests that: 1) his PAs be amended by redaction of all comments to which he objects, including any and all statements made by his rating official, [redacted]; 2) he be allowed to reword his own statements in the PAs; 3) his Selection Board rankings for 2007, 2008 and 2009 be expunged; 4) reconstituted Selection Boards be held to review his 2007, 2008 and 2009 amended PAs for promotion consideration after they have been modified to his satisfaction; and 5) he be granted any other relief deemed just and proper.

II. BACKGROUND

[redacted] filed a grievance on May 28, 2010 contesting statements in his PAs prepared shortly after the May 31 end-of-rating periods for 2008 and 2009. The agency denied his grievance in a decision letter dated August 26, 2010. He appealed to this Board on September 16, 2010 , asserting that the appraisals contain "falsely prejudicial character of information in the official personnel record of a member which is or could be prejudicial to the member" and because Commerce procedures regarding the preparation and content of his performance appraisals were violated.

[1] He retired from the agency on May 31, 2011.

Grievant filed a Supplementary Submission on May 27 and the agency responded on June 27. The Record of Proceedings (ROP) was closed on July 21, 2011.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant asserts that inadmissible comments in his 2008 PA include a paragraph regarding the preparation of the Country Commercial Guide that is contrary to the facts. He contends that his reviewing officer, the Senior Commercial Officer (SCO) at the Embassy in [redacted], [redacted]:

> . . . left out the crucial fact that he verbally cleared, in person, the entire contents of a hardcopy printout of the subject document several days before claiming that the document was somehow incomplete. The SCO also reversed his clearance without using specific examples, at a time when he knew I was under crushing and stressful time constraints concerning another grievance, and without sufficient time for one person to make any corrections before the document deadline.

Grievant's rating officer, [redacted], Deputy Senior Commercial Officer (DSCO), also located in the Embassy, stated in the PA:

> [redacted] understood our commitment to broadening and balancing the portfolio in [redacted]. He expanded the scope of the CS [redacted] operation and produced successful events in the education, building materials and franchising sectors. Importantly, [redacted] made progress toward ensuring that these [redacted] programs were better coordinated with the rest of CS [redacted], one of our key Balanced Scorecard Strategic Objectives. To help facilitate this process of integrating CS [redacted] into CS [redacted]s overall strategy, the SCO and I asked [redacted] to coordinate this year's Country Commercial Guide. Despite a strong start, [redacted] was unable to complete the project. While there may have been extenuating circumstances, his self-imposed withdrawal from this critical project caused hardship and extra work for a number of other officers, including the SCO and me.

He contends that inadmissible comments in his 2009 PA include reference to a telephone call he made to DOC Headquarters. He asserts that comments in the PA

regarding this call are unsubstantiated and constitute retaliation for a protected action, which resulted in an atmosphere of intimidation, creating a hostile work environment. Alleged inadmissible comments by his rater, DSCO [redacted], in his 2009 PA include:

> [I]n discussions with me he has been objective and consummately professional in presenting his views. However, once during the rating period I participated in a discussion with Headquarters which [redacted] handled very differently, to the detriment of his effectiveness in my opinion (a view shared by the SCO and the Regional Director [RD]). This has been discussed with [redacted] and I urge him to reflect carefully on organizational roles before entering into contentious discussions, and to consider authority relationships when given feedback by superiors.

His reviewing officer, SCO [redacted] stated:

> At the same time, as noted by the rating officer, if [redacted] wishes to raise the performance bar for himself, he would be wise to recognize that in leading by example, he will need to better embrace feedback from management, instead of what sometimes seems to be a dismissive reaction to constructive guidance. This is a tendency that [redacted] doesn't need as it unnecessarily tarnishes an otherwise sterling and remarkable performance.

On appeal grievant alleges that the inclusion of these statements in his PAs constitute a violation of 3 FAM 2811.2 which provides that evaluations must "provide a just and equitable basis for career tenure, promotions, within-class salary increases, performance pay, assignments, training, separations, and disciplinary action by . . . establishing dialogue between supervisors and subordinates to continue throughout the rating period." As a result of the above falsely prejudicial comments, grievant received no recognition from the Selection Boards for promotion, though he had been recommended for promotion in 2005 and 2006.

He asserted in his January 28, 2009 e-mail to DSCO [redacted] that:

> I am surprised and perplexed that no one asked me what happened or did not happen prior to presenting hearsay as fact and announcing conclusions up front. If the issues are appropriateness, acceptability, and professional

courtesy, I have no difficulty classifying the "shoot first ask questions later" approach being taken here.

Grievant maintains that he is entitled to have the comments removed because:

> 1. The actions of the officials involved prove prejudice (i.e. assumption of guilt was instantly determined before I had even been asked for my side of the story, as evidenced by the content of emails to me announcing my guilt prior to any investigation, substantiation, or discussion); and the fact that my sides of the story were never considered. Nothing even resembling a "constructive dialog" ever took place as required by administrative law.
>
> 2. The fundamental reason concerned with this grievance is the actions of the Agency during the years 2006-2008 (specifically but not limited to the actions involved in FSGB Case 2008-043). Had I not been engaged in the necessity of defending myself (in one case preparting [sic] for a critical interview with a Director General, and in another obtaining information about the status of the Director-General's employment), the alleged incidences would never have taken place.
>
> 3. They are unsubstantiated and/or exaggerated. In effect, I am being punished for pushing back at individuals that years ago deliberately targeted the destruction of my career, and other individuals who have been assisting them either actively or passively – and who have been , as evidenced by their assignments, promotions, and awards in recent years, richly compensated for doing so.

He contends that the only accurate statement in the string of e-mails following his call is that he did call the Director General's office regarding personal issues which he claims are exempt from any chain of command requirement. In response to his supervisors' request for a conference call, he acquiesced, stating:

> I will say, however, that I called HQ to ask a simple, yes or no question: "Is Mr. Hernandez still a USDOC employee?" This is a perfectly reasonable and important question: however, the only answer I was given – from the Office of the Director General – was "We don't know." I was as polite as possible given this ridiculous situation, although considering that it took a long time and many tries before I was actually able to reach someone, only to be given such a unsatisfactory answer, some frustration might have been detectable in addition to being perfectly understandable.

THE AGENCY

Grievant's rating officer stands by his 2008 appraisal statement and refers to contemporaneous feedback he sent grievant on March 6, 2008:

> [redacted],
>
> Now that we have officially submitted the 2008 Country Commercial Guide, I think it is important to recap your performance during the CCG process. I appreciated the time and effort you put into the preparation of the CCG. I know you worked hard to pull the information together from the various sources within the mission.
>
> [redacted] and I reviewed the CCG over the weekend of February 16-18. I relayed this information to you in a phone call on Tuesday, February 19. I explained that [redacted] had spent a significant amount of time over the weekend, and that I also reviewed the CCG over the weekend. I explained that we were concerned by the number of editing errors, as well as what appeared to be "cut and paste" type of errors. You expressed surprise at this, and were even apologetic, but said that you had reviewed the document. You said that after a point it was simply hard to catch these things. Having "reflected" briefly on this with you over the phone, I said it was time to move on, and get the project done and up to the Ambassador for final review.
>
> When I suggested that you needed to dive back into the project because there were a number of things that needed to be done, you told me you simply "didn't feel up to it." You said you felt you were being set up for failure and that you wanted to take the rest of the week off. I said that it was not at all the case that you were being set up for failure, and that if anything, we were trying to work as a team to get the project done. I repeated that you were assigned the project so that you would have an opportunity to shine. I suggested that you think about this decision, and we agreed that we would speak again at the end of the day on Tuesday. When we spoke again at the end of the day, you said that indeed you would like to be removed from the project. You said that you felt that you simply could not contribute to its successful completion at that point. You said you would try and work through the rest of the week. I said I understood, and that we would not task you with completion of the project. Several officers pitched in here in [redacted], and on February 25th we successfully submitted the CCG for the Ambassador's review.
>
> [redacted], as I've pointed out before, we all receive feedback regarding our performance. The feedback I provided you was candid and honest. I outlined [redacted]'s and my concerns regarding the quality of the draft . . . you

submitted to us for final review. I believe that your reaction to that feedback, namely, throwing up your hands and walking away. . . was not commensurate with what we would expect of an officer at your grade level, experience and ability. Your self-imposed withdrawal. . . at a critical juncture, was unprofessional and I believe unwarranted. We understand that you feel that you have been under a lot of pressure from the Service, and that there may be extenuating circumstances for why you withdrew. Be that as it may, you left the project at a critical time, thus calling into question your judgment and dependability. I honestly hope you are able to work your way through whatever issues precluded you from fully participating in this important project. We need you fully and reliably engaged in our operations.

In response to the allegations in the grievance, reviewing official [redacted] submitted the following statement:

> Our records indicate that [redacted] was given ample opportunity to respond to our ratings and reviews of his performance, but he chose at the time not to raise the claims that he now seeks to address. While I don't know why [redacted] is making these allegations so long after they occurred, I do see that [he] is not only misconstruing what was noted in his . . . appraisals, but is also misrepresenting the reasons why our observations were so noted. There is nothing in [his] appraisals that was not discussed with him when it occurred, either verbally or in writing.
>
> With regard to [his] views on his ...(CCG) duties, the . . . March 6, 2008 memorandum from the rating officer [above] carefully describes the real issue with [redacted]s efforts: that being, irresponsible and unreliable performance, as reflected in [his] abandoning an important project mid-way through completion because he could not respect or accept good faith feedback and supervisory guidance. In fact [he] submitted a sub-standard CCG draft; he declined to accept constructive criticism; and he declined to continue managing the compilation of the CCG. When [he] gave me and the rating officer the draft on February 7, 2008, I in no way implied that it was "cleared", as I hadn't even read it. It was not until the weekend of February 16-18 that I was able to do a thorough reading of the draft. . . and where we found that it was incomplete, and in need of revision.

In addition to the above statements of his supervisors, the agency cites another statement by Mr. [redacted]:

> [redacted] implies that during the CCG process I was insensitive to the stress he was under due to another grievance he was pursuing. This distorts and mis-characterizes the warm and respectful relationship we had

at that time, more than two years ago, and which is evident in the attached memo to [redacted] and in our subsequent email exchanges of January 2008, just a few weeks before [redacted]s CCG issue.

In a January 21, 2008 email to grievant, [redacted] stated, in part:

> [redacted],
> Just a few thoughts. I'm glad we had a good talk on Friday. . . . I know you're a good man, and a talented, experienced FSO . . . . But, you'll need to make some adjustments, in my view, in order to get through this, and to allow yourself to perform really well. . . .
>
> But you've got to keep your great sense of humor, and your sense of proportion and balance, and keep smiling. And you'll need to double-check, all the time, that your responses and statements, and actions will be perceived as measured and thoughtful, and respectful, no matter what; resist the temptation to be perceived as right or smarter, or to get pissed if things don't go the way you want.
>
> Like anyone under stress, you'll need to be careful you don't inadvertently become your own worst enemy; or think that the very folks that want to help you the most, are out to get you.

Grievant replied on January 23:

> Well, that's terrific advice as always, [redacted]. No matter what, I always remind myself how lucky I am to be working for you again. Your perspective has to be unique without [sic] our ranks. I will read and re-read your message many times in the days ahead.

The Deciding Official's letter referenced the January 29, 2009 conference call in which grievant's rating official, the SCO and RD counseled him regarding the inappropriate manner in which he addressed a staffer in his call to the Director General's (DG's) office, demanding answers regarding the former DG and an email sent to Commercial Service personnel concerning the death of the Deciding Official's husband. Grievant's rating official later clarified this reference by stating:

> The statement in the rating concerns instead a conference call in which the [RD] (supported by the SCO and me) attempted to counsel [redacted] regarding the fact that his right to report what he may perceive to be

wrongdoing does not confer upon him the right to treat others in a way that they perceive to be intimidating.

. . . [redacted] refused to consider the possibility that his own behavior toward the receptionist had been improper (or that she may have not been an appropriate person from whom to demand immediate answers regarding the staffing of senior CS positions and the authorization of certain messages from HQ). Rather than try to understand [our] concerns, [redacted] sought to preempt and delegitimize the RD's feedback by portraying the session as a violation of his "constitutional" rights, retaliation against him for whistle blowing, etc. His inability . . . to interpret authority relationships, together with his lack of sensitivity to others, foresight, or positive attitude, constituted a spectacular performance lapse that I believed must be noted . . . an officer who will not consider the possibility that he or she may have erred, and will not heed considered advice from . . . officers with explicit responsibility and authority for managing his or her performance, cannot hope to be effective.

IV. DISCUSSION AND FINDINGS

In all grievances, with the exception of those concerning disciplinary actions, the grievant has the burden of establishing by a preponderance of the evidence that the grievance appeal is meritorious.[2] The Board finds that grievant in this appeal has failed to meet his burden of proof.

Grievant's 2008 appraisal presented very positive assessments of his accomplishments in [redacted] after a year's gap between his predecessor's departure and grievant's arrival at the Consulate. It discusses his extensive knowledge of [redacted] and excellent language skills. He was given high marks in all activities in both rating years, with the exception of his inability to accept constructive criticism and his failure to complete the 2008 "Country Commercial Guide."

Grievant's claim that his reviewing officer, [redacted], verbally cleared the draft of the Guide and then later reversed the clearance does not ring true. Both supervisors,

[2] 22 CFR 905.1(a).

[redacted] and [redacted], maintain that they first read the draft Guide over the weekend of February 16-18. In his March 6, 2008 recap memo to grievant, [redacted] recounted his February 19 call to him regarding a number of editing and apparent "cut and paste" errors that both had noted. He stated that grievant expressed surprise and was even apologetic and commented that after a certain point it was simply hard to catch the errors. This also directly contradicts grievant's assertion that [redacted] had already cleared the draft of the Guide. We find [redacted]'s statement to be credible and find nothing in the ROP to refute it; among other things, although grievant submitted a voluminous amount of documents on a range of issues, he did not introduce into the record any draft of the Guide or other documentation or information reflecting that his draft was cleared. Further, both [redacted] and [redacted] expressed indirect knowledge of grievant's ongoing differences with the agency, but they were very clear that he needed to be fully and reliably engaged in their own operations in [redacted].

Grievant's assertions that his 2009 PA includes inadmissible and unsubstantiated criticisms for a telephone call he made to the DG's office in January 2009 constituting retaliation for a protected action, and creating an atmosphere of intimidation and a hostile working environment, are also unsupported by the record. The receptionist who answered the phone call about which grievant was criticized reported that he was "clearly very angry and distressed." She complained of grievant's behavior to the Deputy Assistant Secretary, who called [redacted], by then posted at USDOC Headquarters as Regional Director-East Asia & Pacific. The telephonic counseling session that followed included grievant's rating officer ([redacted], reviewing officer ([redacted]), [redacted] and the

grievant. In an email the day before counseling occurred, rating officer [redacted] informed grievant:

> [redacted] and I are especially distressed that you completely bypassed the chain of command to call the Assistant Secretary's office directly and deliver an oral critique of senior management's decisions and procedures to the person who answered the phone. Had you discussed these issues with us, we could have helped you raise them in an acceptable manner. As it was, you are reported to have taken the wrong approach across the boards and it is hard for me to imagine how an officer with your experience and seniority could play it so inappropriately.
>
> We must first figure out exactly what happened, so we will take Patrick up on his suggestion that you, he, [redacted], and I have a conference call.
>
> Given that our information comes from Patrick in the report below, please put any response you may have in writing to the addressees of this email. I would like to be clear that you chose not to avail yourself of the opportunity to talk with [redacted] and/or me about the issues you raised with the Front Office. Those issues will not be the subject of our conference call; your reported conduct (especially your disregard for the chain of command) will be the focus of our discussion.

After the counseling session, [redacted], in a recap email to grievant, noted that grievant had claimed the call to the DG's office was prompted by an urgent inquiry from a congressional office and that given the nature of the inquiry and the fact that it may have included people in his chain of command, grievant felt it was appropriate to go directly to the DG's office. The Board observes that grievant did not refute, repeat or support this claim in later submissions. [redacted] advised grievant that the person who answered the phone call was clearly upset and had reported the incident to the DAS. He informed grievant that his comportment during the call indicated a lapse in communications skills, judgment and professionalism: "Because I have counseled you in the past regarding your comportment and communication skills, I felt it was very important to include [redacted] and [redacted] on my counseling session with you." Grievant

continued to claim that he had a responsibility to report mismanagement and the right to acquire information outside the "chain of command."

[redacted] again replied:

> What we discussed on the phone . . . and what I have counseled you about in the past, is your serious performance deficit in the area of leadership and interpersonal communication . . . It is regrettable that someone who is otherwise talented and experienced is unable to accept constructive feedback, and appears unwilling or unable to improve performance in this regard. This is a grave issue, and in my opinion, is an indication of your lack of suitability as an effective leader.
>
> Grievant simply responded: "You're entitled to your opinion, of course."

We agree with the agency and grievant's supervisors that they have an obligation to assess grievant's interpersonal exchanges with other employees in the core precept areas of leadership and interpersonal skills, and that grievant repeatedly failed to credit the criticisms or to change his demeanor. For example, in just under four months after grievant's arrival in [redacted], on October 27, 2007, [redacted] sent him a memo concerning his performance at a staff meeting a few days earlier, an October 19 email he sent to grievant, and a call from grievant on the night of October 30. [redacted] stated:

> We would expect you to accept the feedback on your performance that we provided to you in a gracious and professional manner. And even if you disagreed with that feedback, we expect you to behave in a civil and professional manner.
>
> We could not have imagined that my email would trigger the kind of angry and hostile call that you placed to my home on Saturday evening. I found the tone and content of that conversation to be inappropriate and offensive.
>
> If you have an emergency, you can call me anytime of the day or night, including at home. However, I do not expect you to call me at home and harangue me about your views on feedback that I have given you on your performance, nor is it acceptable for you to call me using profanity and a threatening tone.

> As your supervisor, I expect to be able to provide you with candid and honest views of your performance. This is an especially important part of my job. I trust that when I provide that feedback you will listen to it and act upon it accordingly. Once again, if you do disagree, there are professional and appropriate methods to express your views, including bringing them up with [redacted] as your reviewing officer.
>
> We understand that you may have had issues with the Service in the past. Many of us have. As we have told you since you arrived, we are not privy to the details of those issues, nor have we factored them into our assessment of your performance in any way. On the contrary, we have gone to great lengths to tell you that you were starting from scratch with us, and that based on your knowledge of the country and your skills, we expected you to shine as PCO in [redacted], and that we would do all we could to help you achieve that goal.
>
> . . .
>
> You closed the conversation by saying that "I was the boss," and that you weren't going to argue with me. You said that you had a different version of how the conversation developed on Saturday night, but that you wanted to move forward.
>
> I said that I agreed that what we wanted to do was to move forward, and that I saw it as important to provide you direct and clear feedback when I saw a lapse in performance, and that was what I was doing with our conversation today.

Based on a preponderance of the evidence in the record, the Board finds that grievant's supervisors in 2008 and 2009 were sympathetic to the stresses he was under with respect to certain other officials in the Service, and with an openly declared "clean start," tried to help him succeed. Grievant failed to demonstrate that the challenged statements in either the 2008 or the 2009 PA were inaccurate, falsely prejudicial or violative of agency procedures.

Any other issues raised by the grievant in this appeal and not addressed by the Board in its decision were found to be irrelevant, immaterial or inconsequential.

V. DECISION

The grievance appeal is denied.

For the Foreign Service Grievance Board:

[redacted]

Elliot H. Shaller
Presiding Member

[redacted]

Jeanne Schulz
Member

[redacted]

Nancy M. Serpa
Member