

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]
Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2011-017

January 25, 2012

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

James E. Blanford
Alfred O. Haynes

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Bridget Mugane, Attorney

Representative for the Department:

Melinda P. Chandler
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Assoc.

CASE SUMMARY

HELD: Grievant carried the burden of proving that a rating official's statement in the Area for Improvement (AFI) section of her 2009 EER criticizing her communication skills was prejudicial and inaccurate. As a result, the Board ordered the AFI statement expunged and that reconstituted Selection Boards consider her for promotion after the removal of the AFI statement from her 2009 EER.

OVERVIEW

Grievant, an FS-02 Information Technology Management Specialist, alleged that a statement by her supervisor and rating official which was included in the Area for Improvement section of her 2009 EER was erroneous, extremely prejudicial, and resulted in her being denied promotion to FS-01 by the 2009 Selection Board. She further alleged that the flawed AFI statement had an adverse effect on her next assignment and harmed her future career prospects. The rater's AFI criticism concerned an event that occurred toward the end of the rating period in which the rater expressed concern about grievant's ability to communicate effectively in her efforts to correct what she perceived as a data security problem. Since the essence of the criticism had not been discussed with grievant in counseling during the rating period, the statement critical of her communication skills was so broadly worded as to be misleading and was inconsistent with other parts of the EER which praised grievant's communication skills, the Board concluded that the statement was unfairly prejudicial and ordered it expunged. However, the Board found no basis to conclude that grievant was harmed as a result of the AFI statement in her next assignment under the circumstances, since her new supervisor in that assignment was not aware of the previous supervisor's prejudicial criticisms.

Given the foregoing findings and conclusions, the Board ordered expunction of the AFI statement and consideration of grievant for promotion by a reconstituted 2009 Selection Board. If necessary, the Board further ordered reconstituted SBs for 2010 and 2011 to consider grievant for promotion as well.

DECISION

I. THE GRIEVANCE

[Grievant] (grievant), an FS-02 Information Technology Management Specialist with the Department of State (Department; agency), filed a grievance with the Department on December 1, 2010. She claimed that the Area For Improvement (AFI) section of her April 16, 2008 to April 15, 2009 Employee Evaluation Report (EER) is erroneous and extremely prejudicial, and resulted in her being denied promotion to FS-01 by the 2009 Selection Board. In addition, she contended that the flawed AFI had an adverse effect on her current assignment in the [REDACTED] [REDACTED] ([REDACTED]) at [REDACTED]. For relief, she made several requests that were subsequently revised and expanded in her May 11, 2001 appeal to this Board (see page 7, infra) after the Department issued its decision on March 21, 2011, denying her grievance in full.

II. BACKGROUND

Grievant began working for the Department in 1987 and has served abroad in [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED]. In 2006, grievant was assigned to [REDACTED] [REDACTED] for three years, as the Senior Information Systems Officer. Her supervisor and EER rating officer was [Name 1], the Information Management Officer (IMO). Her Reviewing Officer at that time was [REDACTED] the Management Counselor.¹ In November 2008, grievant was informed that, upon completion of her three-year assignment in [REDACTED] she would be assigned to the [REDACTED] [REDACTED] Chief position in [REDACTED]. While this position was supervisory, it would not have constituted a promotion for grievant.

¹ Following [REDACTED] departure, [REDACTED] was assigned as the new Management Counselor and became grievant's reviewing officer for the 2008-2009 rating cycle which resulted in the challenged EER.

On February 23, 2009, during the monthly Information Systems Center (ISC) meeting in [REDACTED] [Name 1] presented a report prepared by [REDACTED] who was assigned to the Information Program Office (IPO). In generating the report, [REDACTED] used the Sensitive But Unclassified (SBU) network of agency information which he lacked authority to use. Since grievant had responsibility for the security of the information on the network, she first discussed the matter privately with [Name 1] following the ISC meeting, but subsequently involved higher-level management through emails that she sent in an effort to obtain vindication for her position that security protocols had been breached and needed to be corrected. Grievant initiated a series of emails over the ensuing months to several individuals within the Information Management hierarchy, claiming that [REDACTED] lacked authority to use the SBU network in generating his report and pointing out that she had not been contacted about his access despite her direct responsibility for the network's security. When grievant eventually was advised that management did not consider the security issue to be as serious as she did, she dropped the matter.

On April 6, 2009, in the process of preparing grievant's 2008-2009 EER, [Name 1] sent the following email to grievant:

[REDACTED] I know I said I'd wait until I read your statement but inasmuch as almost the entire week will be taken up first with ILMS and then procurement and then you are gone next week, I thought it best to give you my rough draft right now. The AFI is a new one, not reflected in the mid-year counseling session and actually came out of a couple of discussions I had with [REDACTED] [REDACTED] the reviewing official]

This email also transmitted grievant's draft EER, which included the newly-modified AFI statement noted above.

In the revised AFI statement, the rater identified “Communications” as the area for grievant to improve and included the following statement:

██████ needs to focus on her written (email) communication- specifically whether something merits an email or alternatively a face-to-face meeting would better address the issue. In addition, consideration is needed regarding her written rhetoric and the nature and importance of the subject. Said another way by a colleague, “she uses a howitzer when a pea-shooter would have done.” I have seen over the almost 3 years in ██████ her written communication improve and am confident this will continue.

On April 29, 2009, grievant’s rater and reviewer completed her 2008-2009 EER and grievant received a copy that day. The EER indicated that counseling sessions were held on June 25, 2008 and November 4, 2008.

In Section X of the EER (Optional Statement by the Rated Employee), which grievant signed on April 29, she added the following:

I am disappointed that my rater has identified an area for improvement that addresses a competency that was never identified as a weakness in any formal or informal counseling session.

On May 15, the Post’s EER Review Panel completed its review of the EER and prepared the following statement:

V. REVIEW PANEL STATEMENT:

Under 3 FAH-1 H-2817.1, the Review Panel is responsible for, inter alia, checking whether evaluation reports are consistent and conform to the Instructions for Preparation of the EER and regulations. The Panel is also charged with suggesting that an evaluation report containing discrepancies or inconsistencies be revised, and if attempts to have such deficiencies corrected are unsuccessful, the Panel should describe the circumstances.

In Section X, the rated employee states that the rater “identifies an Area for Improvement that addresses a competency that was never identified as a weakness in any formal or informal counseling session.” Because the instructions for Section VIII, B Area for

Improvement (AFI) state that the AFI area “must have been discussed with the employee in counseling during the rating period,” the Review Panel attempted to correct this apparent discrepancy/inconsistency. With the rated employee’s permission, the Review Panel read the Section X language to the Rater. The Rater replied that he wanted to leave the AFI section unchanged. The Rater also stated that he had discussed the cited AFI example on two separate occasions with the rated employee during the rating period. Discussions between the rated employee and the Rater failed to resolve the Area of Improvement discrepancy/inconsistency.

In the summer of 2009, the 2009 SBs were convened. Grievant’s OPF was considered by the Promotion Panel that reviewed the records of Information Management Specialists. One of the members of that Promotion Panel was [REDACTED] who was the Director of [REDACTED] in [REDACTED].²

As noted above, in November 2008, prior to grievant’s departure from [REDACTED] she had been named to fill the supervisory position of Branch Chief at the [REDACTED] in [REDACTED]. Her supervisor there would be [REDACTED], who was a member of the Promotion Panel that reviewed grievant’s OPF. On August 24, 2009, when grievant arrived in [REDACTED] to assume her new assignment, she was informed by [REDACTED] that she would not be placed in the Branch Chief position; that another officer already located in the [REDACTED] office ([REDACTED] [REDACTED]) would be assuming that position; and that grievant would be assigned to a non-supervisory position titled Senior Information Systems Officer. [REDACTED] only explanation was that she had been considering a reorganization of the office since well before grievant was selected for the position, and that she had decided to implement the reorganization plan.

On December 1, 2009, [REDACTED] filed her grievance with the Department. In addition to her complaint regarding the AFI, [REDACTED] grievance submission included the following statement:

²Grievant was not promoted by the 2009 SB.

Since [REDACTED] sat on the summer 2009 IRM Promotion Board, she informed me that my personnel file went back and forth several times and that I came very close to a promotion. [REDACTED] [REDACTED] said I was not chosen for a promotion due to my 2009 AFI. She also mentioned that she had spoken to IMO [Name 1], who surely provided her with outside information to influence her decision about me. It was during this conversation that [REDACTED] [REDACTED] said her deputy at the [REDACTED] and I would not get promoted. [REDACTED] wrongfully received outside information about me which had an effect on her ability to neutrally make a decision about my promotion. She shared all this information with me before the promotion cable even came out.

On March 21, 2011, the Department issued its decision denying grievant's claims. While responding to grievant's arguments against the validity of [Name 1]'s AFI statement, the Department did not address grievant's charges regarding her change in assignment at [REDACTED] [REDACTED] or the allegations concerning alleged inappropriate action by [REDACTED] as a member of the 2009 Promotion Panel that considered her OPF for promotion purposes. On May 11, 2011, grievant appealed the Department's decision to this Board, essentially reiterating the arguments contained in the grievance she had filed with the Department. She did, however, modify her prior request for relief as follows:

1. Deletion of the 4/16/08-4/15/09 AFI in its entirety.
2. Promotion to Class 1 retroactive to the date 2009 promotees received their promotion, with back pay and any benefits.
3. If the greater remedy of promotion is not granted and without prejudice to that request, Grievant requests reviews by reconstituted selection boards for all years in which the intact EER has been in the OPF. (This is likely to be 2009, 2010, 2011.) If promoted as a result, she asks for back pay and benefits.
4. Grant of a one-year extension of single and multi-class TIC to compensate for the lack of an AFI if it is deleted.
5. Preferential consideration for a supervisory domestic or overseas position (by having her bid on such a position presented to the Assignments Panel for consideration before other bids submitted for the same position).
6. Attorney's fees and costs.
7. Such other relief as is deemed just and proper.

Following the completion of grievant's discovery process, she informed this Board on July 11 that she "does not intend to submit a motion to compel, follow-up discovery requests, or a supplemental submission. She will reply to any agency response or other pleading."

On July 29, the Department initiated its own discovery and, upon completion of that process, on October 3 the Department submitted its response to grievant's appeal addressing all of her contentions. Grievant filed a reply to the Department's response on October 18 and an addendum thereto on October 20.

Upon receipt of the above documents, the record of proceedings was closed on November 2, 2011.

III. POSITIONS OF THE PARTIES

Grievant:

Grievant challenges the accuracy of the AFI statement in her 2009 EER. She notes that the instructions for preparing the AFI statement provide that the rater must use at least one of the counseling sessions during the rating period to discuss with the rated employee the area being identified in the AFI section as requiring improvement. Grievant says that no such discussions were ever held with her wherein she was told that communications was an area she needed to improve. She claims that the rater's AFI statement came as a complete surprise to her. Also, she alleges that the rater did not support his statement with any examples of her perceived deficiency, and that nowhere else in her EER, despite all of the references praising her communication skills, is there any mention of flaws in her written communication skills or her inability to determine whether something merits an email or a face-to-face meeting.

In her appeal to this Board, grievant continues to assert that her rater never counseled her concerning the documented criticism he placed in her AFI statement. She claims that the rater

admitted to her that his AFI statement was based solely on one incident that occurred in February 2009. She notes that [Name 1]'s lack of prior notice to her before he included the comment in her AFI section violates the Department's regulations. She claims, further, that the AFI statement is ambiguous, overly broad, and could be interpreted by a promotion panel as referring to numerous instances or subjects rather than just one. As such, she asserts that the comment is damaging, falsely prejudicial, and impermissible.

Grievant also charges that [REDACTED] wrongfully used information she had received from [Name 1] in the Selection Board and assignment processes, resulting in her not being promoted by the 2009 SB and her removal from the supervisory position for which she had been selected.

Department:

The Department disagrees with grievant's statement that the AFI is inaccurate. In adjudicating this case, the Department contacted grievant's rating officer regarding this matter.

[Name 1]'s reply to the Department included the following comments:

The email (and subsequent email chain) that motivated this specific area of improvement is [an e-mail dated February 24, 2009 with the subject line "[REDACTED] unauthorized access"] A more appropriate approach (and one I subsequently discussed with [REDACTED] but no, I have no formal record regarding the conversation) would have been that [REDACTED] meet and talk with me discussing her concerns.

The Department states that it has accepted the comments provided by grievant's rater and has concluded that grievant failed to show that the AFI statement was erroneous or falsely prejudicial. The Department also denies grievant's claim that the AFI statement was not supported with examples.

The Department also rejects as unsubstantiated grievant's allegations that [Name 1]'s discussions with [REDACTED] resulted in the downgrading of the [REDACTED] position in [REDACTED]

to which grievant had been assigned and that the [Name 1] [REDACTED] discussions were interjected into the deliberations of the 2009 SB to grievant's detriment and contrary to applicable regulations. The Department notes that grievant has not produced any evidence to support the foregoing contentions. Rather, the only conclusion supported by the record evidence is that [Name 1] gave [REDACTED] a good recommendation when [REDACTED] called in late-September 2008 to inquire about her application for the Branch Chief position in [REDACTED] before selecting her in October, and that there were no improper communications between [REDACTED] and the other SB members concerning grievant's consideration for promotion thereafter.

IV. DISCUSSION AND FINDINGS

In all grievances, other than those involving disciplinary actions, grievant has the burden to show, by a preponderance of the evidence, that his/her grievance is meritorious.³

In this case, grievant has cited two areas where her treatment violated Department regulations: 1) the falsely prejudicial AFI in her 2008-2009 EER, and 2) the improper use of communications between [Name 1] and [REDACTED] that had an adverse effect on her opportunity for promotion and resulted in the downgrading of her assignment to [REDACTED] [REDACTED] as the supervisory Section Chief to a non-supervisory position. We will discuss these incidents separately below.

The AFI Grievance:

It is a well-established basic merit principle that all employees should receive fair and equitable treatment in all aspects of personnel management. This is particularly important in the Department's Employee Evaluation process.

The EER instructions contain a section entitled *Ensuring Fairness*. That section states, in part, as follows:

³ 22 C.F.R. 905.1 (a).

... . A rating officer must discuss the work requirements and parameters of acceptable performance with the rated employee at the beginning of the rating period and provide feedback on the employee's performance during this period. *In situations where employees are not performing at an acceptable level, they must be counseled and afforded an acceptable period of time to improve.* (Emphasis added)

Employees have a right to be fully informed of performance deficiencies and areas of improvement and provided with a reasonable opportunity to improve such performance prior to their documentation in the EER. In order to accomplish this, the Department has adopted a separate Counseling Certification Form (DS-1974) for documenting instances of counseling, and requires supervisors to initiate formal counseling of employees at least twice during the rating period.

Section VIII B of the EER form, titled **Area for Improvement**, states as follows:

The following must be completed. The employee should be made aware of an area where he or she should concentrate efforts to improve. Specify the area in which such efforts should be directed. The area cited must be linked to one of the competency groups listed in Section VIII *and must have been discussed with the employee in counseling during the rating period.* Justify your recommendation with examples and indicate which competency group is being addressed. You cannot direct the response to a need for formal training. (Emphasis added)

The issue being considered here is grievant's claim that the AFI statement in her 2008-2009 EER is erroneous and extremely prejudicial. For the following reasons, we find grievant's claims meritorious.

First, this EER covers an annual period from April 16, 2008 to April 15, 2009. However, the record clearly shows that the contents of this AFI statement is the product of one single precipitating event and its aftermath rather than repeated behavior. Moreover, the event at issue took place less than two months prior to the end of the rating period and thus at a time when any

perceived deficiency – even if it had been promptly communicated to grievant – afforded little if any opportunity for corrective action on her part.

During this EER reporting period, [Name 1] and grievant had two formal counseling sessions; the first occurred on June 25, 2008 and the second on November 4, 2008. There is nothing in the record to show that, during these two formal counseling sessions, [Name 1] ever counseled grievant regarding a deficiency in any aspect of her communication skills or approaches to problem-solving, much less the content of the AFI statement that appears in her final EER. Indeed, all of the other references in her EER were highly complimentary of grievant's skills in this area. It was for this specific reason that the Post's EER Review Panel, noting the foregoing "discrepancy/inconsistency," urged [Name 1] to revise his comments -- an offer that [Name 1] could and did summarily refuse.

While [Name 1] and the Department claim that grievant knew or should have known that her "overreaction" to the [REDACTED] report was viewed as a communication deficiency because [Name 1] had two oral discussions with her concerning the matter, we completely disagree. We find no evidence that the oral discussions in question were memorialized in writing either on a counseling form that should have been presented to grievant or even in some contemporaneous notes kept by [Name 1] following his meetings with grievant. We further find that the discussions between [Name 1] and grievant were not counseling sessions at all. They were impromptu meetings initiated by grievant rather than by her supervisor and were in furtherance of grievant's desire to pursue and correct the security problem manifested by [REDACTED] unauthorized access to the SBU network. These oral discussions concentrated not on any perceived deficiency in grievant's communication skills but rather on language that grievant

wanted [Name 1] to release concerning the proper procedures for obtaining authorized access to the SBU network.

Grievant had every reason to believe that [Name 1] was not criticizing her behavior during these discussions, particularly since [Name 1] thanked her for the concern she had shown for the security of the Embassy's stored data. Under these circumstances, we find that grievant was not properly counseled concerning any perceived communications deficiency or afforded a reasonable opportunity to correct the problem.

Secondly, we find the AFI statement overly broad and misleading. The statement, as written, gives an objective reader of grievant's EER the impression that the area cited for improvement was a consistent deficiency throughout the EER rating period, rather than being the product of a single event.

In addition, [Name 1]'s criticism of [REDACTED] for escalating the dispute rather than dealing with it privately in one-on-one discussions overlooks the record evidence. Such evidence consists of recollections from those who were at the ISC meeting when [Name 1] presented [REDACTED] report that first gave rise to grievant's security concerns. She sought to (and did) discuss the issue with [Name 1] privately after the meeting adjourned. As such, [Name 1]'s suggested method for grievant to improve her communications skills seems consistent with the actions that grievant actually took.

Accordingly, we conclude that the AFI statement contained in her 2009 EER was prejudicial and inaccurate and that grievant was unfairly prejudiced before the 2009 Selection Board by the inclusion of the AFI in her EER.

Effects of the [Name 1]/[REDACTED] Communication:

However, we find that grievant has failed to carry her burden of proving that [Name 1]'s communications with ██████████ may have tainted her chances for promotion by the SB in 2009 or created "downstream damage" to the rest of her career. With respect to grievant's contention that ██████████ may have received negative information about her from [Name 1] which was not contained in her OPF and therefore could not properly be considered by ██████████ or any other member of the 2009 SB, we find no basis in the record to support a conclusion that any SB member had received such improper information. Grievant submitted no evidence to support her contention. Conversely, ██████████ categorically denied receiving any such information from [Name 1] or passing it on to other SB members. Further, we find the statements by other persons who served on that SB to be credible and convincing in denying that any negative comments concerning grievant were made by ██████████ during the course of their deliberations. We find particularly credible the statement by an SB member who knew both [Name 1] and ██████████ and, as such, would have been certain to recall any such negative comments.

We further reject the contention that ██████████ downgraded the supervisory position in ██████████ for which grievant had been selected after speaking with [Name 1] about her candidacy. In this regard, we credit ██████████ statement that she spoke to [Name 1] about grievant only once, and that was in 2008 before a selection for the position was made. We credit ██████████ statement that [Name 1] made positive comments about grievant's ability to perform the Branch Chief job and get along well with her staff. In this regard, we note that ██████████ in fact selected grievant for the position in October 2008, shortly after speaking with [Name 1] late in September. While it is true that ██████████ -- as a member of the 2009 SB -- had access to grievant's EER containing the prejudicial AFI before the latter reported to ██████████ in August 2009, there is no evidence that ██████████ was motivated by the content of that AFI to

reassign her from the Branch Chief position for which she had been selected. Indeed, grievant does not even make such an assertion. She simply contends that [Name 1] must have conveyed negative information about her to [REDACTED] which did not appear in the OPF and therefore could not have been properly considered by the 2009 SB.

To be sure, it was insensitive of [REDACTED] not to have informed grievant prior to her arrival in [REDACTED] about the internal reorganization of the office which changed the Branch Chief position to which she had been reassigned from supervisory to non-supervisory. However, we credit [REDACTED] statement that she had been considering an internal reorganization in [REDACTED] well before posting the Branch Chief vacancy but decided to exercise her authority to take such action only after grievant's selection had been made in October 2008. We find no evidence that [REDACTED] decision was contrary to any law, regulation or policy. Accordingly, we find grievant's claim in this regard unsupported by the record and without merit.

IV. DECISION

The grievance is sustained in part and denied in part. The Department is directed to expunge the AFI statement in grievant's 2008-2009 EER and to convene a reconstituted 2009 Selection Board to review grievant's amended OPF for promotion purposes. If grievant is not promoted as a result of action taken by the 2009 reconstituted SB, her OPF is to be placed before a reconstituted 2010 SB which s[Name 1] consider her for promotion. If grievant is not promoted as a result of action taken by either of those two reconstituted SBs, her OPF is to be placed before a reconstituted 2011 SB which s[Name 1] consider her for promotion. However, we find no basis on which to grant grievant's requests that this Board direct her promotion to Class 1; alternatively extend her TIC for one year to compensate for the deletion of the

prejudicial AFI from her 2009 EER; or order her preferential consideration for future supervisory positions.

With regard to the request for attorney fees and costs, grievant must file such a request within 30 days after the date of this Board's decision on the merits, accompanied by supporting documentation both as to her entitlement to such fees and as to the reasonableness of the amount claimed, in accordance with the provisions of 22 C.F.R. § 908.2(b). Accordingly, we find such a request to be premature at this time and do not address it.

The remainder of the grievance appeal is denied.

For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



James E. Blanford
Member



Alfred O. Haynes
Member