

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████
Grievant

Record of Proceeding
FSGB No. 2011-023

And

February 14, 2013

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Alfred O. Haynes
Nancy M. Serpa

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Thomas Lipovski, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant has met her burden of proof with respect to the prejudicial nature of some of the statements contained in her September, 2008 EER. That EER, as well as the low-ranking issued by the 2009 Selection Board, are ordered expunged from her Official Personnel File. She failed to meet her burden of proof with respect to alleged irregularities in her Work Requirements Statement for that year, to alleged pressure to sign her EER, or to any threats of retaliation.

OVERVIEW

Grievant, a second tour Career Candidate generalist officer with the Department of State, serving in her first reporting position, grieved her EER for the period of April – September, 2008, completed by a newly-arrived rating officer. Citing the laudatory report completed by her former rater, grievant claimed that a strained relationship with her new rater was the cause, at least in part, of the negative comments in her EER. The September 2008 EER was cited extensively by the 2009 Selection Board, which low-ranked her.

Grievant failed to show that she had been harmed by the fact that her new rater did not complete an updated Work Requirements Statement (WRS) until near the end of the rating period, because they had agreed that she would continue to use her prior WRS until a new one could be finalized. Likewise, her claim fails that she was pressured to sign her EER, even when she did not agree with it, because she did in fact sign it. Grievant offers no evidence of violation of the No Fear Act, other than her assertions that she feared retaliation by her supervisors if she complained about her treatment.¹

However, the Board found that the grievant was insufficiently counseled. In response to her claims that she was not counseled about weaknesses in her drafting skills, the Department produced only two cables, both returned to the grievant late in the rating period, on which her rater had made written comments about drafting weaknesses. Likewise, the Board found credible grievant's claims that, despite her requests to him for assistance, her rater responded tardily, and only in one email, to her difficulties with a locally-engaged employee.

The Board ordered grievant's EER deleted from her Official Performance file, its replacement with a standard gap memo, excision of her low-ranking, and reconstituted selection boards for 2009, and for any subsequent year in which the EER in question was reviewed by a Selection Board.

¹ The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) became effective on October 1, 2003. The Act imposes additional duties upon Federal agency employers intended to reinforce their obligation to provide a work environment free of discrimination and retaliation. (Public Law 107-174)

DECISION

I. THE GRIEVANCE

██████████, a member of the Foreign Service with the U.S. Department of State (the Department), appeals a decision by the Department, denying a grievance concerning her Employee Evaluation Report (EER) for the period of March 1, 2008 to September 5, 2008 (hereafter, the 2008 EER). In that grievance, she claimed that her 2008 EER contained procedural violations and falsely prejudicial characterizations of her performance, which played a large role in the decision of the 2009 Selection Board (SB) to low-rank her. She also grieves the 2009 Low Ranking Statement (LRS) as procedurally flawed. In her appeal to the Board, grievant seeks the following relief:

1. Removal from her Official Personnel File (OPF) of the 2008 EER;
2. Rescission of the 2009 Low Ranking;
3. Review of her file by a reconstituted 2009 SB; and
4. All other appropriate relief.²

II. BACKGROUND

Grievant, a Career Candidate Generalist, joined the Department in June 2004. Her first overseas tour was in ██████████ as Vice Consul. She left ██████████ in early 2007 for language training, in preparation for her next assignment in ██████████

In November, 2007, grievant arrived in ██████████ and took up her duties as a Global Affairs Officer. For her first four months in that job, she was supervised and rated by an Economic Officer, who departed ██████████ in February 2008. Prior to his departure, her rating officer prepared a laudatory “Career Candidate” EER covering the period of

² Grievant appears to have abandoned her charges about violation of the No Fear Act, as well as her fear of additional retaliation, contained on p. 5 of her original grievance appeal dated September 14, 2010.

November 1, 2007 to February 28, 2008. His enthusiastic rating was seconded by her reviewing officer, the Economic Minister-Counselor, who, among other praise, complimented her “written and oral presentations” as “succinct and clear, often condensing a huge amount of technical information into a clear and digestible analysis.”

Grievant’s new rating officer arrived at post in April 2008; her reviewing officer did not change. At the outset of the rating period, grievant and her rater agreed to continue use of her previous Work Requirements Statement (WRS) until they could establish a new WRS for the April 2008- April 2009 rating period.

On September 18, 2008, her rating and reviewing officers completed an EER on grievant for the period of March 1, 2008 to September 5, 2008. In Section V, Part B, under Interpersonal Skills, the rater commented:

Although [REDACTED] has formed good working relationships with others in the Embassy, she has had serious problems working with one of the Locally Engaged Staff (LES) in the section. I have counseled her extensively about the need to work productively and respectfully with everyone. While I am still evaluating her performance on this precept, I expect to see improvement over the coming rating period.

In the same section, under Communications skills, the rater wrote:

Aside from routine demarche replies, some of the cables that she has drafted have required structural revision in order to more carefully develop the message. I have provided extensive feedback in these cases and am confident that she will continue to improve her drafting skills.

In the Area For Improvement section, the rater cited “Interpersonal Skills” and commented:

During this rating period, [REDACTED] had interpersonal problems with a Locally Engaged Staffer in the section. Her frustration was evident in her manner of communicating. However, I have counseled her extensively about this and am certain to see improvement over the coming rating period.

In November 2008, grievant requested and was granted curtailment from [REDACTED]. She requested the early departure because of the difficult relationship she had with her supervisor. She moved to a job in Washington, working in several offices and earned her Masters Degree in International Relations.

The 2009 SB, which met in the summer, ranked grievant in the lowest five per cent of her competition group, and prepared a Low Ranking Statement (LRS) citing the reasons for that ranking. The low ranking was based primarily on the comments in the AFI section of the September 2008 EER concerning the interpersonal problems with the LES. The LRS also cited the AFI sections of two earlier EERs that pointed to concern about knowledge of institutional structure and chain of command. On December 16, 2009, grievant's Career Development Officer (CDO) sent her a copy of the LRS.

On September 14, 2010, grievant filed her agency-level grievance, which was denied in its entirety by the Department in a decision dated March 31, 2011. On June 2, 2011, grievant appealed that decision to this Board. Following discovery, grievant filed a Supplemental Submission. The Department filed its response to the Supplemental Submission on February 24, 2012, following discovery. Grievant's rebuttal to that filing was submitted to the Board on March 26, 2012. The Record of Proceedings was closed on April 30, 2012.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant contends that there were procedural violations in the completion of her 2008 EER, that it contains falsely prejudicial comments, and that it was a major factor in her low ranking by the 2009 SB. She claims that, starting with her new rating officer's

arrival in [REDACTED] in early 2008, her relationship with him was strained, and remained that way throughout the rating period. She cited several instances in which he berated her “to the point of tears.”

She asserts that her rater violated the Department’s instructions for EER preparation by failing to complete an updated Work Requirements Statement (WRS) within the first 45 days of the rating period. She acknowledges that, at the outset of the rating period, they agreed to follow her previous WRS, as her job had remained largely the same. But she claims that, despite her repeated requests to her rater for an updated WRS, her new one was not established until August, when her EER was due in early September.

She also argues that she was criticized in her EER for failure to perform a duty that was never a part of either her old or new work requirements - supervision of the LES with whom she had serious difficulties - and that the LES refused to take supervision from the grievant. She claims she was wrongly criticized for interpersonal skills problems in her efforts to supervise the LES, contending that, although she had been orally assigned to supervise this employee, that assignment was never put in writing in her WRS, thus denying her the authority needed to carry it out. Grievant contends that, because supervision of the LES was not part of her WRS, her rater chose instead to characterize her difficulties with the employee in question as “interpersonal,” not supervisory, problems. However, she argues that because the supervisory relationship was never put in writing in her WRS, she cannot be criticized for failure to accomplish that task. Furthermore, she contends that her rater wrote the unfavorable comments in

her EER because of his anger at grievant's request to the post's AFSA representative to address this issue with the rater.

Grievant also challenges the critical comments regarding her drafting skills. She contends that she was never formally counseled about her writing, and that no Counseling Certification Form reflecting alleged counseling she was given was ever completed, as required by the EER instructions. In this regard, she also claims that the counseling sessions noted on the face of her EER (June 3 and July 25), were in fact only informal conversations, and did not constitute counseling sessions. She avers that she initially refused to sign the EER statement saying those sessions had taken place, but finally did so only because she was pressured by the Human Resources Officer and her rater to sign the EER. Grievant also includes in her appeal complaints about the Areas for Improvement sections of her 2007 and early 2008 EERs, but seeks as relief only the rescission of the 2009 Low Ranking Statement referring to them.

In her agency level grievance, grievant asserted a claim under the "No Fear Act" and a claim of retaliation. Finally, grievant claims that, as a result of the strained relationship she had with her supervisor, she asked to curtail her [REDACTED] assignment early, a request that was approved by the Department.

THE DEPARTMENT

The Department maintains that grievant's claims are without merit. It avers that grievant has not shown that she was harmed by the rating officer's failure to establish a new WRS within the 45-day period required by the EER instructions. Because she agreed to use the previous WRS during the early months of the rating period, she was never without a WRS during the rating period at issue. The Department submitted a side-

by-side comparison between the previous WRS and the one later drafted by the rater, and claims it shows there was very little difference between the two.

With respect to grievant's claim of having been pressured to sign the first page of the EER and thereby certify that the counseling dates written on it were accurate, the Department does not concede that grievant was pressured to sign the EER, and argues that grievant has not shown she was harmed as a result of signing the EER.

On the issue of counseling, the Department contends that, even if no Counseling Certification forms were signed, the grievant was counseled by her rater, who gave her extensive feedback on her drafting. The Department cites several draft cables, written by the grievant, on which her rating officer wrote detailed comments about both the content and structure of grievant's drafts, and on which he detailed the weaknesses of several of her draft cables. Moreover, the Department argues, grievant's claim that the EER was falsely prejudicial because the "rater gave the false impression that "she received counseling on multiple occasions about this issue, when in fact [she] received no counseling," is without merit. First, it argues, the EER does not state that she received counseling, but only that she was provided "extensive feedback." Second, it contends that detailed feedback was provided on a number of occasions. Finally, the Department cites FSGB Case no. 2000-071 (2001), in which this Board held that, although formal counseling is called for in the regulations, methods such as markups of draft cables constitute "at least some form of counseling." In that case, the Board denied a grievance based on an alleged failure to counsel.

Grievant's claims that her rater criticized her "interpersonal skills" because he could not, for lack of a statement in her WRS about supervision of an LES employee,

criticize her supervisory skills, are based only on mere speculation. Further, neither her rater's motive for commenting on grievant's interpersonal skills, nor the nature of her relationship to the other employee (i.e., co-worker or supervisor) is relevant, because the promotion precepts call for employees to work "effectively and cooperatively with supervisors, colleagues, teammates, or subordinates." Citing grievant's own emails, as well as the accounts of other employees, the Department contends that it is clear grievant had interpersonal problems with an LES employee, and thus reference to that situation in her EER cannot be deemed "falsely prejudicial." The Department also argues that AFI statements in prior EERs referred to in the LRS constitute critical comments of past performance sufficient to satisfy the 2009 Procedural Precept's requirements. In essence, the precept provides that the Selection Board must not rely solely on critical comments in the AFI section unless supported by examples there or in other EERs from the most recent five years.

IV. DISCUSSION AND FINDINGS

In all grievances, other than those involving discipline, the grievant bears the burden of proof to show the appeal is meritorious.³ We find that, for the following reasons, grievant has met that burden with respect to several of her claims. We examine each of her claims separately.

Failure to draft WRS within the first 45 days of the rating period

The record shows that, shortly after the arrival at post of her new rating officer, grievant and he agreed that she would use her existing WRS until the two could sit down to establish a new one. A new WRS was prepared much later in the rating period in

³ 22 CFR 905.1(a)

August 2008. While no significant duties were added, we note that some items that appeared in the old WRS were removed from the new one.

Given that grievant has not disputed the statement that she agreed to use her previous WRS for the start of the rating period, and the fact that she was never without a WRS, we find that she has not shown that she was harmed by the tardiness of completion of a revised WRS.

Pressure to sign her EER

Grievant contends that she initially declined to sign the cover page of her 2008 EER, because she was unwilling to certify that formal counseling sessions had taken place on specified dates. She alleges that other officers at post advised her to sign the form, and that she felt pressure to sign what she believed was a false counseling certification.

Grievant has the burden to show how she was harmed by signing the certification statement on page one of her EER. She has raised an allegation that she was pressured to sign the EER even though she did not believe it to be accurate. However, the only evidence of such pressure consists of her unsupported, conclusory statement. Accordingly, we find that she did not meet her burden of proof in this regard.

Falsely prejudicial statements in her EER (writing and interpersonal skills)

1. Writing skills

Grievant argues that she was never formally counseled about problems with her writing skills, while the Department and her rater assert that she was counseled. In response to grievant's claim, the Department provided two cables written by grievant, one dated July 15, 2008 and the other dated August 1, 2008. Each had been annotated by

grievant's rater, pointing out alleged deficiencies he found with grievant's drafting. In addition, he sent her an email on July 23, 2008 with some general comments about the drafting of cables.⁴

Grievant had been working with her supervisor since April 16, 2008. She was performing under the same work requirements statement for all of that period and, thus had responsibilities to draft cables throughout that time. However, there is no evidence in the record that she was ever adequately counseled by her rater regarding her writing skills. As required by 3 FAH-1 H 2242, Career Candidates should be counseled regarding their strengths and weaknesses and ways to improve their performance, enhance their professional development, and strengthen their potential for tenure and promotion. In this case, grievant was not provided with that counseling. Neither grievant's rater nor the Department produced a signed Counseling Certification Form (DS-1974) to show that formal counseling took place. Instead, it provided comments the rating officer had made on the two cables cited above. These comments provided limited feedback on what the rater viewed as deficiencies, as well as suggestions for improvement. However, in view of the fact that grievant was an untenured officer in her first assignment doing substantive reporting, more formal counseling may have been helpful to achieve improvement in the drafting of cables. In addition, the annotated cables are dated a mere six weeks and four weeks before the end of the rating period on September 5, 2008. The August annotated cable came too late and provided no real opportunity for the grievant to make the changes that the rater was seeking.

⁴ In the same email, rater describes grievant as a "good writer." In a later email, August 13, he compliments grievant for a cable on another subject as "Very well researched and lots of substance."

The rater's comments in the EER at issue stand in stark contrast to grievant's two prior EERs. In both prior EERs, she was praised in superlative terms for her writing ability. In her [REDACTED] EER, she was praised for her reports and Security Advisory Opinions that "were not only well written, but also conveyed an understanding of the interests of the audience". In the same EER, the reviewer noted that she prepared a cable that was very helpful to a visit by the Secretary of HHS.

In her first [REDACTED] EER, grievant's prior rater described her as a gifted writer and gave special praise to her analytical reports, and took special note of a cable that she and another colleague drafted that distilled detailed issues about an EU satellite positioning system into an easy-to-read cable. In this same EER, grievant's reviewer went even further in his praise. He described her written presentations as "succinct and clear" and stated that she often condensed a large amount of technical information into a "clear and digestible analysis." Also he cited two cables as exceptional for explaining to Washington policy makers the reasons for positions taken by the German government that were not likely to change. This reviewer was the same reviewer in the EER at issue.

We further find the Department's reliance on FSGB Case No. 2000-071 (2001), a case involving a grievant with 20 years' experience in the Foreign Service, to be inapposite. In that case, the Board stated:

Grievant asserts that part of the problem here was lack of counseling. However, with respect to the drafting problem, the record supports the conclusion that grievant received at least some form of counseling in that in most, if not all, cases it appears that grievant's drafts were returned to him marked up with his request for needed revisions. Either [this method or another] would have provided him feedback on what his supervisor wanted and where his initial product failed to attain the desired standard. And while we note here that there was an absence of formal counseling, although called for in Department regulations, we find that, in this case, the omission was not harmful error.

The grievant in that case was a mid-career officer whose years of experience in the Foreign Service would certainly have taught that repeated commentary and requests for changes on written drafts may constitute a supervisor's feedback on writing skills. The instant case involves an untenured career candidate in her first reporting tour. We do not find the written feedback that was provided near the end of the rating period and that was not reinforced by verbal mentoring to be "counseling" as required by the Department's Career Candidate Program.⁵

The above-cited instructions provide that grievant was entitled to be provided with formal counseling and to have such counseling annotated on the Counseling Certificate form-DS-1974. We do not find the two edited cables and unstructured conversations to be the counseling intended by the applicable regulations. Nor do we find that these two cables support the rater's assertion he provided "extensive feedback" about her communications skills. We find that the Department failed to counsel grievant adequately about her drafting skills. Unlike in other cases of this nature, we find that grievant suffered direct harm – criticisms in her EER that led to low ranking a year later - - from the lack of counseling.

In this regard, this Board has ruled that the counseling requirement for Career Candidates is more stringent than it is for tenured employees. In FSGB Case No. 2001-029 (August 1, 2002), the Board stated:

The Board finds the lack of counseling to be particularly egregious in the case at hand. The career candidacy period is specifically provided to give new officers the opportunity to adjust their work styles to the needs and peculiarities of the Service. . . . Counseling means talking to the

⁵ The Department does not contend that grievant's rating officer ever orally discussed with her his displeasure with the structure and content of her drafting.

officer solely about his or her strengths and weaknesses, and providing a chance to improve as need be. (FSGB 2001-029 at 17.)⁶

2. Interpersonal skills deficiencies

Grievant's EER refers to interpersonal problems between her and a Locally Engaged Staff member (LES), whom grievant was orally directed to supervise, and cites these problems as an area for improvement.⁷ Grievant claims that supervision of this LES was never included in her WRS, and, at least partially as a result of this informal supervisory arrangement, the LES refused to take supervision from her. Grievant states that she sought assistance from the Human Resources Office to develop a Performance Improvement Plan that the LES refused to sign.

As the supervisor of both employees, the rating officer's management of this delicate relationship may have exacerbated the situation. The record shows, for example, no evidence that the rater responded to grievant's email complaints about the LES, until after the matter had escalated into a name-calling situation. On June 5, 2008, he sent grievant an email that he had received a telephone call from the LES complaining that grievant had been rude and had berated the LES. Grievant responded to the rater's email promptly and attempted to explain what had occurred.

There is no evidence that the rater ever met with the two employees. He merely sent an email on June 23, 2008 in which he chastised both employees in general terms.

In addition, he stated as follows:

Each of you has made startling and contradictory allegations about unprofessional behavior and conduct of the other during your interactions. I have also started hearing mentions of the same from others . . . As your

⁶ The Board has also held that counseling is a substantive and not merely a procedural right. See FSGB Case No. 2002-040 (May 28, 2003); also see FSGB 2001-029 (August 1, 2002) for impact on career candidates.

⁷ The rater states that he has counseled her "extensively" about this situation.

rater/reviewer, since this is already an issue area, I want you to know that I will watch this area particularly closely and will objectively and candidly describe your performance in my rating and statement to the promotion panel.

The Board finds it significant that the rating officer, even when contacted by the career candidate grievant about her difficulties in dealing with the LES employee, apparently did nothing about the situation until the LES called him to complain about grievant a month later. Even then, his involvement was limited to sending a sternly worded email to both of them.

Grievant and all employees have an obligation to deal effectively with all contacts and co-workers. However, when grievant was having difficulty dealing effectively with the LES employee, she sought help and advice from her supervisor, a request he apparently ignored until receiving a complaint from the LES. Again, we note that in her two prior EERs, grievant's interpersonal skills were praised by her raters. In her first [REDACTED] EER, grievant's managerial skills were described as follows:

In confronting the delicate situation of managing a difficult Foreign Service National staff member, (grievant) has learned the importance of managing proactively and setting clear and precise goals. She sought the guidance and advice of her supervisor and other more senior colleagues in dealing with this situation and has achieved positive results.

We find that the grievant has carried her burden that the portion of the EER at issue concerning her interpersonal skills is not supported by the record, that she was not properly counseled on this alleged deficiency, and was harmed by its inclusion in the EER. We make no finding on grievant's assertion that it was her lack of written supervisory authority that led to the difficulty with the LES.

In her agency level grievance, grievant asserted a claim under the "No Fear Act" and a claim of retaliation by her rater. In her rebuttal to the Department's argument that

she has abandoned these claims, she states that she has not abandoned any claims on appeal. However, other than her opinions, she has not provided any evidence in support of these allegations. These claims are therefore denied.

V. DECISION

Grievant failed to show that she was harmed by the use of her WRS for the previous rating period for the EER at issue, or the fact that she felt pressure to sign her EER. Grievant's claims of retaliation and violations of the "No Fear Act" are denied. However, grievant was not properly counseled with respect to her writing skills and interpersonal skills in her 2008 EER. Therefore, the Department shall:

1. Remove the EER for the period of March 1, 2008 to September 5, 2008 from grievant's OPF, and replace it with a standard "gap memo."
2. Remove the Low Ranking Statement by the 2009 Selection Board and any related documents.
3. Reconstitute a 2009 Selection Board to consider grievant's amended OPF, and, if she is not promoted by that Board, reconstitute Selection Boards for all subsequent years in which the EER in question was reviewed by those Boards, unless she was promoted by a subsequent SB.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



Nancy M. Serpa
Member



Alfred O. Haynes
Member