

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2011-028

December 8(or 9), 2011

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Alfred O. Haynes
Jeanne L. Schulz

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Agency:

Melinda Chandler, Director HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant's claim of entitlement to an Interim Employee Evaluation Report (EER) following his involuntary curtailment from Post upon suspension of his security clearance was rejected and his appeal denied.

OVERVIEW

In May 2009, grievant claimed to have received an e-mail from his Career Development Officer (CDO), informing him that the Bureau of Diplomatic Security (DS) had suspended his security clearance and, at DS's request, he was being involuntarily curtailed from Post. He did not however introduce a copy of the email into the record. Grievant left the Post in June and was officially assigned to a position in Washington on September 3, 2009.

The grievance alleges that, in accordance with 3 FAH-1 H-2814.2, the Post or Bureau requesting the curtailment must submit an Interim EER covering the period of service, regardless of the length of time involved since his previous EER. He argued that, as DS requested his curtailment, that Bureau should prepare such an EER for the period from April 16 to June 2009 when he was involuntarily curtailed from the Post.

The Department's position was that grievant was not curtailed from the Post as a result of any request from DS or any other Bureau or Post. Grievant was curtailed because his security clearance was withdrawn.

The Board found that grievant had the burden of producing preponderant evidence to show that DS requested his curtailment but that he failed to do so. Although he contended that his CDO told him that DS made such a request, he never produced the E-mail message from his CDO or any other factual evidence to support that claim.

Further, because Grievant has not proven or even alleged that he worked for DS, there would not have been anyone in DS who supervised him and thereby be in a position to prepare an EER on his performance while at Post.

Consistent with the Department's position, the record supported a finding that grievant's curtailment was the result of the withdrawal of his security clearance. Further, it is well established that the loss of a security clearance in itself negatively affects the employee's assignability.

The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

██████████, a member of the Foreign Service with the Department of State (Department/Agency), filed a grievance with the Department on December 3, 2010. He claims that, in accordance with 3 FAH-1 H-2814.2, when he was curtailed from his post in June 2009, the requesting post or bureau should have submitted an interim Employee Evaluation Report (EER), documenting his performance, regardless of the time elapsed since his previous EER. For relief, grievant asks for the following:

1. The Bureau of Diplomatic Security (DS) should prepare an interim EER for him and include it in his Official Performance Folder (OPF);
2. In accordance with 3 FAH-1 H-2819.3,¹ HR/PE should annotate the files of those employees and their supervisors who were responsible for a delinquent EER;
3. HR/PE should inform the Inspector General of DS's delinquency in this matter.

II. BACKGROUND

In the spring of 2009, while posted at Mission Geneva, grievant received an EER covering the period from April 16, 2008 to April 15, 2009. In June 2009, grievant was involuntarily curtailed from post and on September 3, he was officially reassigned from Mission Geneva to a position in the Bureau of Human Resources, Office of Performance Evaluation (HR/PE). In the spring of 2010, grievant received an EER covering his performance in HR/PE for the period from September 28, 2009 to April 15, 2010.

On December 3, 2010, ██████████ filed a grievance with the Department contending that an e-mail from his Career Development Officer (CDO) in May 2009 had informed

¹ The cited regulation states in part: "Bureau of Human Resources, Office of Performance Evaluation (HR/PE) should annotate the files of those employees and their supervisors who are responsible for delinquent reports and fail to comply with 3 FAH-1 H-2819.3".

him that DS had requested his curtailment. On May 9, 2011, the Department issued its decision denying the grievance, finding that “Your reassignment was not at the request of a post or bureau, but due to the suspension of your security clearance pending a DS investigation.”

On June 24, ██████ appealed the Department’s decision to this Board. On August 31, the Department filed its response. Citing 3 FAM 2813.4, the Department noted that an interim evaluation is unnecessary for periods of less than 120 days; that the period of time between the last EER grievant received before he was curtailed from his post in June 2009 was less than 120 days; and that the time period between grievant’s June curtailment date and the subsequent EER he received for the period beginning September 28, 2009 was less than 120 days. When grievant advised this Board that he would file no further submissions, the Record of Proceedings (ROP) was closed on September 21, 2011.

III. POSITIONS OF THE PARTIES

Grievant:

Grievant claims that 3 FAH-1 H-2814.2-2 required the Bureau requesting his reassignment to submit an interim EER on his performance within 30 days of his curtailment.² He argues that since DS requested his curtailment, that Bureau should have submitted an interim EER concerning his performance for the period in question. He alleges that the failure to have done so will diminish his competitiveness before the Selection Boards for years to come. He charges that DS and the Department are

² 3 FAH-1 H-2814.2-2 provides: “When a post or bureau requests that an employee be reassigned and that action is subsequently taken, the post or bureau must submit within 30 days of such reassignment an interim evaluation report documenting the member’s performance, regardless of the time involved. Form DS-1829 or a memorandum (if period covered is less than 120 days) must be prepared and the evaluation report must state the reasons for the request and subsequent reassignment.”

deliberately or negligently seeking to render his file incomplete and defective in order to hasten or force his departure from the Foreign Service.

The Department:

The Department's position is that grievant's reassignment was not made at the request of DS, a post or any other bureau, but was due to the suspension of his security clearance pending further investigation by DS. The Department maintains that the applicable regulation is 3 FAM 2813.4, which provides that an interim EER is not required for any period of less than 120 days. The Department further contends that all periods of performance are properly covered by an EER, as required under the regulations, and that grievant will suffer no adverse inferences from the absence of an interim EER for the summer 2009 period at issue.

IV. DISCUSSION AND FINDINGS

In all grievances, other than those involving disciplinary actions, the grievant has the burden to show by a preponderance of the evidence that his grievance is meritorious.³ In this case grievant alleges that DS requested his curtailment and that as a consequence, DS should prepare an interim EER covering the period April 16 to June 2009.. Thus, if grievant is to prevail, he must produce preponderant evidence to show that DS did in fact request his curtailment.

The crux of grievant's complaint hinges on his understanding of an e-mail he claims to have received from his CDO. In his initial grievance to the Department, grievant made the following statement:

In May 2009, I received an e-mail from my Career Development Officer . informing me that Diplomatic Security (DS) suspended my top secret security clearance, that I held for over twenty-five years, and, at DS's

³ 22 CFR 905.1 (a).

request, I was being involuntarily curtailed from Post and reassigned to over complement status in Washington.

On the basis of the above, grievant claims that since DS requested his involuntary curtailment, in accordance with 3 FAH-1 H-2814.2-2, DS is required to prepare an Interim EER to document his performance, regardless of the time period involved since his prior EER.

Grievant has accurately cited the controlling regulation applicable when it has been determined that an employee was involuntarily curtailed at the request of a post or bureau. However, grievant has the burden of producing evidence to support the claim that he was in fact involuntarily curtailed from his post at the request of DS. We find that he has not produced any evidence demonstrating that his curtailment was requested by DS. Grievant did not place any communication from DS, including the e-mail he purportedly received from his CDO into the record herein. Further, even if his CDO made the statement that grievant attributes to him, further evidence would be required to determine if the CDO's statement was accurate. That is, grievant would be required to show that DS in fact requested his involuntary curtailment and was a post or bureau within the meaning of 3 FAH-1 H 2814.2-2 that was responsible for preparing an interim EER under the circumstances.

Further, Grievant has neither alleged nor established that he worked for DS at the time of his involuntary curtailment from post; presumably he was not supervised by anyone from DS who would have had any basis for preparing an interim evaluation of his performance for the time period at issue. Moreover, and consistent with the Department's position, it is well established that the temporary suspension of a security clearance pending a DS investigation has an automatic negative effect on the

assignability of a member of the Foreign Service. In short, grievant could not stay at his assigned post once his security clearance was temporarily suspended.

We also take note of the two sets of regulations cited in this case. We find that a clear reading of each indicates that 3 FAM 2813.4 describes the policy governing all Interim EERs⁴ whereas 3 FAH-1 H-2814.2-2 applies to a narrower group of situations covering only those individuals who have been involuntarily curtailed at the request of a specific bureau or post.

Accordingly, on the basis of the foregoing, we find that grievant has not met his burden of proving that the Department violated its own regulations and thereby prejudiced him by failing to provide an interim EER for his period of service that was less than 120 days from his previous EER.

V. DECISION

The grievance appeal is denied.

⁴ Interim EERs are not required for any periods of service less than 120 days.