

BEFORE THE FOREIGN SERVICE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2011- 033

April 12, 2012

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

James E. Blanford
Jeanne L. Schulz

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Melinda Chandler
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant was properly counseled regarding the deficiency described in his Employee Evaluation Reports (EERs), and two Selection Boards (SBs) did not violate their precepts by low ranking him.

OVERVIEW

Grievant was low ranked by the 2008 and 2009 SBs. The SBs, in their low ranking statements, cited comments from evaluations written during the previous five years. They also cited comments from earlier reports.

Grievant claims that the low rankings violated the precepts on two grounds. First, the SBs did not prepare statements that gave a balanced presentation of his strengths and weaknesses, and second, the SBs reviewed EERs outside the most recent five-year time period in composing their statements. Grievant further claimed that the SBs based their low rankings on an Area for Improvement (AFI) comment in his 2007 EER that was unacceptably vague and about which he had not been counseled.

The Board found that the AFI adequately described the specific work performance characteristic that needed correction and a preponderance of the evidence showed that grievant had been counseled about it and afforded a reasonable opportunity to improve. The Board also found that the SB statements were appropriately balanced and that there was nothing in the precepts to preclude citations from earlier reports.

Grievant failed to carry his burden to demonstrate that the SBs violated their precepts or that he had not been counseled regarding the issue described in his 2007 AFI. The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

[REDACTED] (grievant) is an FS-03 Diplomatic Security (DS) Special Agent with the Department of State (Department, agency). The 2008 and 2009 Foreign Service Selection Boards (SBs) designated (low ranked) grievant among the bottom five percent of the classes they were evaluating, causing him to be placed before a 2009 Performance Standards Board (PSB) that recommended his separation from the Service. Grievant claims that the SBs violated their precepts and furthermore based their decisions on a 2007 Employee Evaluation Report (EER) that itself contravened the agency's regulations. He requests interim relief from separation, rescission of the SB low rankings and PSB recommendation for separation, mid ranking for 2008 and 2009, removal of the Area for Improvement (AFI) statement from his 2007 EER, and any other relief deemed just and proper.

II. BACKGROUND

Following his entry into the Foreign Service in 1990, grievant was posted to a number of challenging assignments, both domestic and foreign. He received an award for heroism and a superior honor award for service at [REDACTED] in 1994, a meritorious step increase for his work at the [REDACTED] field office in the late 1990s, and accolades for his handling of security for the embassy and the new [REDACTED] president during a 2004 crisis. Posted to an atypical [REDACTED] assignment in 2006, grievant was supervised during the 2006-2007 rating period by an officer that he never met. Grievant describes his next posting to the [REDACTED] field office from 2007 to 2009 as difficult, partly because of confusion over the chain of command.

Both the 2008 and 2009 SBs low ranked grievant. As a result of these two low rankings, grievant's Official Performance File (OPF) was automatically referred to the 2009 PSB, which designated him for selection out of the Foreign Service for failure to maintain the standard of performance required for members of the FS-03 class. In his current assignment in the [REDACTED] section in Washington, DC, grievant received a meritorious honor award and his 2010 and 2011 EERs recommended him for promotion.

Grievant filed his agency-level grievance on October 14, 2010, claiming that the 2008 and 2009 SBs violated their precepts by basing their decisions on performance outside of the most recent five years and by failing to prepare low ranking statements (LRSs) that provided a balanced presentation of his strengths and weaknesses. In addition, he claimed the 2008 SB relied in part on a 2007 EER that contained an AFI criticism about which grievant was never counseled by his rating officer, as required by the evaluation form itself.

In denying his grievance on July 1, 2011, the agency concluded that the challenged SB decisions and statements conformed to the precepts and that grievant was counseled by his rating officer about the concerns raised in the contested AFI. Grievant appealed to this Board on July 13, 2011, and, following discovery, filed his supplemental submission on October 14, 2011. The agency responded on November 14 and grievant submitted his final rebuttal on December 12, 2011. The Record of Proceedings (ROP) was closed on March 7, 2012.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant contends that he was unfairly disadvantaged by the 2008 and 2009 SBs due to their violations of the applicable precepts. He asserts that the 2008 SB focused on performance that was outside of the range of the most recent five years when making its decision to low rank him. In fact, he claims, the performance that “caused [it] the most concern” was from the 2001–2002 rating period. The error committed by the 2008 SB was followed by the 2009 SB, which chose to look even farther back in his career, making reference to EERs from 1997, 1998, 1999, 2000, 2001, and 2002. He asserts that reliance on performance evaluations that were written over a decade prior to the convening of the SBs was an egregious violation of the precepts.

The 2008 SB precepts state that “[i]nadequacies that lead to low ranking must be documented by one or more examples of performance from the most recent five years.” An SB focusing on performance outside of the most recent five years—and having that performance serve as the deciding factor in its decision to low rank an individual-- is contrary to the purpose behind the low ranking. The Department argues that in FSGB Case No. 2007-004 (January 18, 2008), the Board “cited with approval an SB’s reliance on EERs that were at least 10 years old.” However, this was not the gist of the Board’s holding in that case. In fact, the FSGB was commenting on a Performance Standards Board’s (PSB's) review of all of the individual’s documents in the OPF dating back to 1997, not an SB’s review of those documents. Grievant does not take issue with a PSB’s ability to review an individual’s entire OPF in determining whether to recommend separation or not. What is contrary to the intent and spirit of the precepts is the 2008 and

2009 SBs' decisions to base a low ranking on material that was more than five years old. The 2008 SB referred to a lone comment from grievant's 2002 EER that had nothing to do with the other comments used by the SB. A low ranking is supposed to be based on an inadequacy or problem area in an individual's most recent five years of performance. Going beyond this period has the potential to continue to punish an individual for overall performance or a specific incident that may no longer be an area of concern. The emphasis that the 2008 SB placed on the 2002 rating period violated the precepts.

The precepts also declare: "Boards will prepare statements explaining the reasons for the low ranking, through a balanced presentation of the member's strengths and weaknesses...." The statement provided by the 2008 SB was one and one-half pages long and contained just one line of text directed at grievant's strengths, hardly a balanced presentation. The statement contained no examples of grievant's accomplishments; the only examples included, albeit extremely limited, were those that the SB perceived as weaknesses in his performance.

The 2009 SB statement failed to provide a balanced presentation of strengths and weaknesses or any explanation at all of what they found particularly troublesome about grievant's AFIs outside of the competency listed. The entire statement is only one and one-quarter pages long. While it acknowledges there was some value to grievant's performance, it provides no examples. The manner in which the statement was written completely ignores the counseling function that the statements are intended to serve.

Not only did the SBs violate their precepts, they also based their decisions on inaccurate information. Despite what appears on his 2007 EER, grievant was never

counseled on the following AFI comment used by the SBs to justify their decisions to low rank him:

At times, [REDACTED] can get caught up in meeting the needs of one project without following through fully on another. He would do himself and his colleagues a service by balancing competing needs better and work to ensure that all projects are fully covered or properly handed over to another colleague.

The Department's discovery response corroborates the fact that grievant's rater was in that role for barely half the rating period and never met grievant personally. The rater indicates that he did not recall whether there was documentation of any counseling on a Form DS 1974. Indeed, there was not. This was a direct violation of the Instructions for Preparation of an EER, which require at least one counseling session to be documented on the counseling certification form (DS-1974). Grievant claims it is irrelevant whether or not grievant's AFI from a prior year discussed managerial skills. Grievant never received any feedback critical of his work or performance. Because grievant was in [REDACTED] at the time, he gave permission for a proxy to sign his rated officer's statement. The proxy did not have authorization to certify that counseling took place. Grievant did not protest the absence of counseling or comment on his AFI at the time because he did not wish to risk damage to his career. Grievant explains that "they call the employee's response in an EER the 'suicide box' for a reason and I was concerned that, particularly in the very insular DS community, I would potentially harm myself if I tried to raise the issue any sooner."

In addition to the lack of counseling, grievant asserts that the 2007 AFI statement is vague and overbroad and provides no examples. He cites FSGB Case No. 2001-017 (dated June 15, 2001) for the proposition that the difference between an example and a

general critical statement is a matter of specificity and that specificity is required so that the officer being criticized is given a fair opportunity to answer the criticism or to use it as a basis for self-improvement. Had grievant been properly counseled, he would have been on notice of a potential performance issue and would have been able to respond to it.

There is no evidence to support the contention that he was counseled; moreover, the AFI lacks sufficient specificity to be used for low ranking. The FSGB has held that an officer has the substantive right to documented counseling, and that “Department regulations explicitly require that employees be counseled with respect to deficiencies during the rating period.” (FSGB Case No. 2008-006, dated December 31, 2008) For these reasons, the 2007 AFI should be expunged and the low ranking rescinded.

Grievant argues that the violations of the precepts committed by both the 2008 and 2009 SBs led to his being low ranked in both years and ultimately to his being selected for separation out of the Foreign Service. The poor crafting of the low rankings he received is directly responsible for his being sent to the PSB and as a result of these defective documents, he now faces separation. He requests that the PSB decision to separate him be rescinded, the low rankings expunged and his scorecard changed to show mid ranking for 2008 and 2009, and the AFI section of the 2007 EER expunged from his OPF.

The Agency

The Department contends that grievant's arguments are meritless. The SBs are not precluded from citing EERs older than five years and both the 2008 and 2009 LRSs properly explain the reasons for the low rankings through appropriately balanced

presentations of grievant's strengths and weaknesses. Moreover, the 2007 AFI about which grievant complains is neither vague nor overly broad and the record evidence demonstrates that grievant was, in fact, properly counseled on the subject matter of the AFI.

Grievant's 2008 LRS was appropriately balanced. The SB noted at the outset of his 2008 LRS that grievant was a "dedicated and hardworking Special Agent who has demonstrated strong leadership and investigative skills." Similarly, the SB stated at the outset of grievant's 2009 LRS that his "performance evaluation file shows him to be a Special Agent with demonstrated skills and abilities." The 2009 SB also declared that grievant "has done important and worthwhile work in his career to date."

The Department states that the purpose of an LRS is to notify a "low-ranked employee of areas of concern identified by the [Selection Board]; it is not a comparison of strengths and weaknesses" (citing FSGB Case No. 2007-004 (January 18, 2008)). In fact, the precepts task the SB with "addressing areas in which performance or potential might be improved." This effectively means that emphasis must be on the employee's weaknesses and not strengths.

In the 2008 LRS, the SB cited from grievant's 2008, 2007, 2006 and 2002 EERs. The SB concluded that incidents found in these documents, "when consolidated, indicate a pattern of poor management and lack of proper coordination." The precepts contain the caveat that Boards "should not give undue weight to any single evaluation report in isolation from other reports covering the last five years or time in class, whichever is longer." The 2008 SB noted comments from grievant's 2001-2002 EER, which, when "consolidated" with comments from his 2008, 2007, and 2006 EERs, "indicate a pattern

of poor management and lack of proper coordination." This is exactly how the SB is supposed to treat performance occurring before, but nevertheless related to, performance within the most recent five years. The SB advised grievant to take proper steps to ensure that he coordinated closely with leadership in order to avoid situations where his actions were not aligned with Department policy.

The 2009 SB determined that there was a recurring theme of weakness in the competencies of managerial, interpersonal, and communication skills, identified in the grievant's AFI's in his 2009, 2008, 2007, 2006, 2005, 2004, 2002, 2001, 2000, 1999, 1998, and 1997 evaluations. The 2009 SB referenced earlier EERs, but did so in the context of grievant's most recent EERs.

Finally, the record evidence in this case demonstrates that grievant received the necessary counseling on the subject matter of his 2007 AFI, which counseling was appropriately focused with sufficient specificity.

When the Grievance Staff contacted grievant's rating officer about the assertion that there had been a lack of counseling, he responded with the following recollections:

I DO remember emailing [grievant] a few times--specifically— about what he eventually got as his AFI. On several occasions other [redacted]¹ colleagues and RSOs in the field had grouched that [he] either owed them a response or that [he] had never followed through on some matter of mutual concern. He occasionally initiated projects/cases and just flat out never followed up. I recalled having to ask him a few times via email to *close out cases, close loops, follow up with RSOs, and/or pull back on getting involved in matters that eventually he left to others within CIL to resolve* (his DS colleague at the [redacted] office DC grumbled often that [redacted] would "dish" issues off that could have been handed/closed out by [him] directly in [redacted]. This *was* something that I had to discuss specifically with him, and something which I recall that he never quite managed to sufficiently overcome. (Emphasis from the original.)

[redacted]

Furthermore, in response to grievant's discovery request asking whether the rater formally counseled him and documented that counseling session on Form DS-1974, the rater responded as follows:

During the 2006-2007 rating period I did formally counsel [grievant] on at least two occasions. Although I cannot specifically recall every Form DS-1974 I filled out, I specifically recall documenting at least one of those formal counseling sessions on a Form DS-1974 and e-mailing that form to [him]. I do not recall signing any Form DS-1974 that I sent to [him] (I cannot recall if I sent more than one), and also I do not believe that I asked [him] to sign any such form and return it to me.... Due to [changes in station and office relocations], I do not have a copy of any Form DS- 1974 that documented any counseling session with [him].

The rater's account directly contradicts grievant's assertion that he was unaware of the issue raised in his AFI. In addition, the need for grievant to improve his managerial skills, which was the basis for his AFI in 2007, was also the basis for the AFI in his 2006 EER. This was not a problem that was identified for the first time in 2007. Moreover, the absence of any Counseling Certification Form, or even a formal counseling session, for that matter, is not dispositive. The Board has held that a grievant suffers no harm, even where a formal counseling form was not prepared, provided that the grievant was counseled by his supervisor throughout the rating period. The test is whether or not the grievant was, or should have been, aware of the rater's concern regarding his performance of those areas where improvement was needed. *See, e.g.*, FSGB Case No. 2003-048 (May 5, 2006); FSGB Case No. 2005-023 (October 7, 2005); and FSGB Case No. 2005-068 (September 11, 2006). Given the certainty with which the rater confirmed at least two counseling sessions with grievant, coupled with the fact that the managerial competency was also the basis of grievant's AFI in the previous year,

there can be little doubt that grievant was, or should have been, aware of his rater's concerns.

The fact that grievant was aware of the substance of his AFI is further reinforced by grievant's failure to raise any issue about the content of his AFI prior to the eve of his separation, despite having had numerous opportunities to do so. First, grievant could have addressed his AFI while it was being prepared and chose not to do so. Indeed, the rater seemed surprised that grievant was objecting to his AFI now, considering grievant's participation in crafting the final version of his 2007 EER. As the rater stated:

I should also mention that I remember during the EER drafting process discussing [grievant's] EER at length (the only issue he seemed really focused on, and responsive to). He gave me seven pages of input that I worked to properly mold into a suitable evaluation. In the end, I emailed my draft to him, with the customary *"attached is your evaluation-please take a look at it and let me know if you have any issues, questions, comments, or concerns..."* opening statement. I remember [redacted] tried to push me to 'spice' up a bit what I wrote as his rater, but do NOT recall any push back on his AFI at all. In the end I want to say I got a sort of a genuine "thank you" email from him, which I took to mean that he was pretty happy with his final product. (Emphasis from the original)

Grievant also did not raise any objection about his AFI in the Statement by Rated Employee section of his EER. In fact, he started his comments in that section with an "appreciation [of the rater and reviewer's] assessment of [his] accomplishments over the past year." Not only did grievant not raise any objections to his AFI, he did not have any apparent objection to a proxy's confirmation of the counseling sessions after the EER was finalized. Indeed, it was not until the eve of his separation date, and over three years after receiving the 2007 AFI, that grievant first raised any issue with his AFI. Apart from grievant's self-serving denials, there is no evidence supporting his contention that his AFI took him by surprise. Instead, the totality of the circumstances demonstrates that he was

well aware of the subject matter of his AFI and was, in fact, counseled on the matter before receiving the AFI.

Finally, the AFI itself is neither vague nor overly broad. In FSGB Case No. 2001-017 (June 15, 2001), the Board stated that "[t]he difference between an example and a general critical statement is a matter of specificity. Specificity is required so that the officer being criticized is given a fair opportunity to answer the criticism or to use it as a basis for self-improvement." The AFI in question contains in itself an example of the behavior it recommends. The AFI example provided sufficient detail for grievant to respond to the criticism in the statement and also provided enough specificity for him to use the criticism as the basis for self-improvement. The AFI, therefore, is neither vague nor overly broad.

Grievant's 2008 and 2009 LRSs are entirely proper. They both appropriately assessed grievant's performance with a focus on the five most recent years, as supplemented by performance comments from previous years in accordance with the precepts, and did so in a fair and balanced approach. The totality of the circumstances demonstrates that grievant was counseled on the subject matter of his 2007 AFI and the text of the AFI is neither vague nor overly broad. Grievant has failed to carry his burden of proving that his grievance is meritorious and his appeal, therefore, should be denied.

IV. DISCUSSION AND FINDINGS

In accordance with 22 CFR 905.1(a), the grievant has the burden of proof in establishing by a preponderance of the evidence that the grievance is meritorious. We find, for reasons set forth below, that in this case the grievant has failed to bear that burden and, therefore, his grievance is denied.

Performance outside the most recent five years

The 2008 precepts cited in the ROP declare, “[t]hese statements [LRS] shall draw where possible on material from more than one rating period and from more than one rating officer. Such statements will include specific examples of performance given in reports from the most recent five years.” Part IIIC (3) of the 2008 Procedural Precepts states, "Boards may review the entire performance folder, placing greatest emphasis on the most recent five years of service or time in class whichever is longer."

The precepts clearly provide for an SB to consider EERs outside the most recent five years, with emphasis on more recent EERs. SBs are provided with each member’s entire performance folder, and are tasked with making their decisions regarding promotability based upon the information contained therein. The precepts state that a low ranking statement will include specific examples from the most recent five years. They contain no language restricting a SB’s review to the most recent five years, nor is there any restriction limiting the material contained in a low ranking statement to that from the most recent five years.

The 2008 SB appropriately noted specific examples from three recent EERs (2008, 2007, and 2006) as well as comments from grievant’s 2002 EER before concluding that the incidents, “when consolidated indicate a pattern of poor management and lack of proper coordination.” The 2009 SB directed grievant's attention to specific AFIs that had examples of failings in the competencies of managerial, interpersonal, and communications skills, as well as the judgment element of the leadership competency. It found examples of weaknesses in all five of grievant’s most recent reports, citing two examples apiece from the 2009 and 2008 EERs. The 2009 SB linked those weaknesses

to similar shortcomings in seven earlier EERs before concluding that grievant "still appears to be challenged in these areas in comparison to his FS-03 peers."

According to the precepts, "low ranking is an indication to the member and the Department of problem areas or inadequacies in needed skills, performance, and/or potential." In the LRS both SBs devoted most of their attention to grievant's most recent five years of service. Neither SB referred grievant to a PSB. They explained that their observations and recommendations were offered "in the spirit of helping [grievant] meet the performance standards of his class." Grievant has not demonstrated by a preponderance of the evidence that the 2008 and 2009 SBs violated their precepts.

Balanced Presentation

According to the precepts cited in the ROP:

For each member low ranked but not referred to a PSB, Boards will prepare statements explaining the reasons for the low ranking, through a balanced presentation of the member's strengths and weaknesses, and addressing areas in which performance or potential might be improved.

The 2008 SB began its LRS as follows:

The Board took note of [grievant's] demonstrated performance in a number of domestic and overseas assignments since 1995. The file shows him to be a dedicated and hardworking Special Agent who has demonstrated strong leadership and investigative skills.

The 2009 SB declared:

The Board took note of [grievant's] demonstrated performance in Department of State assignments. The performance evaluation file shows him to be a Special Agent with demonstrated skills and abilities. [Grievant] has done important and worthwhile work in his career to date.

Both of the SBs addressed areas of grievant's performance that could be improved, and did so after acknowledging his contributions. They were neither overly

harsh nor one-sided. Instead, the LRSs presented both aspects of grievant's performance, describing his weaknesses without omitting reference to his strengths. In accounting for the low ranking, they not surprisingly called attention to the areas in most need of improvement, as required by the precepts. We find that the 2008 and 2009 LRSs appropriately recognized grievant's positive aspects and provided him with an explanation of the reasons for his low ranking, through a balanced presentation of his strengths and weaknesses. The fact that the SBs devoted more of the LRSs to addressing areas in which grievant's performance might be improved does not require us to invalidate the LRSs. As the Board stated in FSGB Case No. 2007-004, "[t]he LRS is notification to a low-ranked employee of areas of concern identified by the SB; it is not a comparison of strengths and weaknesses."

2007 AFI

In FSGB Case No. 2001-017, this Board stated: "[s]pecificity is required so that the officer being criticized is given a fair opportunity to answer the criticism or to use it as a basis for self-improvement. The panel recognizes that specificity is a matter of degree, and whether a criticism is adequately specific will be a close call in some cases. The analysis is done from the perspective of a reasonable person – in this case, the reasonable rated person – as to whether the person is given adequate notice of a deficiency in performance so as to be able to respond to it."

The Board finds that the 2007 AFI comment, quoted above and cited by the 2008 and 2009 SBs, is adequately specific. The rater's comments were unlikely to be misunderstood by grievant. In effect, the rater advised grievant to finish a project or hand it over to someone else for completion. In the Board's view, the 2007 AFI comment is

easy to comprehend and in itself constitutes an example. As the rater explained, he based his AFI comment on his own observations and those of grievant's colleagues. In FSGB Case No. 2003-001 (dated May 12, 2003), the Board held, "neither regulation nor reason excludes, from EER appraisal, relevant, credible comment based on reliable first-hand reports of others. There is no requirement that the rating officer personally be present for every aspect of a subordinate's performance in order to report and evaluate such material activity."

The rater's recommendation to grievant was meant to provide guidance on an attribute that would serve both grievant and the agency well. By urging grievant to follow through on projects fully or to hand them over appropriately to colleagues, the rating officer provided enough specificity for grievant to answer the criticism or to use it as a basis for self-improvement. A separate question is whether grievant was put on notice during the rating period regarding the need to complete or properly hand over projects. In the 2006-2007 rating period, grievant was serving in a unique assignment as the sole DS representative at [REDACTED] in [REDACTED] [REDACTED]. His rating officer and his reviewing officer were both resident in Washington, D.C., which precluded them from observing and interacting with grievant directly. Communications among them consisted of emails and phone calls.

Grievant claims that he was never counseled about the issue in his 2007 AFI and points to the lack of a counseling certification form (DS-1974) as proof. The rating officer recollects that he counseled grievant formally on at least two occasions and that he emailed grievant a DS-1974 on one occasion, although he believes he did not ask grievant to sign and return the form. Without excusing raters from their duty to ensure

that a counseling form is prepared, the Board has held in previous cases that the absence of a DS-1974 is a technical error that is harmless if the totality of the circumstances establishes that the employee was aware of the area in which the rater believed he needed to improve.² In judging the credibility of conflicting statements, we take into account the entirety of the record.

We begin with the EER itself. The indisputably favorable 2007 EER depicts grievant as a capable and dedicated officer whose difficult assignment required him to work closely with representatives of member countries at [REDACTED] with DS and other bureaus in Washington, and with American diplomatic missions around the world. The EER displays the rater's and the reviewer's professional respect for grievant's accomplishments. The only criticism is found in the AFI, a section of the EER which must be completed for all employees. Overall, the EER appears to be an accurate and balanced depiction of grievant's performance during the rating period.

Grievant does not dispute any element of the EER other than the AFI. Indeed, he does not dispute the substance of the AFI. He does not argue that he never failed to follow through on projects, only that his rating officer did not formally counsel him about this particular concern. The Board notes, moreover, that his 2006 and 2008 EERs³ discussed analogous managerial weaknesses, adding support to the conclusion that grievant was aware he needed to improve his managerial skills.

² See FSGB Case No. 2003-048 (May 5, 2006) and FSGB Case No. 2005-068 (September 11, 2006).

³ The 2008 SB cited grievant's 2008 EER, which stated that grievant "should fully coordinate his ideas, initiatives and work products with the RAIC [Resident Agent in Charge] and [REDACTED] [REDACTED] Field Office] Management to ensure they are in line with overall regional objectives." The SB also cited Grievant's 2006 EER, noting that he was "counseled for sending a personal email that indicated that he was composing a controversial memo to an outside organization, 'without consultation with DS headquarters.'"

Grievant cites FSGB Case No. 2008-006 in support of his contention that such counseling is necessary. The Board notes that the grievant in the cited case pointedly objected in the EER itself to a lack of counseling. Under his signature, he wrote, "Non-concur. No counseling took place. Only signing for receipt of EER." In contrast, grievant began his rated officer's statement with the following: "I appreciate [the rater's and the reviewer's] assessments of my accomplishments over the past year." He made no reference to a lack of counseling. We find unpersuasive grievant's explanation that he was concerned about ruining his career if he raised the counseling issue at the time that the EER was in preparation. The reviewer described relations between grievant and the rater as "effective and cordial." Certainly the general tenor of the EER supports this conclusion. Although grievant contests the rater's claim that he counseled grievant, he does not challenge his reviewer's positive portrayal of their interaction. The rater convincingly described a normal interactive EER drafting process in which grievant was given an opportunity to (and did) negotiate the final product. Grievant does not dispute that he reviewed his complete 2007 EER while it was being drafted and certainly before it was added to his OPF. Two counseling dates and the AFI itself appeared clearly in the EER. Yet, grievant acknowledges he never brought up counseling or objected to the AFI wording.

Grievant is an experienced officer with a more than twenty year career. He was low ranked by the 2009, 2008, 2007 and 2002 SBs and his file was sent to a 2008 PSB, which added its counseling, though without recommending separation. The 2009 PSB observed that grievant had been given performance feedback and sound advice throughout his career in the area of his performance deficiencies. His 1993, 1994, 1999,

2002, 2006, 2007, 2008, and 2009 EERs particularly noted recurring managerial and communication deficiencies. Nonetheless, despite his considerable experience with EERs, and a previous low ranking, grievant maintains that he acquiesced in the inclusion of a specific deficiency in his 2007 EER concerning which he was taken unawares. Grievant did not take issue with it in his rated employee statement, and only raised his objection in his grievance and appeal. He did not question his 2007 EER when he was low ranked in 2007, when he was low ranked in 2008, or when his file was sent to a PSB in 2008. Only after selection out by the 2009 PSB does grievant allege that he was not counseled in 2007. His omission until now to address the AFI comment suggests that it came as no surprise and that he had ample time to correct the faults that the rater pointed out. Grievant has failed to carry his burden of establishing, by a preponderance of the evidence, that the 2007 AFI was inadequately specific or that he was not given timely notice of a performance shortcoming.

The record in this case indicates that grievant has had many noteworthy achievements in his career. Descriptions such as "one of the most passionate and caring RSOs that I have ever worked with" and "possesses a tremendous work ethic" are undoubtedly well-deserved. Neither the SBs nor his rating and reviewing officers recommended the referral to the PSB that resulted from two low rankings. That referral was automatic. This Board, too, acknowledges grievant's contributions, but finds that he has failed to carry the burden of demonstrating that his grievance is meritorious.

The preponderance of the evidence demonstrates that the rater counseled grievant about the need to improve his managerial skills that was the subject of his 2007 AFI. We

find no evidence that the SBs violated any law, regulation or precept in reaching their low ranking decisions.

V. DECISION

The grievance appeal is denied.