

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{GRIEVANT}

Grievant

and

Department of State

Record of Proceedings
FSGB Case No. 2011-034

April 9, 2012

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Nancy M. Serpa
Alfred O. Haynes

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Melinda P. Chandler
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Assoc.

CASE SUMMARY

HELD: A Performance Memorandum (Memorandum) prepared by the Ambassador criticizing grievant's performance was found to be incomplete, prejudicial, devoid of examples, and was the main cause cited by the 2010 Selection Board for grievant's low ranking. The Board ordered the Department to expunge the Memorandum from all personnel records and to mid-rank him for that period.

OVERVIEW

Grievant, a Public Diplomacy Officer, joined the Foreign Service in 1993, and has served at several overseas posts. In September, {yr1}, he was assigned as DCM to {post}, a small post with a critical crime threat environment. At the time of his arrival, the post was scheduled for its regular O.I.G. Inspection and the team of inspectors was scheduled to arrive in a matter of days. One week after grievant arrived, the Ambassador left the post for three weeks of family medical leave.

According to grievant, just before the Ambassador returned, the Inspection Team Leader told him that he did not fare well on the questionnaires completed by post personnel; however, he indicated that because he was new to the post and the difficult nature of the post and other factors, the problems were fixable. A few days after the Ambassador returned to post, grievant left for an official visit to the neighboring {country}. Immediately upon his return to post, the Ambassador had several counseling sessions with grievant in which she criticized his performance. In late October grievant agreed, at the Ambassador's urging, to request a voluntary curtailment. He departed post on December 14, {yr1}.

The Ambassador subsequently prepared a Memorandum on the grievant, evidently at the request of the DCM Committee in Washington, which criticized his performance. It was placed in grievant's OPF in early March 2009. The Board found that the Memorandum was falsely prejudicial because: it did not give examples supporting the criticisms; grievant was not given a reasonable time to improve his performance; and, inasmuch that the Ambassador was away from post for much of the time covered, it was not based on personal observation. Subsequently, the 2010 Selection Board, relying primarily on the criticism in the Memorandum, gave grievant a low ranking.

Because the Board found that the Ambassador's falsely prejudicial Memorandum was the primary cause of grievant's low-ranking, it ordered the Department to excise the Memorandum from the personnel record and change his ranking for 2010 to a mid-rank.

DECISION

I. THE GRIEVANCE

{Grievant} (grievant), a member of the Foreign Service with the Department of State (Department/agency), filed an agency-level grievance on November 24, 2010. He claims that a Performance Memorandum (Memorandum) dated March 2, 2009, prepared by {name1} and placed in his Official Performance Folder (OPF), is falsely prejudicial in that it contains unsubstantiated, inaccurate and unjustified comments. For relief, he asks that this Memorandum be removed from his OPF and any other relief deemed just and proper.

On January 3, 2011, {grievant} supplemented his grievance, challenging the low ranking he subsequently received from the 2010 Selection Board (SB), which he claims resulted from the presence of the Memorandum in his OPF. In that supplemental filing, he repeated his request for removal of the Memorandum from his OPF and added a request for rescission of the low ranking he received by the 2010 SB, as well as all other relief deemed just and proper. On May 24, 2011, the Department issued its decision, denying the grievance, and on July 25, he appealed that decision to the Foreign Service Grievance Board (FSGB).

II. BACKGROUND

Grievant joined the Foreign Service in September 1993, initially with the United States Information Agency (USIA), until its consolidation with the Department of State in 1999. In the Foreign Service, grievant served abroad in Embassy Public Affairs Sections in [REDACTED] [REDACTED] [REDACTED] and in the U.S. Consulate in [REDACTED].

On September 19, {yr1}, grievant arrived in {post} to assume his first assignment as a Deputy Chief of Mission (DCM). This is a small post with a critical crime threat environment. One week after his arrival, {name1}, the Ambassador, left post for three weeks of family

medical leave. According to grievant, the Ambassador was “incommunicado” for at least a portion of that time period. During her absence, Inspectors from the Office of the Inspector General (OIG) arrived in {post} for a regularly-scheduled post inspection. As the DCM, grievant was the highest ranking officer at post; it thus fell to him to lead the significant preparations necessary for the arrival of the Inspection Team.

Just before the Ambassador returned to post, the Inspection Team Leader informed grievant that he had not fared well in the management style questionnaires completed by post personnel. The Team Leader noted that, as grievant had just arrived at post, the problems the OIG team had found were likely fixable. According to grievant, the Team Leader also told him that “settling into a new post as a first-time DCM was difficult . . . and that the immediate absence of the Ambassador and the fact that this was a post with a hyper-critical crime danger causing significant stress to post personnel exponentially exacerbated inherent difficulties.”

Five days after the Inspectors had begun their week-long inspection, the Ambassador returned to post. Grievant stated that he informed the Ambassador of the conversation he had with the OIG Team Leader immediately upon her return. Two days later, the Inspectors briefed key mission personnel and departed post. The next day, grievant left {post} for an official visit to the neighboring {country}, where the Embassy had diplomatic responsibilities. While grievant was in the {country}, he received a communication¹ from the Ambassador that he was to submit to formal counseling as soon as he returned to post. When grievant returned, the Ambassador called him into her office and began the counseling sessions. Upon completion of these sessions, the Ambassador asked grievant to voluntarily request curtailment from the post. Before he agreed to a voluntary curtailment, grievant claimed that the Ambassador promised him that information about the counseling and her criticism of his performance would not be placed

¹ The ROP does not reveal whether this was in a phone call, an email, or some other form of communication.

in his OPF. According to grievant, she told him the only record of his brief tour in {post} would be of his curtailed assignment as noted on his Personnel Audit Report (PAR).

On December 14, {yr1} grievant departed post for Washington and was assigned to the Department's Bureau of [REDACTED] ([REDACTED]) On December 30, apparently responding to an instruction from the DCM Committee, {name1} sent a draft of a Memorandum to the Bureau of Human Resources, Office of Performance Evaluation (HR/PE), documenting grievant's performance as the DCM for the period from September 19, {yr1} to December 14, {yr1} in {post}. The final version of this Memorandum was dated March 2, 2009 and placed in the grievant's OPF. In the summer of 2010, the 2010 Generalist Threshold Foreign Service Selection Board (SB) convened to review the performance records of generalist Class FS-01 members of the Foreign Service. In the course of that review, the SB low-ranked grievant and prepared a statement supporting that low ranking. In its statement, the SB leaned heavily on the contents of the Memorandum prepared by {name1} to support its low-ranking of grievant. The SB also mentioned the Area for Improvement (AFI) section of grievant's 2007-2008 EER as a contributing factor in its decision.

On November 24, 2010, {grievant} filed his grievance with the Department, challenging the Ambassador's Memorandum. On December 3, grievant was informed that he had been low ranked by the 2010 SB, and on January 3, 2011, he supplemented his earlier grievance submission by adding a claim that the 2010 SB's low ranking was based on the contents of the Memorandum that was the subject of his grievance.

On May 24, 2011 the Department issued its decision, denying the grievance, and on July 25, grievant appealed that decision to this Board. On July 28, the FSGB acknowledged receipt of the grievance, establishing it as FSGB Case No. 2011-034.

On December 5, after discovery was completed, grievant filed his supplemental submission, and on January 20, 2012, the Department submitted its response to that submission. On February 6, grievant filed his reply to the Department's January 20 filing. The Record of Proceedings (ROP) was closed on February 28, 2012.

III. POSITIONS OF THE PARTIES

Grievant

Grievant contends that the Memorandum is incomplete, misleading, highly damaging, and does not meet the basic standards of fairness. It provides no specific examples to support the critical comments contained therein, and its falsely prejudicial nature was the basis for the low ranking he received in 2010.

Grievant contends that a fair and well-balanced evaluation, as required in an EER, should provide specific examples and cite some of the relevant circumstances that existed during the evaluation period covered by such a Memorandum. This Memorandum was void of any such examples or context to support the inaccurate allegations regarding his performance. He further argues that he was given no opportunity to improve his performance, as required in the performance evaluation process; indeed, he avers that all of his suggestions to the Ambassador about finding a way forward were rebuffed. Moreover, he argues that the Memorandum at issue covers less than 90 days, far fewer than the 120-day minimum rating period for a required EER envisioned by the regulations.

In addition, grievant claims the "counseling sessions" were in fact one-sided sessions in which the Ambassador told him she had called each employee into her office separately and asked for their views with respect to grievant's handling of the staff during her absence. He

claims the Ambassador accused him of insulting the staff, micro-managing, and ordering employees to perform functions that were not part of their jobs.

The Ambassador made no mention in the Memorandum that she departed post on family medical leave one week after grievant arrived and was away from post for three weeks in the midst of the run-up to and the start of an OIG inspection of a difficult and isolated post. Also, two days after the Ambassador returned, grievant was sent on official travel to neighboring islands where the Embassy was also accredited.

Grievant cited some of the hardships, notably the “lock down” environment created by the critical crime threat that exists at {post}, as described in the Post Hardship Differential Questionnaire, contending that such hardships have a decided impact on the morale of those assigned to this post.

In his February 6 submission, grievant noted that neither the Ambassador’s Memorandum nor the Department could cite examples to support the comments that he displayed a lack of cultural sensitivity with the local staff and made comments they found offensive. Such examples are required by the performance evaluation guidelines, and the absence of any render the Memorandum unfair and falsely prejudicial.

The Department

The Department’s position is that grievant has neither met his burden to show that the Memorandum at issue contains falsely prejudicial material, nor shown that the 2010 SB relied upon falsely prejudicial material when it low-ranked him. The Department noted that the Ambassador “was very concerned about the conditions at the post under grievant’s leadership.” Grievant had made comments which staff found to be offensive, and he displayed a lack of cultural sensitivity with the local staff and interlocutors.

The Department argues, and introduced into the record emails corroborating, that the Ambassador and grievant “negotiated” the language that was in the Memorandum, so grievant should have raised problems he perceived with its content at that time. Indeed, the grievant asked the Ambassador to keep the Memorandum concise. It also contends that the Memorandum contains specific examples which support the Ambassador’s assessment of grievant’s performance and her statement that he was an ineffective DCM. It refers in particular to the statements in the Memorandum that grievant: lacked sufficient preparation to be an effective DCM and described how that was the case; had difficulty managing and gaining confidence of the American staff which led to a morale problem; had difficulty delegating and being an effective team leader; should have sought her guidance or that of the section chiefs; and had on two occasions made inappropriate remarks to local staff and interlocutors and that he needed to be more conscious of how others may perceive such remarks.

In response to grievant’s argument that the 2010 SB based its low-ranking primarily on the Ambassador’s Memorandum, the Department disagrees, pointing out that the Board also cited a weakness contained in the AFI section of a previous EER. In short, the Department argues that grievant has not met his burden of proof and thus the grievance should be denied.

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. Thus, if grievant is to prevail in this case, he must show that the Ambassador’s Memorandum contains falsely prejudicial information, that it lacks examples to support the critical assessments made therein, and that it played a significant role in the low-ranking statement he received from the 2010 Selection Board. We find the grievant has met his burden in this case.

Before addressing the allegedly falsely prejudicial nature of the information in the Memorandum, the Board notes several initial matters relating to the fairness of the process employed in this case. First, because of the short period covered by the Memorandum (September 19 to December 14, {yr1}),² there was no regulatory requirement that any evaluative material be included in grievant's OPF. If, as the Ambassador avers, the DCM Committee instructed her to prepare a performance evaluation, she could have prepared one for that Committee's use, but asked that it not be included in the grievant's OPF. Because the Memorandum was included in the OPF, in determining whether the statements in it may be inaccurate, erroneous or falsely prejudicial, it is appropriate to apply the basic standards normally applicable to full Employee Evaluation Reports. In so doing, we find that some of these standards were not met in this case.

First, there is no indication that the Ambassador, as rating officer, gave the grievant any reasonable period of time in which to improve his performance, as required by performance evaluation guidelines. Further, in support of his argument that the Memorandum was falsely prejudicial, grievant emphasizes that it did not contain examples to support her critical statements regarding his performance. He asserts that in charging that grievant "made comments which staff found offensive," "displayed a lack of cultural sensitivity," and "staff morale plummeted" under his guidance, the Ambassador did not cite a single supporting example. But the Department disagrees, asserting that in fact the Memorandum does include examples.

As we have held in prior cases, an "example" of a performance deficiency must be sufficiently specific to give grievant a fair opportunity to answer the criticisms or use them as a

²Grievant contends, and the Board agrees, that even this period of time exaggerates the "rating period." With the Ambassador away from post for three weeks early in the period, and with her having urged him to curtail from post before the end of October, (when, grievant claims and the Department does not dispute, he was effectively relieved of his duties as DCM), the Board finds it an overreach for grievant to have been evaluated by Ambassador {name1} for the period from September 19th to December 14th, {yr1}.

basis for self improvement. The Board has scrutinized the Memorandum to determine whether there are statements that meet this standard and therefore may be deemed “examples.” The critical comments are contained primarily in the second and third paragraphs. Paragraph two reads as follows:

Not long after his arrival, {grievant} showed signs of difficulty in managing and gaining the confidence of the American staff. Unfortunately, he did not seek information guidance from me or the section chiefs before making key decisions. This compounded simple issues and rapidly escalated into serious morale problems among the staff. He also had difficulty being an effective team leader and was unable to delegate appropriately.

In the first sentence, we find no example to show what signs the Ambassador saw which led to this comment. With regard to the charge in the second sentence, for much of the time covered by the Memorandum, the Ambassador was away from post and unavailable to advise grievant; under such circumstances, it would not have been realistic for him to have sought guidance from her. Also, nothing in the record shows that grievant did not discuss matters with the section chiefs or seek any advice from them. With respect to the third sentence, the Memorandum does not identify the “serious morale problems” created as a result of grievant’s performance. Similarly, there is nothing in the record, and no example cited, to support the Ambassador’s charge that grievant was an ineffective team leader and unable to delegate.

In paragraph three, the Ambassador stated the following:

{Grievant} was often unaware of how others perceived him. On a number of occasions he made comments which staff found offensive or misinterpreted. In two separate incidents, he displayed a lack of cultural sensitivity with local staff and interlocutors. {Grievant} did not remember a number of these incidents when they were brought to his attention. In this leadership position he needed to be more self-aware and conscious of how others might view his actions and comments.

We find that there are no examples that identify the comments grievant made that the staff allegedly found offensive, or the instances in which grievant displayed a lack of cultural sensitivity toward the local staff and interlocutors.

In sum, the statements the Department cites as constituting examples are not sufficiently specific to have given grievant a fair opportunity to answer the criticisms or use them as a basis for self improvement. Accordingly, we conclude that the Memorandum lacks any examples of grievant's alleged weaknesses.

Further, under performance evaluation guidelines, when deficiencies are cited, the rater must provide the employee an opportunity to improve in those areas, usually for at least 30 days. The record lacks any evidence that the Ambassador gave grievant any chance to show improvement in his performance. Indeed, grievant claims, and the Department does not dispute, that his suggestions to the Ambassador as to how they could move forward with grievant remaining in {post} were dismissed out of hand.

Further, a supervisor's assessment of an employee's performance is typically assumed to have been based on that supervisor's personal observation and interaction with the employee. But in this case, as discussed above, a few days after grievant arrived at the post, the Ambassador left the post for three weeks of family medical leave. When she returned to the post, grievant left the post just two days later on an official visit to the {country}. While grievant was away, the Ambassador notified him that when he returned to {post}, he was to submit to counseling. The timing of these events suggests that the majority of the deficiencies cited in the Memorandum were likely reported to the Ambassador by staff and occurred within about one month after grievant arrived at the post and during the time the Ambassador was away from post. It is thus reasonable to assume that the Ambassador prepared this critical Memorandum, not on the basis

of her own personal observations of grievant's performance and behavior, but on the basis of information she received from members of her staff. In our view, that renders the resulting criticisms less reliable, and possibly more falsely prejudicial, than criticisms the rating officer herself observed.

The Inspection Team Leader informed grievant that he did not fare well in the management style questionnaires received from post personnel. According to the grievant, the OIG Team Leader informed him that, as he had just arrived at post and was in his first DCM assignment, the problems he had encountered were "fixable." Despite this assessment, the Ambassador did not provide the grievant any opportunity to improve his performance.

Grievant has also claimed that this falsely prejudicial Memorandum was the primary cause of his low ranking by the 2010 SB. The Department disagreed with grievant on this point, and noted that the SB also cited comments from the Areas for Improvement (AFI) section in grievant's 2007-2008 EER as an element in his low ranking.

We take note of the contents of the 2010 SB's low ranking statement. The third paragraph of that statement reads as follows:

However, the Board noted that *the Memorandum of Performance dated March 2, 2009*, prepared while {grievant} served as Deputy Chief of Mission in a particularly difficult and challenging environment, {post} (September 19-December 14, {yr1}), highlighted a range of inadequacies. The Board considered that this performance, when reviewed against other FS-01's—a decidedly superior and select group within the Foreign Service, *constitutes a basis for low ranking.* (Emphasis Added).

While the SB also commented on the AFI statement in grievant's 2007-2008 EER, it is clear from the above that the 2010 SB viewed the Memorandum as the primary basis for its low ranking of grievant, and we so find.

We find that grievant has met his burden to show that the Memorandum prepared by {name1} is incomplete, prejudicial, devoid of examples, and should be expunged from all personnel records. We further find that the Memorandum was the main cause cited by the 2010 SB in grievant's low ranking. We note that the Department did not argue, much less prove, that the grievant would have been low-ranked even in the absence of the Ambassador's Memorandum. Also, in paragraph three of its low ranking statement, the SB commented: "However, the Board noted that the Memorandum of Performance . . . constitutes a basis for low ranking." Accordingly, grievant's low ranking by the 2010 SB shall be expunged from his personnel records and his record modified to show that he was mid-ranked for that period.³

V. DECISION

The grievance is sustained. The Memorandum is to be removed from all personnel records. The low ranking by the 2010 SB is to be expunged from the record and grievant's record modified to show him as mid-ranked by the 2010 Selection Board.

³We also note that, given the fact that two Selection Boards (2010 and 2011) have reviewed Grievant's file with the falsely prejudicial memorandum contained in it, this Board would normally order that Selection Boards be reconstituted for those years, in order to have the file reviewed after the relevant memorandum is removed. However, grievant specifically stated that he is not requesting reconstituted Selection Boards.