

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

and

Department of State

Record of Proceeding

FSGB Nos. 2011-050

August 24, 2012

**DECISION
EXCISION**

For the Foreign Service Grievance
Board:

Presiding Member:

John M. Vittone

Board Members:

Jeanne L. Schulz
William B. Nance

Special Assistant:

Joseph Pastic

Representative for the Grievant

Pro Se

Melinda Chandler
Director
Grievance Staff

Employee Exclusive
Representative:

American Foreign Service
Association

CASE SUMMARY

Held: The Board holds that the grievant failed to establish by a preponderance of the evidence that the rating officer's comments in the Area For Improvement (AFI) section of her 2008 EER were inaccurate, or that she received no counseling about deficiencies in her interpersonal skills.

OVERVIEW

Grievant served as a Diplomatic Security Officer in [REDACTED] from July 2005 through August 2008. During the last four months of her assignment – April 16, 2008 through August 31, 2008 – she was supervised by a new supervisor, who completed her EER several months after she (the supervisor) transferred from [REDACTED]. Grievant objected to the AFI section of her EER addressing interpersonal skills, claiming that the language is vague, lacks supporting examples and specificity, and is inaccurate. She also claims that she was not counseled about any perceived deficiencies in interpersonal skills prior to the issuance of the EER. She argues that the AFI should be expunged and that her corrected file should be placed before reconstituted selection boards for 2009, 2010, and 2011.

Statements by both her rating and reviewing officers directly contradicted grievant's claims concerning the topics of discussion during counseling sessions, and with respect to grievant's actions and comportment during one of the sessions. The preponderance of the evidence supports the Department's ruling that grievant was properly counseled about a number of interpersonal deficiencies, that she was well aware of the basis for the rating officer's comments in the EER's AFI section, and that the statements in the AFI section are not erroneous. The grievance was denied.

DECISION

I. THE GRIEVANCE

[REDACTED] a Security Officer with the Department of State (Department, agency), grieves the Department's denial of her request to expunge the AFI section of her EER covering the period April 16, 2008 – August 31, 2008. She claims that the AFI section is inaccurate, unsupported by the facts, and that she was never counseled by her rating officer on any deficiencies in her interpersonal skills. For relief she requests that the AFI section be expunged from her file, and that the corrected EER be placed before reconstituted selection boards for 2009, 2010 and 2011.

II. BACKGROUND

Grievant was an FS-04 serving as a Special Agent in [REDACTED] [REDACTED]. Her supervisor/rating officer was [REDACTED] a GS-14 Supervisory Special Agent (SAC), recently promoted to that position. The reviewing officer was FS-02 Assistant Special Agent-in-Charge, (ASAC), [REDACTED]. Grievant completed her tour of duty at the end of August 2008 and was transferred to another assignment. Grievant objects to the following statement in the AFI section of the EER, which cites the competency being addressed as "Interpersonal Skills":

Complex criminal investigations inherently have both opportunities and challenges. As an ambitious junior agent who is not afraid to tackle the toughest cases and duties [grievant] would be well served by seeking guidance from supervisors and by adhering to rules and responsibilities when she encounters future roadblocks, setbacks, and challenges

Grievant and the rating officer exchanged correspondence on a draft of the EER, and minor editing changes were made. However, after grievant sought and obtained the intervention of her new [REDACTED] who

contacted [REDACTED] and requested that [REDACTED] take another look at the EER, [REDACTED] dropped specific examples of rules infractions from the assessment, but declined to modify the AFI statement. The EER was signed by all parties on May 1, 2009, eight months after grievant transferred.

On May 3, 2011 grievant filed an agency-level grievance, claiming that the statement in the AFI was vague, overly broad, contained no supporting examples, and was not an accurate reflection of her interpersonal skills. She also asserted she had not been counseled about the alleged deficiencies. On July 28, 2011, the Department denied the grievance in a letter signed by the Deputy Assistant Secretary for Human Resources, concluding that grievant was aware of the circumstances supporting the rating officer's comments and that she was in a position to respond to his suggestion for future improvement.

Grievant appealed the agency decision to the Board on October 4, 2011, claiming that her Official Personnel File (OPF) contained "materially false and inaccurate comments" and that, in particular, the AFI section of the May 2009 EER did not accurately reflect her interpersonal skills. She reiterated her claim that she had never been counseled about her interpersonal skills, although she acknowledged that counseling sessions had taken place during the rating period. For relief she also added a request that her corrected EER be placed before a 2011 reconstituted Selection Board.

The Record of Proceedings was closed February 13, 2012. It was re-opened on March 5, 2012 for the limited purpose of seeking a statement from the reviewing officer for grievant's 2008 EER. The ROP was re-closed on March 26, 2012.

III. POSITIONS OF THE PARTIES

A. The Grievant

Grievant contends that the rating officer's AFI comments are not accurate, are not supported by facts or examples, and do not accurately reflect her interpersonal skills. Moreover, she argues that she was never counseled about any deficiency in her interpersonal skills, and was therefore not afforded an opportunity to improve any real or perceived deficiency.

Grievant admits that she had three counseling sessions during the rating period, but disputes what was discussed at these sessions. With respect to the third counseling session, she denies that it was held as a result of her screaming and yelling at her supervisor, as he claims, or that she ever engaged in such conduct in the work place. She notes that it is stated elsewhere in the EER that offices she worked with outside the Department held her in high esteem because of her work and that she was "always a team player." Grievant contends that these and other statements in other sections of the EER contradict the negative comments in the AFI section. She also claims that the AFI fails to accurately portray her work relationships with colleagues – both inside and outside the Department – which she contends are reflected in the many statements of support she introduced into the ROP that attest to the quality of her interpersonal skills.

Grievant asserts that issues concerning interpersonal skills are so important to an officer's EER that these types of performance issues should be discussed on a regular basis with both the rating officer and the reviewing officer, and that such discussions should be properly documented, along with a plan for the reviewed officer to follow in order to improve. She claims that no potential or alleged problems were ever

documented on a DS 1974 counseling form, and that this failure constitutes “a material and prejudicial error”.

Grievant takes issue with the specific statement in the AFI that she “would be well served by seeking guidance from supervisors and by adhering to rules and responsibilities when she encounters future roadblocks, setbacks, and challenges.” This statement is vague and overbroad, providing none of the specificity required by EER preparation instructions. Grievant claims further that the AFI does not identify decisions she took without seeking guidance from supervisors, nor does it state specific rules and/or responsibilities that grievant failed to adhere to when she allegedly encountered these problems.

Grievant’s position is that the AFI section of her 2008 EER should be expunged from her records, and that her corrected EER should be placed before reconstituted selection boards for 2009, 2010, and 2011.

B. The Department

The Department denies that the AFI section is vague, overly broad, and does not contain any supporting examples. By having made this claim, grievant opened the door for her rating officer to refute her statement and to explain why she should not have been surprised by his comments. The rating officer avers in a statement provided during the agency-level grievance that the original draft of the EER included specific examples of grievant’s rule-breaking and failure to properly discharge responsibilities as a Diplomatic Security Special Agent. Even though he considered grievant’s actions to be grave infractions of Diplomatic Security rules, he dropped the specific examples after grievant’s new office director at [REDACTED] placed a telephone call

to the SAC in [REDACTED] asking that [REDACTED] take a second look at grievant's EER before putting it in final form. Grievant had asked her new supervisor to make the call for the purpose of correcting mistakes in the EER, following a protracted period of "back and forth" over specific wording of the document, and the rating officer stated that he was persuaded to drop any mention of these infractions (discussed below) from the EER, believing that discussions about specific rule breaking incidents in several counseling sessions provided sufficient documentation for the record. However, he declined to change the wording in the AFI section.

The Department asserts that grievant was counseled on several occasions and had ample opportunity to improve her interpersonal skills if she had been inclined to do so. Grievant knew the basis for the comments in the AFI section and she was properly counseled about her deficiencies.

IV. DISCUSSION AND FINDINGS

In all non-disciplinary cases, the grievant has the burden of establishing by a preponderance of the evidence that her grievance is meritorious.¹

First we address the grievant's claim that the rating officer's AFI comments were not accurate and do not reflect her interpersonal skills and abilities. Grievant's EER is a strong and favorable document in its overall portrayal of grievant's performance. She is described as "...competent, reliable, and skilled in Protective Security..." She is rated highly in all the substantive skills areas², including interpersonal skills. The rating officer wrote favorably of her close work with the [REDACTED]

¹ 22 CFR 905.1(a)

² All officers are assessed on the "core" competency groups of leadership skills, managerial skills, interpersonal skills, communication and foreign language skills, intellectual skills, and substantive knowledge.

in a case involving prostitutes and visa fraud: “[Grievant] has built a productive relationship with [REDACTED] and interacts with them in both official and social encounters with distinction.” Her EER shows solid performance of an officer who appears to be on a normal progression track. In fact, the reviewing officer stated that: “Her potential seems limitless and I expect that she will continue to embody the best of what is expected of a successful Diplomatic Security Special Agent.”

Despite the high praise afforded by the rating and reviewing officers, grievant challenged the AFI statement, and by so doing, brought into the record several facts that had not been previously introduced, many of which she has subsequently challenged in her appeal. In defending his choice of words in the AFI statement, the rating officer introduced information that brought to light the apparent existence of considerable tension between him and the grievant, including her alleged sharp verbal outbursts. He made explicit reference to several infractions of rules governing the conduct of a Diplomatic Security officer, including two which he had initially included in an early draft of the EER, but dropped after the call from grievant’s new supervisor. The rater believed that having addressed them in counseling sessions would be sufficient, and that formal documentation in her EER was not necessary. He also had concerns about grievant’s yelling and screaming at him, but did not cite these as issues in the AFI.

The two infractions referred to are 1) receiving a purse from a Confidential Informer, and 2) mishandling evidence in the form of a laptop computer. Whether or not these specific examples were or were not included in an earlier draft, and why they were or were not excluded from it, are immaterial at this point. The fact is that the rating officer has now made claims, on the record, that these infractions were committed by

grievant and she has included in her grievance copies of reports she drafted – apparently at the request of her rating officer – documenting her version of the facts concerning the two infractions.

The 2008 Core Precepts³ define Interpersonal Skills at the Entry Level (grievant was an FS-04 at the time of the EER) in five key areas, two of which are particularly relevant in this case:

Professional Standards:

Holds self accountable for rules and responsibilities; is dependable and conscientious; is composed, professional, and productive, even in difficult conditions. Treats all with respect.

Workplace Perceptiveness:

Demonstrates sensitivity in both domestic and foreign environments to status, protocol, and chain of command; responds considerately to the needs, feelings, and capabilities of others; shows respect for cultural differences.

These are the standards against which the AFI comments must be read. The rating officer counseled grievant three times during the rating period, as evidenced by the initials of both in Section I of the EER, Certification – Work Requirements and Counseling, indicating that counseling sessions were held on April 16, May 8, and June 18, 2008.

The rating officer states:

In early 2008, I was appointed to be [grievant's] Supervisor/Rater. As I always do with new Ratees, I conveyed my expectations to her and reminded her of the rules she must follow....Shortly after becoming her Supervisor, I noticed [grievant] was not present during regular business hours and that I considered her to be Absent Without Leave. I spoke to [grievant] about this and she told me she was flexing her time and working on nights and weekends. I told [her] that the Office does not have a flexible work program and that she was to cease her self-directed "flex-time"....[grievant] then yelled and screamed at me and said something about her "working very hard" and not being appreciated, or something like that, I then orally counseled her that she had broken office rules by 1)

³ 3 FAH -1 H-2320; DS1829CP,

creating her own unauthorized “flex-time” program and 2) by yelling at me.

While he was not clear in his statement about the specific date, he recalls that the counseling took place early during his supervision of grievant during the rating period in question. The Special Agent in Charge confirmed this during the agency-level review. We find that interpersonal skills were addressed during this session. We also find that the rating officer, the SAC, and the ASAC counseled grievant on May 8, 2008 concerning acceptance of gifts and misplaced evidence. The rating officer also instructed grievant to document the two incidents, both of which fall within the professional standards’ rules and responsibilities as identified in the Precepts.

Grievant submitted for the record separate statements (Reports of Investigation), both dated May 8, 2008 giving her version of how the purse from a Confidential Informer and a laptop computer taken as evidence during a raid on a suspected brothel came to be in her possession. The fact that both of these reports were prepared, and dated, by grievant on the same day the rating officer states she was counseled gives added credibility to his statement. Both of grievant’s statements indicate deviations from following established procedures and fall within the Precepts’ definition of interpersonal skills.

Grievant’s rating officer again counseled her on or about June 18, 2008 in areas, clearly relevant to interpersonal skills. In addition, in her own statement, grievant recalls having participated in a counseling session on June 18, which she described as “a normal review of the visa fraud case and my Work Requirements.” Her supervisor described the counseling session quite differently, however. Grievant:

was yelling and screaming at me ...concern[ing] my restrictions on her and my loss of confidence. The ASAC and I counseled her again for breaking rules about yelling at a supervisor...

Grievant's contention that she never yelled or screamed at anyone – at the June 18 meeting or at any other time – is contradicted by her reviewing officer, [REDACTED] whom we find was present at the meeting.⁴ His statement corroborates the rater's claims, and speaks to the substance of the interpersonal counseling provided to the grievant in a session he both observed and participated in:

On June 18, 2008, I was serving as the Assistant Special Agent in Charge (ASAC) of [REDACTED]

[REDACTED] On or about that day, I was requested by Supervisory Special Agent (SSA) to observe an employee counseling session in his office for Special Agent (SA) [grievant]... (note - I don't remember the exact date the counseling session took place, however, based on the info provided below, that appears to be the correct date) During the counseling session, SSA . . . discussed with SA . . . various aspects of her performance and areas where she needed improvement. SSA's demeanor during the counseling session was professional and forthright. During her counseling session, I noted that SA... appeared to be exasperated, intransigent and interrupted SSA... several times to dispute the discussion of her job performance. At one point she began yelling at him. Both myself and SSA . . . reminded her of the need to maintain proper decorum within the office and counseled her about her lack of courtesy and respect.⁵

Given the overall context of the rating officer's statement and the reviewing officer's specific references to the substance of the counseling session, we find that grievant was made aware of deficiencies in her interpersonal skills, and that reference to those deficiencies in the AFI section of her EER should not have come as a surprise.

Grievant's claims that the AFI section of her 2008 EER is vague, overly broad, and contains no supporting examples and that the rating officer's comments are not an

⁴ Grievant's reviewing officer, ASAC [REDACTED] had been unavailable during the agency level review of this case to provide his statement of what occurred at the counseling session. Later, the Board solicited his comments on what occurred.

⁵ Statement from [REDACTED] to David Rochelle, HR/G, dated March 13, 2012.

accurate reflection of her interpersonal skills and are inconsistent with the more compelling the evidence to the contrary. This Board has held that “[t]he difference between an example and a general critical statement is a matter of specificity,” and there are cases where an AFI statement is itself an example of the performance it describes, and not simply a general criticism or general recommendation for the future.⁶ If a statement contains enough specificity on which one can respond to criticism or take action for self-improvement, it meets this test. In our view, the AFI statement itself in the subject case contains enough specificity to be considered an example, and provides sufficient basis for grievant to use the criticism as the basis for self-improvement, when the rater comments that:

[grievant] would be well served by seeking guidance from supervisors and by adhering to rules and responsibilities when she encounters future roadblocks, setbacks, and challenges.

While the grievant refers to this statement as “vague and overbroad, providing none of the specificity required by EER preparation instructions”, we do not believe this comment is likely to be misunderstood by grievant as to what action needs to be taken to improve her performance. Nor is this AFI comment made in a vacuum, since the record contains discussion elsewhere in the EER of specific concerns the rating officer had about the grievant’s lack of adherence to Diplomatic Security practices and procedures.

Section IV.B of the EER addresses the concern when the rater states:

At points during the investigation, [grievant] made some decisions which adversely affected the case. After guidance to follow and adhere to Department regulations and policy, [grievant] refocused her efforts. She then arrested the preparer for a related immigration offense.

⁶ FSGB 2001-017, June 15, 2001

The record demonstrates that the grievant was not only aware of the deficiency, but that she was counseled adequately about the need for her to improve her interpersonal skills. Based on the grievant's own statements, and statements made by both the rating and reviewing officers, we are not persuaded that the EER contains "materially false and/or inaccurate comments."

Grievant contends that counseling sessions were not documented on a Form DS 1974. The rating officer does not recall if he completed a Form DS 1974, but states very clearly the dates of the counseling sessions and what was discussed during such sessions. Grievant's claim that the failure to provide her with a Form DS-1974 Counseling Certification during the rating period is a material and prejudicial error is not supported by the record. A rating officer's failure to document a counseling session does not invalidate an EER or an AFI, particularly when there is other evidence that counseling occurred.⁷ Grievant's admission that counseling occurred and the fact that she drafted her version of the events surrounding the purse and laptop are clear proof that she was counseled on those issues. Grievant's reviewing officer corroborates her rating officer's claim that he was present during the counseling session in which she yelled and screamed and was counseled by both on that issue.

Based on record evidence, we find that multiple counseling sessions took place during the rating period, that interpersonal skills – as defined in the Core Precepts – were a subject of discussion in those sessions, and that grievant was specifically counseled regarding those skills.

This Board has held consistently that an employee has the right to be advised of deficiencies in performance and the employee must be given a reasonable opportunity to

⁷ FSGB Case No. 2005-068 (September 11, 2006)

demonstrate acceptable improvement. FSGB Case No. 2005-002 (September 15, 2005) held that while there was no formal counseling certificate for the rating period, the grievant received informal counseling sufficient to put him on notice of his shortcomings. The obligation to counsel rests with the agency and is an agency requirement, not merely a requirement for the rating official (FSGB Case No. 2000-060, (May 7, 2001); FSGB Case No. 2003-025, (August 10, 2004). The Department's guidance on counseling is set forth in its Instructions for Preparation of an EER, DS-1829-I, and clearly establishes the obligation of raters in this regard, as follows:

Employees must be given the opportunity to perform their assigned duties and must be evaluated on their performance of established work requirements. A rating officer must discuss the work requirements and parameters of acceptable performance with the rated employee at the beginning of the rating period and provide feedback on their performance during this period. In situations where employees are not performing at an acceptable level, they must be counseled and afforded an acceptable period of time to improve.

While the rating officer had an obligation to complete a DS 1974 form to formally document a counseling session, the error in this case has not harmed the grievant because she had been counseled and knew the substance of the criticisms. The question that remains is whether grievant was afforded "an acceptable period of time in which to improve." The rating officer counseled grievant "shortly after becoming her Supervisor" concerning inappropriate behavior in the workplace, as well as on other rules-related issues, and grievant confirms she was counseled on the dates listed in her EER. This, in conjunction with the reviewing officer's statement that he was present and participated in at least one counseling session, and that grievant had more than half the rating period to work on improvement of interpersonal skills addressed during counseling sessions, leads

us to conclude the requirement of an “acceptable period of time in which to improve” has been met.

V. DECISION

The grievance appeal is denied.