

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB No. 2011-055

June 12, 2014

**ORDER: REVISED SECOND
MOTION FOR RECONSIDERATION**

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Harlan F. Rosacker

Special Assistant:

Lisa K. Bucher

Representative for the Grievant:

Self

Representative for the Agency:

Thomas M. Lipovski
Attorney Advisor, HR/G

Employee Exclusive Representative:

American Foreign Service Association

I. THE MOTION

This order addresses a revised second motion for reconsideration of a decision of the Foreign Service Grievance Board (FSGB, Board), dated January 24, 2013. In the decision, the Board concluded that an Inspection Evaluation Report (IER) of grievant's performance as Consul General in ██████████ was conducted fairly and in accordance with agency regulatory procedures. The Board also determined that one statement in the IER was unfounded and was not supported by adequate corroboration. Accordingly, that statement was ordered to be redacted. The Board concluded that all other negative statements in the IER were adequately corroborated by evidence provided by identified sources. In a previous motion for reconsideration, the Board reviewed the original decision in light of grievant's claims, and denied the motion. On this second occasion to review and reconsider the original decision, the Board again concludes that the motion should be denied.

II. BACKGROUND

In this case, ██████████ (grievant) challenged a standard IER that was prepared by a team from the Department of State (Department, agency) Office of the Inspector General (OIG). From May 20-26, 2010, the IER team inspected the U.S. Mission at the Consulate General in ██████████ including grievant's performance as Principal Officer. The IER issued on May 25, 2010 and noted that grievant had several performance deficiencies in the areas of leadership and management. Grievant alleged that the IER was procedurally flawed, contained statements that were falsely prejudicial and inaccurate, did not give specific examples of his alleged performance deficiencies, and did not reveal the names of any employees who allegedly reported his performance problems. Grievant contended that his IER was both a standard and "corrective" one and that he should have been counseled about any shortcomings before negative

statements could properly be included in the IER. Grievant presented positive supporting statements from several employees at post that contradicted the criticisms made in the IER. He requested that the IER be expunged.

At the agency-level, the Department agreed to delete one statement from the IER and declined any other relief. The Department then solicited additional corroborative information from most of the direct-hire employees who were assigned to the Consulate during grievant's tenure. A large number of employees responded with detailed corroborative information about their loss of confidence in grievant's leadership and the low morale of many Americans at post during grievant's tenure as CG.

On January 24, 2013, the Board issued a decision in this case concluding that the IER process was fair and accurate with the exception of one statement that was ordered redacted. The Board further concluded that the issue of counseling did not need to be resolved on the facts presented because, even if counseling were required, grievant received some counseling and was otherwise sufficiently on notice of the negative perception of his performance. With the one redaction, the grievance appeal was denied.

On May 23, 2013, grievant filed the first motion for reconsideration (MFR) of the decision based on claims that his counsel was grossly inadequate; he had newly discovered evidence; and there was "clear error" in the decision. The Department challenged most of grievant's assertions and the timeliness of the motion. In an order dated September 9, 2013 (Order: MFR), the Board concluded that grievant's claims about his attorney were not grounds for reconsideration and that much of what he offered as newly discovered evidence was not, in fact, newly discovered, but was available to him during his original grievance appeal. The Board further concluded that the proffered newly discovered evidence would not have altered the

outcome of the original decision had it been considered. Lastly, the Board concluded that there were no “clear errors” in its initial decision. Thus, the MFR was denied in its entirety.

On January 20, 2014, grievant filed the instant revised second motion for reconsideration (MFR2) in which he asserts again that there are “clear errors” in the original decision and in the Order: MFR. In its opposition filed on February 10, 2014, the Department claims that the instant motion is untimely because it was not filed within a “reasonable time” and, alternatively, that it should be denied on the merits because it does not rely on newly discovered evidence or an intervening change in the law and because the claims of “clear error” are unsubstantiated. Grievant filed a rebuttal on March 3, 2014. The Record of Proceedings (ROP) is closed with the issuance of this order.

III. POSITIONS OF THE PARTIES

Grievant’s arguments will be recounted in the discussion section below, followed by the counterarguments advanced by the Department, followed by the discussion and conclusions of the Board.

IV. DISCUSSION AND ANALYSIS

A. GENERAL

Under applicable statutes, regulations and procedures governing motions for reconsideration:

The Board may reconsider any decision upon presentation of newly discovered or previously unavailable material evidence.¹

This general principle has been expanded by court interpretation of the statutory and regulatory standards. Under the expanded interpretation, a motion for reconsideration may also be based on:

¹ See, Section 1106(9) of the Foreign Service Act, 22 U.S.C. § 4136(9) and 22 CFR § 910.1.

(1) an intervening change in controlling law, (2) the availability of new evidence, or (3) the need to correct clear error or to prevent manifest injustice. FSGB Case No. 2008-029 (February 22, 2010); FSGB Case No. 2006-011 (April 12, 2007). The burden of proof is on the movant to establish that his motion is meritorious. In the instant MFR2, grievant relies on claims of clear error and the alleged need to prevent manifest injustice. He does not offer evidence of a claimed intervening change in the law.

Under our Policies and Procedures, a motion for reconsideration must be filed within a reasonable time after a decision issues.² Grievant filed the instant motion more than four months after the decision issued on his first MFR. He attributes the delay to his “intense work and travel schedule.” However, in the instant motion for reconsideration, grievant largely reargues evidence that has already been considered and has always been available to him. We conclude that repetition of arguments previously made is not an adequate ground for a second reconsideration of the final decision of the Board. Notwithstanding this conclusion, we address the merits of the instant motion and conclude that it must be denied for the reasons that follow.

B. GRIEVANT’S CLAIMS, AGENCY RESPONSES AND BOARD

CONCLUSIONS

1. Examples of Clear Errors

Grievant argues that in our Order: MFR, the FSGB “prejudicially edit[ed]” the record and incorrectly concluded that he was on notice in September 2009 of low morale at post. Grievant claims that this is an example of a clear error because he claims that in September 2009, he was only put on notice of a complaint about weekend travel that he immediately addressed. He therefore claims that the FSGB “selectively edit[ed]” the record to “hide” the real reason for the complaint and the fact that he responded to it and corrected the problem.

² Foreign Service Grievance Board Policies and Procedures Effective March 1, 2013, at p. 13.

The Department argues that the record is replete with information that there was low morale at post and that grievant was on notice of same as early as September 2009. The Department cites a statement by [REDACTED]:

In mid September 2009, I told [grievant] that there was a morale problem in [REDACTED] and pointed out that his weekend and evening travel was making some officers unhappy.

The Department contends that the issue of grievant's notice of low morale at post has been fully litigated, both when the grievance appeal was decided on the merits and when the matter was reconsidered on grievant's MFR. The agency asserts that there is no clear error with respect to the Board's conclusion that grievant was first put on notice of low morale in September 2009.

Board Conclusion

Grievant challenges our statement in the Order: MFR (p. 12) and in the original decision (p. 39) that Political Officer [REDACTED] met with him in September 2009 and advised him that there was a morale problem at the Consulate. He argues that the meeting was limited to a discussion of weekend travel which he addressed immediately and effectively. Our statement, however, contains two comments: that [REDACTED] talked to grievant about morale problems at post *and* concerns about weekend and evening travel. In his statement, [REDACTED] reports that the weekend and evening travel issue affected *some* employees, while the issue of low morale affected the post. Grievant's efforts to minimize the statement and constrict it to the issue of weekend travel only are not borne out by the words that [REDACTED] used.

Moreover, even were we to accept grievant's argument that his conversation with [REDACTED] pertained only to weekend and evening travel and that he stopped demanding such travel from employees at post, we nonetheless conclude that the statements in the Order: MFR and in the original decision were not clear error. The statements, that we now affirm, were: "Grievant

should have been aware months before the IER issued that there was serious dissatisfaction among members of his staff. *The staff's discussions with him began as early as September 2009.*" (Emphasis added.) The fact remains, based on the record evidence in this case, that grievant was on notice of serious morale problems at the Consulate because staff discussed them with him, beginning in September 2009. He should therefore not have been surprised by the performance criticisms in the IER because, as we said in the Order: MFR (p. 21), "several high level officials, including the [Minister Counselor] MC, the Country [Public Affairs Officer] PAO and the [Deputy Chief of Mission] DCM, put grievant on notice of the morale issues at post *as early as March 2010.*" We find no error in this conclusion or the conclusion that notice to grievant began in September 2009.

We are also unpersuaded by grievant's additional argument that the weekend travel issue "should never have been treated by the OIG or the FSGB as a 'morale' issue, but rather as a 'needs of the Service' issue." This argument is not based on newly discovered evidence and does not assert clear error. It is instead grievant's effort to raise new arguments in a second MFR on issues that have been decided after a full review of the ROP. "The decision of the Board shall be final, subject only to judicial review." 22 U.S.C. § 4136(9). *See also*, FSGB Case No. 2007-049 (January 31, 2011) ("[Reconsideration] is not intended to provide grievant with an additional chance to argue his cause.")

We further reject as groundless grievant's attempt to analyze the decision and the motivation of the Board when he claims:

. . . the FSGB has unconsciously *anchored* its Decision . . . based on the Department's original, false assertions. . . . "Anchoring" is a well-researched cognitive bias in decision-making whereby too much weight is placed on the first or original piece of information offered (the "anchor") when making decisions. Once an anchor is set, there is a bias toward interpreting other information around the anchor, even if that original

information is false. **Grievant is also concerned that the Board, because of this unconscious anchoring bias also chose to ignore the preponderance of evidence presented by Grievant – included in dozens of documents, many of them contemporaneous e-mails – demonstrating a series of prejudicial actions taken by DCM [REDACTED] and the OIG inspectors and false statements by Grievant’s accusers, who were close friends and angered by Grievant’s confidential counseling.**

(Emphases in original).

The Board carefully reviewed all of the documents submitted by grievant and the Department in the first MFR as well as all of the statements and documents submitted in the original grievance appeal and found the evidence compelling in its support of the validity of the IER. We are satisfied that the conclusions about grievant’s first notice of morale issues in September of 2009 was not a misplaced or unconscious “anchor.”

2. Grievant’s Notice of Employees’ Dissatisfaction

Grievant contends that the Board erred in relying on and quoting from mid-level officers in support of our conclusion that grievant was on notice about subordinates’ dissatisfaction with his performance at the Consulate in the early spring of 2010. Grievant first challenges the Board’s reliance on five different officers’ reports that there was widespread dissatisfaction with him. He next speculates about who spoke with him about their dissatisfaction³ and offers his opinions about what their motives might have been. Then he offers extensive arguments that

³ Grievant cites a statement by [REDACTED] that “at least one colleague and several senior officers from Embassy [REDACTED] had attempted to convince [grievant] that our post had a serious morale problem.” Grievant then speculates:

[H]e [REDACTED] must have been referring to Country MGMT [REDACTED] Country PAO [REDACTED] and DCM [REDACTED]. . . . [T]his suggests that [REDACTED] was writing from a perspective of spring 2010, i.e. less than two months before the OIG inspectors arrived on May 21, 2010. . . . [REDACTED] does not say which ‘one colleague’ supposedly informed Grievant of his/her concerns and when he/she allegedly did so. However, he was likely referring to [REDACTED] PAO [REDACTED] who spoke with Grievant at Grievant’s request on March 25, 2010 – again less than two months before the inspection [began].

these conversations either did not involve morale at post or occurred less than two months before the IER team arrived.

The Department argues that this claim by grievant has been fully litigated and is not properly the subject of a motion for reconsideration.

Board Conclusion

The issue, again, is whether grievant should have been surprised by the negative comments in the IER, given the notices he received of the dissatisfaction of Consulate employees with his work performance. Upon a second reconsideration of the decision and the Order: MFR in this case, the Board concludes that there was no clear error in the conclusion that grievant was alerted to some of his work performance deficiencies when several senior officers reported that they spoke with him about morale problems at post as well as their concerns about his leadership. These included a conversation in February 2010 when the Embassy MC visited post and mentioned morale concerns with grievant.⁴ The record further establishes that this visit was followed by a conversation between grievant and the DCM who visited post and counseled grievant in both March and April 2010. Likewise, the country PAO visited the post and reported having a “frank” discussion with grievant on March 22 about his “abusive and erratic management style.”

Five other officers also reported that they either discussed morale issues with grievant or were aware of such discussions by others in early spring 2010. Grievant does no more than repeat his earlier challenges to the bona fides of these officers and deny that his subordinates shared their concerns with him. We decline grievant’s invitation to reread all of the quotes submitted in this ROP. The record is very clear that a significant number of employees at the

⁴ We relied upon a statement by the Embassy’s MC for Management Affairs who stated that she raised issues with grievant regarding personnel issues that were affecting productivity at post. She stated that she encouraged grievant to be very aware of morale at post.

Consulate became disheartened and dissatisfied with grievant's management and leadership efforts and many of them communicated concerns to him before the IER process began.

Grievant simply disagrees with the Board's conclusion that the feedback he received about his performance deficiencies ought not to have come as a surprise, given the number of employees and officers who tried to bring their concerns to his attention. We find no error in our conclusion that:

. . . the pivotal issue for this Board was notice. The last comment in the IER that grievant originally challenged in his grievance appeal was that he seemed surprised by the feedback, despite "counseling" he received from the DCM. We concluded that grievant should not have been surprised by the negative feedback because he "received counseling and was fully apprised of the deficiencies noted in the IER." . . . [T]he evidence supported our conclusion that grievant was placed on notice of his leadership deficiencies by staff members and superiors, including the DCM, many months before the IER issued.

(Order: MFR p. 21). We repeat that this issue has been decided and reconsidered. There is nothing else required.

Grievant also disputes that these conversations occurred "months before the IER was issued," as the Board concluded. The IER issued on May 25, 2010, while the majority of the discussions with grievant about his leadership deficiencies occurred in February and March 2010. It was therefore accurate to state that some of these conversations occurred at least two months before the IER issued.⁵

⁵ Grievant concedes as much in the MFR2 when he states: "[DCM] ██████████ did not ever mention the word 'morale' to Grievant before March 19, 2010, and only did so in a brief encounter in ██████████. Thus, grievant acknowledges that more than two months before the IER issued on May 25, 2010, he had a counseling session with the DCM about post morale. He states: "Grievant has never denied that DCM ██████████ raised morale issues in a brief, non-specific way . . . on March 19 2010. This brief encounter occurred . . . only 62 days before the OIG inspection began on May 21."

Similarly, grievant concedes that he had a conversation about post morale with ██████████ on March 25, 2010, exactly two months before the IER issued. Nonetheless, he claims that this was less than two months before the OIG inspectors arrived and therefore not "months before the IER was issued." The conclusion by the Board, however, did not pertain to the arrival of the OIG team; rather it pertained to the issuance of the IER. There

3. Grievant's Attention to Morale Issues

Grievant asserts that he was attentive to all issues of morale that were brought to his attention. He cites 15 examples of how he attended to morale concerns at post. He concedes that all of these examples were “already in the record of this grievance even before the FSGB even [sic] began adjudicating this case, but which are repeated here in order to further rebut the FSGB’s assertions above.”

The Department repeats that the purpose of a motion for reconsideration is not to reargue matters that were previously raised.

Board Conclusion

Grievant acknowledges that he made this argument before – that he was attentive to morale issues at the Consulate. The Board reviewed and considered the entire ROP, including all of grievant’s arguments. Nonetheless, the Board reached the conclusion that the challenged comment in the IER was not falsely prejudicial.⁶ Despite grievant’s apparent unwillingness to accept this conclusion, this would not be grounds for reconsideration.

4. Ad Hominem Attacks

Grievant contends that the Board committed clear error in the Order: MFR by “unfairly attacking Grievant . . . for allegedly [sic] ‘ad hominem’ attacks . . . on MGMT [REDACTED] and POL [REDACTED]. He argues that he is “not the monster implied by FSGB.” He contends that he had a right to defend himself in the grievance from what he called “false statements” by the two employees. He claims that he proved that [REDACTED] was “dishonest and insubordinate” and that

is no error in this conclusion. The conclusion, moreover, was not intended to suggest that grievant was entitled to at least 60 days between formal counseling and a criticism. Rather, we concluded only that grievant was on sufficient notice of performance deficiencies to not be surprised by the negative comments in the IER.

⁶ The comment in the IER was: “What is most worrisome . . . is that the feedback I gave [grievant] concerning his performance seemed to come as a surprise despite counseling he received from the DCM.”

██████ was “insulting, had serious misconduct problems and had been declared *persona non grata* by ██████ officials in two of the Consulate’s five consular districts.”

The Department argues that grievant proves the accuracy of the finding when he attacks both employees in the above statement. The agency also argues that our characterization of grievant’s comments about these two employees is irrelevant to the decision reached.

Board Conclusion

The Board was not persuaded by grievant’s explanations about the motivations of the employees who offered negative comments about his leadership skills. Moreover, much of what he now offers was presented and considered previously.⁷ The Board concluded in the decision:

. . . a number of officers at post, senior officers from the Embassy, including the DCM and the Ambassador, all tried to alert him to the serious problems with his leadership. The Board finds that grievant was consistently reluctant to accept any responsibility for the morale problems at post, resorting instead to blaming others for his perceived deficiencies (pp. 39-40).

Similarly, the Board concluded in the Order: MFR:

Grievant does not identify these additional assertions as newly discovered or previously unavailable evidence. Moreover, they are simply expansions of arguments that he presented earlier. They contain nothing that he could not have presented during the pendency of his grievance appeal. Moreover, his assessment of these staff members’ motivations is purely speculative. These contentions do not support a motion for reconsideration (p. 14).

Having twice considered grievant’s arguments about the employees who made negative statements about his performance, no more is required. We do not find clear error based on the comment in the Order: MFR about *ad hominem* attacks.

⁷ Grievant discussed in the first MFR newly created evidence pertaining to ██████ alleged insubordination and dishonesty and ██████ alleged rudeness, *persona non grata* status and his perceived misconduct problems. Grievant also claimed that another critic, the Economic Officer, ██████ made false claims about him because she became defensive when he counseled her about her performance. He also claimed that the Public Affairs Minister, ██████ made negative comments about him because of depression and pressures on her life.

5. Grievant's Claim of Due Process Denial

Grievant claims that this Board must rule in his favor and order the IER expunged in order to provide him with full due process and to correct manifest injustice. He asserts that he was “widely admired by First and Second Tour (FAST) officers and by [post] FSNs⁸ . . .” and therefore the IER should be expunged as inaccurate and falsely prejudicial. He further claims that the IER has caused him “career-ending” damage.⁹

The Department did not specifically address grievant's due process or manifest injustice claims.

Board Conclusion

We are satisfied that our consideration of the grievance as well as the first motion for reconsideration was thorough, careful and correct. Grievant has, accordingly, not shown clear error or manifest injustice on this record of proceedings. The impact of the IER on grievant's career is not an appropriate consideration in determining whether it contained falsely prejudicial statements and was prepared correctly pursuant to applicable procedures.

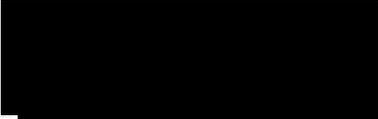
V. CONCLUSIONS

Grievant's motion for reconsideration of our decision dated January 24, 2013 and/or the Order: MFR dated September 9, 2013 is denied.

For the Foreign Service Grievance Board:

⁸ Foreign Service Nationals.

⁹ In his rebuttal, grievant submits a table of every statement made by the Board that he claims was clear error along with a repetition of his arguments. He further claims that the Department submits “deceptive quotes” from employees about their lack of confidence in grievant's leadership and poor post morale. He insists that the unhappy employees were a “tiny minority” of post personnel. These issues have already been addressed in this order.



Susan R. Winfield
Presiding Member



Harlan F. Rosacker
Member