

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2013-037

And

August 14, 2014

Department of State

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Warren R. King

Board Members:

William J. Hudson
Jeanne L. Schulz

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Robert Polistena, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant, a diplomatic security officer, failed to carry his burden to prove that a letter should be placed in his Official Performance Folder (OPF) stating that he did not receive an Employee Evaluation Report (EER) or a Memorandum of Performance (MOP), while assigned to the [REDACTED] and that this “should not be held against [him] in consideration for future promotions,” or that he should be granted a reconstituted 2012 Selection Board (SB) review.

OVERVIEW

Grievant appealed the decision of the Department of State denying his grievance requesting an Employee Evaluation Report (EER) covering his performance from August – November, 2009 and January to July 2010, when he was assigned to the [REDACTED] reporting to the same supervisor. The Board determined that an EER is required for any employee reporting to the same supervisor for a consecutive period of 120 days. Grievant did not meet that requirement. The appeal was denied.

DECISION

I. THE GRIEVANCE

Grievant, a Diplomatic Security (DS) officer, grieves his Bureau's alleged failure to adequately document his performance for certain periods between 2009 - 2011. He asserts that the lack of EERs adversely affected his ability to be promoted to FS3 during the 2012 promotion cycle.

II. BACKGROUND

After initial training as an FP-05 Diplomatic Security Officer, grievant was assigned to the [REDACTED] ([REDACTED]) from April 17, 2009 through June 4, 2010, just over 15 months. On August 17, 2009 he was assigned to a new supervisor and received a MOP from the previous supervisor, but received nothing documenting his performance from August 18 – November 8, 2009 (91 calendar days). He voluntarily participated in training from November 9, 2009 – February 4, 2010 (Basic RSO course or BRSO) for which he received a Statement of Training. There was no evaluation of his performance from February 5 – March 14, 2010 (39 calendar days), nor from April 17 – June 3, 2010 (46 calendar days). Grievant elected to take the Basic Firearms Officer course from February 5 – February 19, 2010 (15 calendar days), and High Tech Tactical Training from March 15 – April 16, 2010 (32 calendar days), for which he received a positive training evaluation report. He requested an EER for the time period of April 16, 2011 – August 4, 2011 (111 days), while serving in [REDACTED] but received a MOP instead.¹

¹ The highly positive MOP recommended immediate tenure and promotion at the earliest opportunity. It covers a period from April 16- July 30, 2011, not August 4.

Grievant also took leave during the unevaluated periods: sick leave from October 30 – November 6, 2009; annual leave from May 3 – May 16, 2010 and May 21 – May 28, 2010.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant states that he has been pursuing this matter since October 2010², after he departed █████ for █████³ Unsuccessful in obtaining the relief sought, he filed his grievance on March 12, 2012.

He notes that the Department has stated that of 39 employees assigned to the █████ from March – November 2009, who were also assigned to the █████ (█████ and/or █████ █████ Ambassador to the U.S.) details, 31 received EERs covering their details, and eight received voluntary MOPs. Grievant therefore argues that DS supervisors “historically speaking” drafted EERs for agents they supervised on █████ and █████ details.

He cites 12 FAH-3 H-123.1 b. which provides:

Rating officers must adhere to the following guidelines:

(1) Ensure that an EER does not cover more than one rating period. An EER is required for an employee who has worked in a position for 120 days or more under the same supervisor. One is not required if the employee worked less than 120 days.

Grievant concludes from this that there is no requirement here or elsewhere in the FAM mandating that the 120 days be consecutive. He argues that the lack of an EER from August 10, 2009 to July 27, 2010 (when he left for █████ minus two training

² In his Rebuttal submission he states this process began in February 2010

³ Grievant’s Employee Profile (ROP p. 62) lists his temporary duty to █████ as 7/2010 not to exceed 7/2011.

periods), totals 232 days of undocumented performance while assigned to [REDACTED] acknowledged by the Department as follows:

August 10, 2009 – November 8, 2009 91 days

February 5, 2010 – March 14, 2010 39 days

March 17, 2010 – July 27, 2010 102 days

232 days

While his calculations of days worked under his second [REDACTED] supervisor have evolved in different submissions, he maintains as undisputed that he was supervised by the second supervisor for more than 120 days total, prior to the start of the next rating period on April 16, 2010 and that nowhere in the FAM does it specify that sick leave or annual leave dates do not count toward the required 120 days total. Grievant points out that this does not even take into account the 102 days he was under that person’s supervision from March 17 – July 27, 2010. After a promotion to FS-03 in 2013, in his Supplemental Submission, grievant altered his request for relief to:

1. That a letter be placed in my OPF stating that I was not provided an EER or MOP while assigned to [REDACTED] and that the lack of documentation should not be used against me for future promotions.
2. That I be granted a reconstituted 2012 Selection Board.
3. That should I be recommended for promotion by the reconstituted board, that such promotion be retroactive, with back pay and interest and back dating my promotion to FS3 to the original 2012 Selection Board.

In his Rebuttal Submission grievant notes that his details from [REDACTED] to [REDACTED] (3/1/09-9/7/09) and [REDACTED] (10/1/09- 10/29/09) were “week on and week off” details, meaning that he was “operationally controlled, one week reporting to an FS-04 Agent-in-Charge and the next week reporting to his [REDACTED] supervisor in his standard position, but

that he was always administratively controlled by that supervisor for the entire time of the details.” He points to the Department’s acknowledgement that the performances of 31 of the 32 agents assigned to the two details were noted in their EERs by their [REDACTED] supervisors

In his Rebuttal Submission grievant requests that he be provided [REDACTED] manning documents, covering his assignment there, in order to prove that he was operationally and administratively controlled by his [REDACTED] supervisor from August 17, 2009 until the end of his [REDACTED] assignment. He also requested: an explanation from Human Resources (HR) that his details were “week on and week off;” a copy of his TDY orders for the details; a copy of an email from AFSA in which he was informed his case was transferred to another representative, but was never informed that his appeal was later transferred back to the original representative; a copy of the email from HR/G⁴ informing him of the name of a new point of contact in that office. He contends that it will be “impossible for the [FSGB] to come to a correct conclusion when all the information they obtain during the H/R ‘investigation’ is faulty, haphazard and incomplete.”

THE DEPARTMENT

Grievant was assigned to the [REDACTED] from April 17, 2009 – through June 3, 2010. He was supervised by one supervisory Special Agent (SSA) from April 17 – August 9, 2009, for which he received a MOP. A second SSA assumed supervisory responsibilities on August 17, 2009, but grievant was on TDY until September 7, 2009. Grievant was in training from November 9, 2009 – February 4, 2010 and received a Training Evaluation Report. He was also in training from March 15, 2010- April 16, 2010 for which he

⁴ Human Resources/Grievance staff

received a Training Evaluation Report. He reported for duty on his next assignment to [REDACTED] on July 27, 2010.

12 FAH-3 H-123.1 provides:

An EER is required for an employee who has worked in a position for 120 days or more under the same supervisor. One is not required if the employee worked for less than 120 days.

Grievant's claim of 232 days under the supervision of the second SSA is misleading, as the Department's timeline demonstrates:

Second SSA assumes supervisory duties 08/17/2009
Annual Leave 08/27-8/31/2009
[REDACTED] detail under separate AIC ⁵ ?⁶-09/07/2009
[REDACTED] detail under separate AIC 10/01 – 10/29/2009
Sick Leave 10/30 – 11/06/2009
Basic RSO School 11/09/2009 – 2/04/2010
Basic Field Firearms Officer Course 02/05/2010 – 02/19/2010
High Threat Training 03/16 – 04/16 /2010
Annual Leave 05/03 – 05/16/2010
Annual Leave 05/24 – 05/28/2010
Permanent Change of Station 06/04/2010

Grievant did not actually report to his second supervisor until on or about September 7, 2009, when his [REDACTED] detail ended, and in the 2010 rating period, he reported to that supervisor for less than a total of four weeks. Grievant's claim that July 27, 2010 was the end of his supervision by the second SSA is inaccurate as his PCS date was June 4, 2010, after which he was no longer reporting to that SSA. During the rating period that began on April 16, 2010, grievant reported to his supervisor only from April 16 - May 3, 2010 (two weeks), the week of May 16 - May 23, 2010 (8 days), and the week before his June 4 PCS date.⁷

⁵ Agent in Charge

⁶ Grievant states he was detailed to [REDACTED] from March 1 – September 7, 2009

⁷ Based on the dates involved and the Department's calculations, it appears that weekend days were counted in some cases and not in others.

The Department references an email exchange between grievant and his second supervisor which made clear that a result of taking the BRSO course (almost three months) would result in a training evaluation, rather than an EER. Grievant's first supervisor informed the second supervisor that as a result of grievant's training plans, scheduled surgery and planned annual leave, grievant would request a MOP from the [REDACTED] and [REDACTED] details to cover his performance during those months. Without those MOPs the supervisor had no information for use in evaluating grievant's performance. It was grievant's responsibility to obtain a MOP from the AIC of the two details. Even so, State cable 128286 (2005) informed that a MOP "is always voluntary, never required." Grievant failed to provide any input (himself or through his detail supervisors) for an EER.

In his agency level grievance, grievant asserted he was entitled to an EER for the 110 days he served in [REDACTED] but as he did not address this claim in his Supplemental Submission, it should be deemed abandoned. He received a MOP covering those 110 days. He also received an EER covering his performance from September 23, 2011 – April 15, 2012. Virtually all of his [REDACTED] performance was evaluated.

In its Response to grievant's Appeal and Supplemental Submission, the Department for the first time raised an objection on grounds that the grievance was untimely, having been filed almost three years after the alleged event giving rise to the grievance.⁸

⁸ 3 FAM 44279(a) states: "Without exception, a grievance must be filed within two years of the event giving rise to the complaint."

The claim that grievant was prejudiced by the lack of a 2010 EER is belied by the fact that he was administratively promoted to FP-04 in April 2011, granted tenure in July 2011, and promoted in the 2013 rating cycle.

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 the grievance is meritorious (22 CFR §905.1 (a)). Based on the following discussion, we find that he has failed to carry that burden of proof.

Timeliness of grievance

At the outset we consider the Department's argument that the claim was untimely. We note that this point was raised for the first time in the Response to Grievant's Supplemental Submission, but grievant did not address it in his Rebuttal. We need not consider whether the Department's failure to raise the issue earlier is dispositive on the timeliness claim however, because, assuming without deciding that the claim was timely, grievant cannot prevail for the reasons set forth below."

The dates of a normal rating period run from April 16 of one year to April 15 of the following year. While some of the dates cited by both parties in this appeal are inconsistent and confusing, the preponderance of the evidence supports the following findings.

Grievant and other [REDACTED] officers received a September 4, 2009 email from his new [REDACTED] supervisor stating that he was in favor of availing oneself of training opportunities. Grievant asked if that meant approval for him to enroll in the November RSO school. The response:

I talked to [name] and one of the issues that he explained influenced evaluation of January v. February class dates is the likelihood of your receiving substantive work opportunities if it turns out that you have only a few weeks back in the Field Office after completing RSO school and HHT.

. . . [T]his means once you start training you're basically committed to the transfer, can anticipate a training MOP vice EER and a number of other admin considerations come into effect. Have you given that consideration? Having gone through the process myself, I can certainly attest to the utility of punching out from an assignment with training dates that allow for a few weeks of leave, consultation, etc, in advance of the transfer.

Grievant responded:

Leaving myself some room after my training is one of the key reasons I am requesting to attend the Nov RSO course. (There is an outside chance that I may be getting married prior to PCSing and getting the training complete first would allow me time to semi-plan something quickly.

. . .

In my mind getting the training done earlier . . . allows me more choices both personally and professionally. Barring any counter information I would like approval to attend the Nov course. (I am not a patient person and knocking out training requirements early seems-to me-to be my best bet.)

[Name] informed me that HTT was not a requirement for [REDACTED], [REDACTED]. However, by attending RSO early it may give me the opportunity to attend HTT, should a slot become available.

A MOP vice EER at this point in my career-won't make a difference. I will be in [REDACTED] when I come up for tenure and FS4 so I'm betting I will receive both for volunteering for a hard-fill post.

Bottom line for me I just think it's the smart thing to do.

Grievant was clearly on notice that should he take the November class and the other training that followed, he would not be entitled to an EER because the number of days he would be reporting to his supervisor would not equal 120 days. He was responsible for obtaining MOPs for his TDY details, which he did not do. In the August to November 9, 2009 time frame grievant only reported to his supervisor for

approximately 10 days in August, 30 days in September, and nine days from October 30 – November 8, and 22 days from February 22 – March 15, 2010, far fewer than the 120 required. He received training reports for classes he took totaling more than four weeks, and these would have been seen by the tenure and promotion boards.

In the next rating period beginning April 15, 2010, grievant was still in training until April 16. He only reported for duty to his [REDACTED] supervisor from April 19 - May 2 (14 days), and May 17 – May 23 (7 days), and from June 1 – June 3 (three days) far short of the 120 days required. Pursuant to State Cable 128286, Voluntary Memorandum of Performance, 7/11/2005 “A memorandum of performance is always voluntary, never required.” Grievant is not entitled to an EER or MOP for the two rating periods at issue.

In his Rebuttal Submission grievant states that he was assigned TDY to [REDACTED] from March 3, 2009 – September 7, 2009 and to [REDACTED] October 1 – October 29, 2009. For the first time he asserts that these details were “week on and week off,” that he was reporting to his [REDACTED] supervisor every other week and that he was “administratively controlled” by that supervisor the entire time. This assertion is unsupported. His second supervisor arrived in the [REDACTED] office on August 17, but did not begin supervising grievant until September 7, 2009, when he returned from the [REDACTED] detail.

Grievant’s claim that “the Department is obligated to ensure that an employee has as comprehensive an official personnel file as possible in order to be fairly and properly competitive for review by the annual Selection Boards” is not referenced in the authority he cites, Instructions for EER Preparation, DS1829i:

Rating officers are encouraged to prepare reports on employees for periods of less than 120 days, when significant developments pertaining to the rated employee’s performance have occurred or the rating officer might experience gaps in covering a rated employee’s performance.

There is no binding obligation explicit or implied in this statement, and the preparation of a report under such circumstances is squarely within the discretion of the rating officer. Without any documentation of significant performance while away from the [REDACTED] grievant has provided nothing that would suggest that a MOP is warranted and his argument that he has been disadvantaged by not receiving the EERs requested is without merit.

His observation that of 39 employees assigned to the [REDACTED] from March 2009 – November 2009, 8 received a voluntary MOP and 31 received EERs, all drafted by their [REDACTED] supervisors, does not advance his position. He has provided no documentation demonstrating that their situations mirrored his own.

Grievant's requests for copies of "investigative steps taken" in his Rebuttal Submission are, in effect, discovery requests, which should have been submitted during the discovery phase of the grievance process. They are inappropriate for consideration at this stage of the process.

V. DECISION

The grievance appeal is denied.

For the Foreign Service Grievance Board:



Warren R. King
Presiding Member



William J. Hudson
Member



Jeanne L. Schulz
Member