

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

████████████████████

and

Department of State

Record of Proceedings
FSGB Case No. 2013-039

February 9, 2015

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Gregory D. Loose
Nancy M. Serpa

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Thomas M. Lipovski, HR/G
Attorney Adviser

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to prove by preponderant evidence the merits of his complaints that: 1) a Fitness For Duty Evaluation Order (FFDE Order) directed to him was deficient and improperly required him to surrender his law enforcement credentials; 2) he was harmed by a delay in the delivery to him of a Status of Fitness For Duty Evaluation Memorandum; 3) a written memorandum of counseling concerning his performance and conduct contained false and misleading information; 4) the issuance of the FFDE Order and the written counseling statement constituted wrongful disciplinary actions; 5) the Department of State violated several statutes proscribing witness tampering and redress of grievances; and 6) the Department committed several errors, including due process violations, in decertifying him from Law Enforcement Availability Pay.

The grievance appeal is denied in its entirety.

OVERVIEW

Grievant, a Special Agent with the Diplomatic Security Service at the Department of State, was counseled in June and August of 2012 regarding a number of incidents of concern to his supervisors. The August counseling session was documented in a written Counseling Memorandum that informed grievant that he was no longer assigned to a particular investigation; that if he wished to make any further inquiries regarding that investigation, he could do so only in his capacity as a private citizen; that he could not use State Department communication channels for such inquiries; and that his conduct had put the Department at potential risk of liability. The counseling memo further advised grievant that noncompliance could be grounds for a charge of insubordination. The incidents that gave rise to the Counseling memo involved allegations that grievant seemed unable to understand and adapt to changes in plans, created and escalated conflict, made irrelevant comments in official meetings and appeared to long-time acquaintances to have undergone sudden changes in demeanor. His supervisor recommended that he undergo a Fitness For Duty Evaluation (FFDE) and in August 2012, grievant was ordered to surrender his law enforcement credentials and Special Protective Equipment.

After grievant surrendered his credentials, the LEAP Advisory Panel decertified him for Law Enforcement Availability Pay (LEAP), effective November 4, 2012. In June, 2013, grievant was ordered to undergo a follow-up FFDE. This ultimately led to his reinstatement as a Special Agent and recertification for LEAP.

Grievant filed a grievance with the Department in December 2012 (amended in February 2013) challenging each of the above decisions. The Department denied the agency-level grievance and grievant filed an appeal with this Board in September 2013. Grievant complains that the FFDE Order was not objective or reasonable; it failed to provide him the date, time and place of his evaluation as required by law; and the requirement to surrender his credentials was an abuse of discretion. He also avers that he suffered harm when a Status of FFDE Memorandum was delivered to him after a delay of several weeks. He complains that the Counseling memo contains false and misleading information which has the potential to cause him future harm. He

further claims that the Counseling memo, the FFDE Order, and the LEAP decertification constitute improper disciplinary action against him. He also contends that the Department committed several violations of various U.S. Code provisions involving, *inter alia*, witness tampering and interference with a right to petition the government for redress of a grievance. Finally, he contends that the vote of the LEAP Panel to decertify him was invalid, inasmuch as certain members of the Panel should have been barred from voting; the vote involved due process violations; and the vote was based on a reason that is not stated in the Department's controlling policies. As a remedy, he requested that he be granted back LEAP pay with interest, that the Counseling memo be removed from the file and that the case be treated as a grievance about discipline with the burden of proof shifted from himself to the Department.

The Board found each of grievant's arguments to be without merit and denied the grievance in its entirety.

DECISION

I. THE GRIEVANCE

This grievance pertains to claims by a Diplomatic Security Service (DS, DSS) Officer that an order for a Fitness for Duty Evaluation, a revocation of his credentials and right to carry Special Protective Equipment (SPE) during that evaluation, and the attendant loss of Law Enforcement Availability Pay (LEAP) were procedural errors and a form of discipline.

II. BACKGROUND

██████████ (grievant) is a Special Agent (SA) in the DSS of the U.S. Department of State (Department, agency). In November 2008, he was assigned as an Assistant Regional Security Officer (ARSO) at the ██████████. In ██████████, while grievant was still the ARSO in ██████████ three persons associated with the Consulate were murdered. For some period of time, grievant was part of the team investigating this incident.

Grievant's tour in ██████████ concluded in July 2010 after which he was mobilized to serve in the U.S. Army from September 2010 until his return to the Department and an assignment as an SA at the ██████████ in December 2011. On December 21, 2011, well after grievant was no longer officially associated with the ██████████ murder investigation, he emailed an employee of DS's Special Investigations Division to request contact information for personnel at the U.S. Department of Justice (DOJ) who were involved in the investigation.¹ Over the next

¹ This information was learned after the Department obtained copies of emails that grievant sent from his military email account to an employee of the Department of Homeland Security. In addition, the Department submitted a request for additional information to grievant's supervisor, ██████████. In addition, grievant concedes that he "tried to contact prosecutors [in the ██████████ murder investigation] in January 2012. I was still trying in August 2012, and I finally had an interview in October 2012 despite ██████████ efforts." ██████████ stated:

Once ██████████ departed his posting as ARSO in ██████████ in July 2010, he was no longer an assigned case agent. After that point, he would no longer know the details of the case. He would also not have any responsibility related to it unless officially requested by others ... to

several months, grievant emailed multiple individuals seeking information about the case. In response, some of these agencies contacted DS to express concern. There were reports that grievant told investigators at one agency that he was prepared to go to the press with certain allegations regarding the case that had come to his attention.²

In May 2012, grievant was assigned to serve as Agent in Charge for a “modified escort detail” at a NATO summit in ██████████. The DS coordinator for the escort details, ██████████, expressed concerns to grievant’s supervisor, Special Agent in Charge, ██████████ about grievant’s performance in ██████████. ██████████ asked ██████████ to document any behavioral or performance issues that he observed.

On June 13, 2012, a supervisor of another DS unit, Supervisory Special Agent, ██████████ ██████████ forwarded to grievant an email inquiry that he received from a DHS agent. In the forwarded email, the DHS agent asked ██████████ if a coworker could travel on an official passport that was due to expire a few months before a scheduled trip. ██████████ learned that grievant was the duty agent for the week and intended to forward the request for information for grievant to answer. ██████████ explained that he accidentally forwarded the email before drafting an explanation for why he was sending it. ██████████ stated that he was surprised and concerned when Grievant responded:

answer questions about his previous knowledge of the case. It is not uncommon that his name remained attached to the case in the IMS data base but that would not have been a legitimate or ethical reason for him to continue professional involvement in the case. The principle of need to know vs access to know would apply to this situation. Furthermore, the lead agency in the investigation of the case was the FBI not the DSS.

See email from ██████████ to ██████████, dated January 18, 2013 at 4:21 p.m. at page 2, “Response 2.”

² This information was also provided to the Department in ██████████ responses. It also appears from emails in the record between ██████████ and ██████████ that grievant contacted the FBI, stating that he “wanted to go to the press . . .”

██████████
I don't work for you. You are welcome to communicate with me through my supervisor, or you could include some text including the word "please" when you forward me something. Have a great day!
██████████

██████████ stated that he had known grievant for "quite a while" and found his response out of character. He forwarded the email to ██████████ who counseled grievant that "he needed to soften his tone when communicating with others." ██████████ reported that grievant replied that he was dealing with much larger issues:

██████████ stated that he is troubled by his experiences related to the investigation of ██████████ shooting in ██████████ the murder of two Consulate staff in ██████████, and his recent divorce. ██████████ was most frustrated by the ██████████ murders. He stated that, "he thinks about the incident every day". ██████████ said that he feels the murders could have been prevented and the subsequent investigation was inadequate. He stated, "he needs to find out the truth" regarding the incident. When discussing the ██████████ murders ██████████ became visibly distressed and cried. ██████████ stated that he believes he will lose his job someday. ██████████ stated that he doesn't hate anyone and he prays for everyone to go to heaven. He said he would never harm himself because then he couldn't get into heaven.

On June 21, 2012, grievant had an appointment to meet an Assistant U.S. Attorney (AUSA) to discuss a case to which grievant was then assigned. ██████████ accompanied grievant to this meeting because emails between grievant and the AUSA had become contentious. At the meeting, the AUSA indicated that the case might be dropped, whereupon grievant became confrontational and questioned the AUSA's motives. ██████████ asked grievant to calm down, to which grievant replied that he was calm, but he proceeded to make a number of comments which ██████████ considered to be irrelevant to the case at hand. In addition, he challenged the AUSA,

³ Grievant and the Department both reference a September 2007 "██████████," however, this incident falls outside the time period encompassed by the record. Grievant also does not make clear what relationship, if any, he had to this incident or any related investigation. Be that as it may, the record before us shows that grievant had served in ██████████ and that this incident was much on his mind.

asking if she was “afraid to prosecute the case.” Given grievant’s conduct, ██████ ended the meeting.

Immediately after the meeting, ██████ told grievant that he could not conduct himself as he had with the AUSA. Grievant stated that he was not afraid to lose his job and that he knew that would happen at some point. He also stated that his job was to “protect the American people” and he would “always seek the truth.” Later that evening, ██████ spoke with grievant again. Grievant expressed frustration with the AUSA and when ██████ stated that grievant’s actions could ruin DS relationships with the Department of Justice (DOJ), grievant stated that DOJ “had ‘screwed him over’ in the ██████ and ██████ investigations.” ██████ again ordered grievant not to contact the AUSA.

The following morning (June 22, 2012), grievant contacted ██████ and asked permission to call the AUSA to explain his views on the case. ██████ repeated that grievant was not to contact her. Notwithstanding this order, grievant sent an email to the AUSA on June 24, 2012, copying ██████ who reiterated his instruction that grievant was not to contact the AUSA.

On June 22, 2012, ██████ wrote a memo to ██████, ██████ ██████ in which he reported grievant’s behavior at the NATO summit in ██████ He stated that grievant repeatedly requested authorization to return to ██████ early in order to attend a kindergarten graduation for his child; grievant carried his duty weapon in a “fanny pack;” and he appeared unable to understand and adapt to late changes in security plans. ██████ reported that grievant also engaged in a confrontation with a U.S. Secret Service agent over changes in plans and, although the Secret Service Agent was acknowledged by others to be “difficult to work with,” grievant’s “attitude and demeanor” were said to have contributed to the confrontation.

On June 25, ██████████ sent ██████████ a memo on grievant's angry response to the email request he had forwarded to him. Also on June 25, ██████████ sent ██████████ a memo (the ██████████) reviewing his concerns about grievant's recent behavior and detailing grievant's exchange with ██████████ and his confrontation with the AUSA. The ██████████ memo said in part:

In recent weeks ██████████ has demonstrated behavior that is out of character and has raised my concerns. Additionally other ██████████ supervisors have brought incidents to my attentions that also indicate a change in behavior. In observed incidents, ██████████ has had sudden change of demeanor. He becomes visually [sic] stressed, frustrated, combative, and had has [sic] cried. ██████████ has also made peculiar statements at inopportune times such as, "I am here to serve and protect the American people," "I am not afraid of the truth," and that he would always be "direct and truthful."

I have had to council [sic] him on his communication with others and the need to tone down his message. ██████████ has ignored instruction concerning communicating with the ██████████ AUSA's Office. I am concerned as ██████████ actions interfere with the performance of his duties and jeopardize the DS relationship with other agencies.

On June 26, 2012, ██████████ and ██████████ met with grievant to discuss the foregoing matters, as well as his experiences in ██████████ and ██████████ suggested that grievant undergo counseling and grievant agreed. Later the same day, ██████████ decided to propose that grievant undergo a fitness for duty examination (FFDE) because he was "not comfortable leaving this process up to him [grievant]...." ██████████ prepared an Action Memo to the Director of DSS, ██████████, recommending a formal FFDE for grievant, pursuant to 3 FAM 4900. This memo stated in part:

██████████ has admitted to struggling with previous experiences It has been noted by multiple persons, on multiple occasions that under certain stressful situations his actions became uncharacteristically erratic and aggressive or the complete opposite, indecisive At this juncture it appears that he is still struggling greatly with these past experiences and little self resolution appears to have been accomplished Taken independently the actions of ██████████ could be explained

to some extent but taken together as a whole compels me to question his abilities and recommend a fitness for duty evaluation.

In addition, grievant was counseled in person by [REDACTED] on August 6, 2012. He was given a Counseling Memorandum that stated that he was no longer associated with the investigation of the [REDACTED] murder case and that if he wished to seek information on the case from other agencies in the future, he must do so in his capacity as a private citizen, not a law enforcement official or an employee of the Department. Moreover, he was instructed that if he made such inquiries, he could not refer to his employment with the Department, nor could he use his Departmental email or any equipment belonging to the Department to do so. The memo lastly stated that grievant's actions placed "the Department of State at potential risk for liability" and advised him that failing to abide by the stipulations set forth in the memo would be considered insubordination.

At the same meeting in August 2012, grievant was given a memo from [REDACTED] ordering him to undergo an FFDE to "provide an assessment of your mental, emotional, and neuro-cognitive ability to perform law enforcement and security duties," pursuant to 12 FAM 045.1.⁴ Grievant was also ordered to "immediately surrender all DS-issued firearms and law-enforcement identification media (credentials, badges, protection pins) to your office supervisor." The memo also stated: "You are instructed to contact [REDACTED] in [REDACTED] ... within three days of receipt of this letter, in order to schedule the necessary appointments for this examination. [REDACTED] will provide the specific date, time and place, as well as the name and title of the individual conducting the FFDE."

⁴ The [REDACTED] and [REDACTED] memos mentioned above cited 3 FAM 4900 as authority, but these FAM provisions were moved to 12 FAM 045, effective June 12, 2012.

On the same day (August 6, 2012), grievant called [REDACTED] and left a message when the doctor did not answer. Grievant then forwarded [REDACTED] the FFDE order and received an out-of-office reply stating that [REDACTED] was away and would return to the office on August 20. Grievant emailed [REDACTED] again on August 20 and 23 and received a reply on August 28 with a consent form and instructions to commence the FFDE process.

In the meantime, the DS Law Enforcement Availability Pay Advisory Panel (LEAP Panel) was informed that grievant no longer possessed valid DS-issued law enforcement credentials. The LEAP Panel scheduled a virtual vote on whether or not to decertify grievant for LEAP, informing the members in part that:

[T]he topic of this virtual panel meeting is to vote on recommending decertification on the basis of a limited duty situation and therefore ineligible for LEAP. The DS LEAP Implementation Guideline defines a Special Agent as “An employee of the Department of State who holds valid credentials as a Special Agent in the Diplomatic Security Service issued by the DSS Director...”

By letter, dated August 23, 2012, grievant was informed that the Leap Panel voted to recommend decertifying him for LEAP. The letter stated that Director [REDACTED] would review the LEAP Panel’s recommendation and that grievant could submit written and/or oral comments for consideration by the Director, who would then make a final decision. On October 31, 2012, grievant was informed by letter from [REDACTED] that he would be decertified from LEAP “effective November 4, 2012 until such time that you have regained the ability to perform law enforcement duties.”

Grievant’s initial FFDE evaluation took place in November 2012. On December 5, 2012, [REDACTED] provided [REDACTED] with grievant’s Fitness For Duty Report. It concluded, in part:

[REDACTED] presently suffers from a medical condition that would render him unable to perform the duties of a Special Agent ... as pertains

to the possession and use of SPE as defined in 12 FAM 040. Therefore, it is MED's opinion that [REDACTED] is presently fit only for LIMITED DUTY AT THIS TIME.

Consistent with the above, it is further MED's recommendation that [REDACTED] participate in a long-term, comprehensive treatment program in order to achieve control of his symptoms and maintain stability of his condition. Following your meeting with [REDACTED] regarding this opinion, MED/MHS can discuss with him the nature and intensity of the treatment that we recommend that would increase the likelihood of his being able to return to full duty status within a reasonable amount of time.

Should DS decide to afford [REDACTED] a limited duty position during a period of intensified treatment, it is recommended that any such position include a low-stress environment with limited decision-making responsibilities, and that he remain under close supervision until he has been able to demonstrate a consistent ability to handle increased responsibility, autonomy, and stress.... Assuming [REDACTED] is compliant with these aforementioned treatments, it is then recommended that he undergo a repeat, independent Fitness for Duty Evaluation in six months in order to assess his capacity to fulfill the essential job functions of a Special Agent with regard to his capacity to utilize SPE.

(Emphasis in the original). A summary of these findings (the Status Memo), dated February 23, 2013, was prepared, but was not provided to grievant until April 17, 2013, approximately seven weeks after it was prepared.

In keeping with [REDACTED] Fitness for Duty Report, grievant was ordered in June 2013 to undergo another FFDE, which he did in July 2013. In August, he was notified that he was deemed fit to return to full duty and could do so after taking a Special Agent In-Service Course in October. By letter, dated November 19, grievant was re-certified for LEAP, effective December 1, 2013.

Grievant filed an agency-level grievance on December 6, 2012 complaining of wrongful disciplinary action; dissatisfaction with respect to his work environment; vague and misleading information in his official personnel record that could be falsely prejudicial to him; and the

improper denial of a financial benefit to him. The Department responded with a series of questions which grievant answered on January 18, 2013. Grievant then submitted an amended grievance appeal to the Department on February 7, 2013, which added a complaint of violation, misinterpretation, and misapplication of the LEAP Implementation Guidelines. On July 2, 2013, the Department denied the grievance.

On September 30, 2013, grievant filed an appeal to the Foreign Service Grievance Board (FSGB, Board) and requested a hearing. The Department opposed the hearing request and the Board denied it in an order, dated January 13, 2014. Following discovery, grievant filed a supplemental submission on June 27, 2014, to which the Department responded on October 9, 2014. Grievant filed a rebuttal on October 22, 2014 and the Record of Proceedings (ROP) was closed on November 19, 2014.

III. POSITIONS OF THE PARTIES

A. Grievant:⁵

Grievant contends that:

- 1) The FFDE Order was deficient because it was not “objective [or] reasonable,” drawing on allegations from memoranda that were not included in the order itself, and it did not provide the date, time, and place of the evaluation, as required under 12 FAM 045.4 (2), instead directing him to contact ██████████ to obtain this information.
- 2) The Department’s demand that he surrender his law enforcement identification media (credentials) constituted an abuse of discretion. The regulations governing FFDE orders prescribe the surrender of Special Protective Equipment (SPE), but not credentials.

⁵ Grievant’s filings contain extensive material relating to the Benghazi Accountability Review Board, the Interim Progress Report of the House Republican Conference on the Events Surrounding the September 11, 2012 Terrorist Attacks in Benghazi, Libya, a State Department Office of the Inspector General report on an inspection of DSS, dated February 2013, etc. (see ROP #001, p. 5, paragraph 3, *inter al.*). While grievant argues that this material bears on the character and credibility of individuals within DSS whom he accuses of committing grievable actions against him, we find this material extrinsic to the facts of the instant grievance and irrelevant for purposes of rendering a decision herein.

- 3) The Department erred in delaying the transmission of the February 26, 2013 Status Memo until April 17 that caused him a loss of pay, humiliation and “lost opportunities to do good work.”
- 4) The Counseling memo contains false or misleading information because it “(1) implied I did things I didn’t do; (2) counseled me for things I didn’t do wrong, and (3) counseled me for things I obviously tried to avoid.” The counseling memo also “threatened” grievant with a charge of insubordination if he did not comply with its directions.
- 5) The Counseling memo’s prohibition on grievant seeking information related to the ██████ murders in an official capacity and on his use of Department communication media constituted intimidation and infringement of his First Amendment rights.
- 6) The statement in the Counseling memo that grievant’s actions placed the Department “at risk for liability” was a pretext. Moreover, management interfered with grievant meeting with other agencies at their requests.
- 7) The Counseling memo caused harm, including: 1) the possibility that readers might draw unwarranted negative conclusions about grievant’s conduct; 2) stress that grievant suffered as a result of the notice that noncompliance would be considered insubordination; and 3) harm to grievant’s reputation inasmuch as his chain of command saw the memo.
- 8) The FFDE order was a “stress weapon” that constituted discipline.
- 9) The Department violated 18 USC § 1512, 1512(b) and 1512(d) by prohibiting communication with other USG agencies regarding the ██████ murders. Grievant argued that this constituted the use of threat, intimidation, corrupt persuasion, misleading conduct to prevent him from communicating with officials conducting a criminal prosecution and witness tampering.
- 10) The LEAP Panel’s vote to decertify grievant was invalid because of: 1) disqualifying conflicts of interest for certain panel members; 2) due process problems; 3) the unauthorized reason given for decertification; and 4) the lack of authority of the panel to decertify grievant.

With regard to this last complaint about the LEAP decertification, grievant argues that certain members of the LEAP Panel had conflicts of interest by virtue of the fact that they recommended the decertification and also voted on the recommendation as members of the

LEAP Panel. Grievant contends that this conflict of interest renders the LEAP Panel's vote invalid.

Grievant further argues that the LEAP Panel lacked proper "voting regulations" to ensure due process to officers whose supervisors recommend decertification from LEAP. He specifically notes that he had no opportunity to argue before the LEAP Panel and complains, citing case precedent,⁶ that it was improper for Director ██████████ to both participate in the LEAP Panel's decision and to serve the FFDE order.

Grievant also challenges the Department's use of email voting procedures and the decision to accept a simple majority of voting members. Finally, grievant contends that the basis for the LEAP Panel's decision to decertify him (i.e., that he no longer possessed valid law enforcement credentials issued by DS) was not an "authorized" reason for decertification. He cites the LEAP Implementation Guidelines that provide:

A Special Agent may be decertified from eligibility and have his or her LEAP suspended if he or she [(1)] fails to work unscheduled duty hours as assigned or reported, or [(2)] is unable to work unscheduled duty hours for an extended period due to physical or health reasons.

Grievant states that the two reasons mentioned in the foregoing regulation are the only authorized grounds for decertification and that neither applied to him.

Grievant makes the following three requests for relief:

- 1) Payment of all LEAP that grievant would have received, plus interest at an unspecified rate, from the date of grievant's decertification until the date of recertification.
- 2) "Withdrawal" of the Counseling memo.
- 3) Require the Department to bear the burden of proof in light of grievant's contention that the Counseling memo constitutes a disciplinary action.

⁶ *Goldberg v. Kelly* 397 U.S. 254 (1970).

B. The Department:

The Department argues as follows:

1. The FFDE Order was not deficient because it was both objective and reasonable, as stipulated by regulation.

12 FAM 045 sets forth a number of factors for management to use in deciding whether to order an assessment of an individual's fitness for duty within the meaning of the regulation. These include, but are not limited to: 1) personnel complaint(s) of, or conduct indicating, an inability to exercise self-control and self-discipline; 2) an abrupt or negative change in ability to perform law enforcement functions; 3) impatience, impulsiveness, loss of temper; 4) a pattern of conduct indicating possible inability, or diminished ability, to defuse tense situations, or a tendency to escalate such situations or create confrontations.⁷ The Department cites examples from the Action Memo and the supporting memoranda as proof that grievant's supervisors relied on documented facts to make a reasonable and objective decision to request that he undergo an FFDE.

The Department also contends that grievant has not established that the FFDE Order failed to comply with the requirement in 12 FAM 045.4(c)(2) that such an order "should include ... [a] brief description of the reasons why the FFDE was ordered" In addition, the Department denies that ██████ abused his discretionary authority as Director of DSS when he directed grievant to surrender his credentials. The Department cites 12 FAM 372.6-1(a), (b) that identifies credentials as property of the USG that are provided to employees for the convenience of the government. The Department maintains that grievant has not cited any law

⁷ 12 FAM 045.1(a); 12 FAM 045.1(b)(1), (2), (9), (10).

or regulation which might constrain the DSS Director's authority to require surrender of DSS-issued credentials.

The Department concedes that the FFDE Order technically failed to comply with the requirement in 12 FAM 045.4(c)(2) to notify the employee of the "specific date, time, and place of the FFDE" However, the agency argues that it complied with the regulation in substance, inasmuch as the FFDE Order provided grievant with the name and contact information of an individual in MED who provided him with the required information. Thus, the Department contends that the omission did not constitute a material breach. The agency also argues that even if the omission is considered a procedural error, grievant does not establish that he was harmed thereby. Specifically, grievant has not cited any law, regulation, or policy that imposes a deadline for the FFDE evaluation and he cannot demonstrate that, but for the delay, his FFDE would have been administered any sooner than it actually was or that the results would have been any different.

2. The delay in delivery of the Status For Fitness For Duty Memorandum (FFDE Status Memo) caused no harm to grievant.

The Department concedes that the delay in delivery of this document to him was inadvertent, but argues that grievant cannot "quantif[y]" any harm caused by the delay, nor suggest a remedy. The Department notes that the FFDE Status Memo recommended that grievant undergo a repeat evaluation in six months before a determination would be made about his ability to resume his job functions and utilize SPE. The Department contends that because grievant was in fact re-evaluated within six months of the original Status Memo, he cannot prove that he suffered any harm from the delay in receiving the document

3. None of grievant's complaints about the Counseling memo have merit.

The Department argues that the Counseling memo contains no false or misleading information because it was largely proscriptive, rather than factual. The facts stated in the Counseling statement were accurate: grievant was “no longer” assigned to the ██████ murder case; his efforts to involve himself in the investigation gave the misimpression that he had a professional involvement in the case; and his activities placed the Department at potential risk for liability. The Department contends that when grievant transferred from ██████ some two years before the Counseling statement was written, his official involvement with the case ended except for his responsibility to answer inquiries about the case. Therefore, the statement that grievant was no longer assigned to the case was true when it was made in the Counseling memo. The Department also argues that given the expressions of concern received from agencies working on the ██████ murder case and grievant's threat to contact the press about one agency's handling of the case, it was also true that grievant's activities placed the Department at potential risk of liability, including: souring relations with other USG agencies, harming public relations for the Department, potentially adversely impacting the government's case against the murder suspects and creating a risk of civil litigation against the Department by families of the victims.

4. Grievant has not established that any disciplinary action has been taken against him.

The Department notes that this Board, in denying grievant's request for a hearing, has already found that while the grievant's complaints are grievable matters, “they are not tantamount to discipline.”

5. Grievant has failed to state a claim upon which relief may be granted with respect to his claims of witness tampering and interference with a right to petition the government for redress of grievances.

The Department asserts that grievant has failed to establish that any of its employees tampered with any witness, including grievant, or interfered with any person's right to redress a grievance. Moreover, the agency contends, the statutes that grievant claims were violated do not offer a private cause of action to individuals or authorize damages or other relief. The Department, moreover, contends that grievant has not requested any relief in connection with these alleged violations. Finally, while grievant complains that his supervisor unlawfully interfered with his right to petition the government for redress of grievances, he has not identified any grievance that he was prevented from presenting to the government.

6. Grievant has failed to establish that the Department committed any procedural error in decertifying him from LEAP.

The Department responds that grievant has not established that any LEAP Panel member was improperly motivated to deny him the benefit. The Department contends, moreover, that the Board must consider the "judicially created presumption of regularity of the actions of government officers"⁸ and that grievant's evidence of alleged improper motives consists of nothing more than "unsubstantiated speculation." The Department also argues that there is no statute, regulation, or procedure that would require a LEAP Panel member to recuse himself from voting under the circumstances of this case. Moreover, grievant does not show how he was harmed by the vote of three Panel members whom he alleges to have had improper motives. The Department contends that a simple majority of Panel members suffices to determine whether an employee is decertified for LEAP. In the instant case, even if the three employees whose

⁸ FSGB Case No. 2006-054 (April 11, 2007).

participation grievant challenges were disqualified, a majority of the remaining members voted for decertification.

The Department also contends that there was no denial of due process when grievant was decertified from LEAP. Due process requires that before an individual is deprived of a property right, he be given notice and an opportunity to be heard. Although the Department argues that LEAP is not a property right, grievant was given both notice and an opportunity to be heard by the Director before he made a final decision. In opposition to grievant's claim that the opportunity to be heard by Director [REDACTED] was inadequate because [REDACTED] had issued the FFDE Order in the first instance, the Department cites FSGB Case No. 2012-059 (January 16, 2014) in which this Board rejected a substantially similar argument. In the cited case, the Board found no due process violation when an employee had the opportunity to address a deciding senior official who made the final decision and took a prior related action with respect to the employee.

7. The LEAP Panel properly recommended that grievant be decertified from LEAP.

The Department cites Section 5 of the LEAP Guidelines as proof that LEAP is only available to employees of the Department who are SAs and who meet certain other conditions. § 3A of the Guidelines define an SA as an employee who holds "valid credentials as a Special Agent in the Diplomatic Security Service issued by the DSS Director...." After grievant surrendered his credentials pursuant to the FFDE Order, the Department contends that grievant was no longer an SA. Therefore, by definition, grievant was not eligible for LEAP until such time as he regained his status as an SA.

To grievant's claim that the Leap Guidelines at §2D only authorize decertification for the two explicitly-stated reasons (failure to work sufficient unscheduled duty hours and an inability

to work requisite unscheduled duty hours for an extended period due to physical or health reasons), the Department counters that this language is not controlling. It does not indicate that the LEAP Panel may not decertify an employee for other reasons. The Department argues that §15A of the LEAP Guidelines “implicitly recognizes that a LEAP panel may recommend the decertification of an individual from LEAP if he or she fails to meet the eligibility criteria for LEAP set out in section 5 of the Guidelines,” including the requirement that an individual be a Special Agent. As of August 6, 2012, grievant was no longer an SA and was thus no longer eligible to receive LEAP. He can prove no harm from the LEAP Panel’s subsequent vote to recommend decertification, or from the decision by the Director of DSS to approve that recommendation.

IV. DISCUSSION AND FINDINGS

3 FAM 4312.g defines a disciplinary action within the Foreign Service as: “Action against an employee in the form of a reprimand, suspension, or separation for cause.” None of the actions taken by the Department that are challenged here – the Counseling memo, the FFDE Order and the LEAP decertification – fall within this definition. Accordingly, under the provisions of 22 CFR 905.1(a), grievant has the burden to establish, by a preponderance of the evidence, that his grievance appeal is meritorious.

At the outset, we note that each of the actions that are the subject of this appeal are separate actions, with different purposes and governing regulations. Beginning with the FFDE Order, we conclude that grievant has failed to establish that the Order was deficient, either because it was not “objective and reasonable” or because it failed to provide the specific date, time, and place of the FFDE. There is no requirement at 12 FAM 045.1.b for an FFDE Order to list exhaustively all of the reasons for the Order. An FFDE Order is not a disciplinary action

requiring a recitation of facts to establish a “case against” an employee; rather, it is a procedure to determine (objectively and reasonably) a threshold for “determining the continuing mental, emotional, and neuro-cognitive fitness of personnel whose duties require the use of SPE...”⁹ We find that the FFDE Order in the instant case was objective and reasonable in that it provided information to grievant about what conduct triggered the order and why that conduct created a justification for the Order, as set forth in 12 FAM 045.1.b.

Regarding the omission of the date/time/place of the evaluation from the FFDE Order, we note the language in 12 FAM 045.4.b.(2) that an FFDE Order “should,” rather than “must,” include this information. Given that grievant was directed to an individual who would provide the date, time and place of the evaluation, we find that the omission of this information from the Order did not render it deficient or invalid.

We further find that grievant has not established that the Department abused its discretion in requiring him to surrender his credentials. He notes that the FAM provision governing FFDE Orders (12 FAM 045.3) refers to SPE, but not to credentials. While that is true, 12 FAM 372.4 is the provision that governs credentials and provides that DS identification media are the property of the USG; that no employee has a property right in them; that a DS employee whose law enforcement authority has been suspended *must* surrender identification media and firearms *immediately*; and that “any DS supervisor may direct a subordinate employee to surrender his or her official DS identification media and Government-issued firearm.” (Emphasis added.) The regulation places no conditions or limitations on this latter authority. The Board therefore finds that the Department did not abuse its discretion in ordering grievant to surrender his credentials during the time he was to be evaluated for fitness for duty.

⁹12 FAM 045.1.a.

Grievant has also failed to establish that the Department violated any law, rule, or regulation when it ordered the FFDE, or when it ordered grievant to surrender his SPE, or when it decertified him for LEAP pay. The decision to order an FFDE was not incompatible with grievant's willingness to undergo counseling. 12 FAM 041.2.e describes the policy underlying FFDE Orders when it states:

[T]his policy is intended to provide a mechanism for the assessment of an employee's mental, emotional, and neuro-cognitive ability to perform law enforcement and security duties requiring the use of SPE when the employee's conduct, behavior, and circumstances indicate to a reasonable person that continued service by the employee may...interfere with the Department's ability to fulfill its mission.

Given the number of incidents of concern regarding grievant's performance/conduct documented by memoranda in the record, the Board is persuaded that it was reasonable for grievant's chain of command to exercise its discretion to recommend an FFDE and for the DSS Director to approve and issue the FFDE Order. We find no evidence in the record to support grievant's claim that the recommendation or the Order were motivated by an intention to reduce his pay as a sanction for conduct resulting from "combat stress." [REDACTED] confirmed during the initial evaluation that grievant was suffering

a medical condition that would render him unable to perform the duties of a Special Agent of the Diplomatic Security Service of the United States Department of State as pertains to the possession and use of SPE ... it is MED's opinion that [REDACTED] is presently fit only for LIMITED DUTY AT THIS TIME.

(Emphasis in original.). Moreover, after six months' time and treatment, grievant was reassessed, found suitable to return to his law enforcement duties and thereafter was re-certified for LEAP. All of this supports a finding that the prime motivation for recommending an FFDE was the employee's welfare and the needs of the Service.

Grievant has failed to establish that he suffered remediable harm arising from the delay in providing him the Status Memo. Grievant does not prove that he would have been otherwise eligible for a return to duty or recertification for LEAP any sooner than he was. [REDACTED] December 5, 2012 FFDE Report called for grievant to “undergo a repeat, independent Fitness for Duty Evaluation in six months in order to assess his capacity to fulfill the essential job functions of a Special Agent with regard to his capacity to utilize SPE.” Within six months, grievant had the recommended follow-up evaluation. Thus, the delay in providing the Status Memo to grievant caused no delay in his re-evaluation.

Grievant also does not prove that the Counseling memo contains any false or misleading information. The prohibition against grievant using official communication channels to make unauthorized inquiries regarding an investigation to which he was no longer assigned was neither intimidation nor an infringement of his First Amendment rights. The Department had authority to assign grievant to, and remove him from, specific duties consistent with the needs of the Service. Having removed him from the investigation of the [REDACTED] murders, the Department was within its authority to instruct grievant to make no further official inquiries about the case. To the extent that grievant had a First Amendment right to inquire into this investigation, it was reasonably restricted to his capacity to inquire as a private citizen. Grievant has not proven that these prohibitions infringed any of his rights. And, while the Counseling memo stated that noncompliance with the guidance therein could be grounds for a charge of insubordination, this warning appears to be a reasonable attempt to ensure that grievant understood in advance the serious consequences that would attend noncompliance with an order that the Department had authority to issue.

Grievant also failed to establish that he suffered any harm as a result of the issuance of the Counseling memo. Grievant's stated fear that readers might draw unwarranted negative conclusions about his conduct is pure speculation. Moreover, since, according to the Department, a copy of the Counseling memo was not widely circulated and has been retained in the custody of grievant's supervisor (later transferred to a locked safe solely for purposes of the instant appeal), it does not appear that there will be any readers outside of the grievance process. Grievant's assertion that his reputation could be harmed by the existence of this document is no more than speculation. Finally, to the extent that grievant cites as harm the stress he suffered upon reading the warning about non-compliance, we conclude that the warning about insubordination, even if stressful, was an appropriate and reasonable effort to provide notice of the consequences of noncompliance.

Grievant has also not established that the Department violated any statutes proscribing witness tampering or interference with the right to redress of grievances. By definition, he is currently engaged in the grievance process and nothing done by the Department interfered with his exercise of those rights. Likewise, to the extent that he was ordered not to inject himself into an ongoing murder investigation, this is not witness tampering under any definition of that term. The "threat" (as grievant termed it) of a charge of insubordination pertained only to his refusal to obey a direct order not to communicate in an official capacity in the investigation.¹⁰

Finally, we conclude that grievant has failed to establish that the LEAP decertification was error. We find that the Panel's vote to decertify him was valid, notwithstanding the participation of members whom grievant alleges had "conflicts of interest." Grievant cites no

¹⁰ In any event, as the Department notes, grievant does not establish that he has a private cause of action to raise these claims, nor has grievant requested any specific relief in connection with these alleged violations.

authority for his claim that three members of the Panel should have been disqualified because they were also in his chain of command and had participated in advancing the recommendation that he be decertified. The LEAP Guidelines, 4.D list the following individuals who may not serve on a LEAP Panel: an individual whose case is being heard by the Panel; a relative of a person whose case is being heard by the Panel; [and] the immediate supervisor of a person whose case is being heard by the Panel. No other grounds for disqualification are given in the Guidelines and grievant does not assert that any member of his Panel was disqualified under these Guidelines.

Grievant has also failed to establish any due process problems with the LEAP Panel vote. In the face of his assertion that a majority vote was insufficient, we note that the LEAP Guidelines do not address what percentage of the whole was sufficient for a valid vote. In the absence of any express standard and given the Department's responsibility to determine how best to implement efficiently its regulations and procedures, the Board finds that grievant does not meet his burden of proving that a different standard was required. Moreover, as the Department argues, even in the absence of the three challenged voting members, a majority of the remaining members voted for decertification.

Grievant also appears to question whether a virtual vote by email is authorized, but advances no proof that it is not. Grievant complains that he had no opportunity to present arguments to the LEAP Panel, but we note that the LEAP Panel only voted to make a recommendation to the Director of DSS and that grievant had both notice and an opportunity to make both written and/or oral arguments to the Director before the final decision was made.

Grievant further claims that DSS Director [REDACTED] was the official who originally signed the FFDE Order and ruled on the recommendation of the LEAP Panel to decertify him,

thus denying him a fair hearing or due process. Grievant cites to no authority for his assertion that the same official may not both order a fitness evaluation and determine that an employee must be decertified from receiving LEAP. In FSGB 2012-059 (January, 16, 2014), this Board made such a finding when an official both decided an employee's LEAP decertification and took an earlier action leading to the decertification. Our conclusion is especially appropriate here because the LEAP decertification was mandated, in our view, by grievant's loss of status. Thus, the FFDE was not the reason for the decertification; rather, the loss of SA status was.

Grievant also does not prove his claim that the LEAP Panel's decision to decertify him was invalid and based on an "unauthorized reason." While it is true that the LEAP Guidelines, at 15.B list two specific reasons for which the LEAP Panel "may" recommend an SA's decertification from LEAP, decertification is not precluded for other reasons. The LEAP Guidelines expressly state that SA status is a prerequisite to receive LEAP.¹¹ Therefore, once grievant surrendered his credentials, he lost his status as an SA and his entitlement to receive LEAP. No other conclusion can reasonably be drawn.

V. DECISION

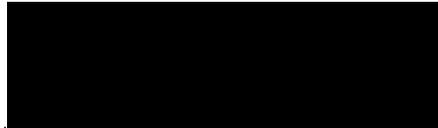
The grievance appeal is denied in its entirety.

¹¹ 3 FAM 3154 ("Law Enforcement Availability Pay (LEAP) for Special Agents in the Diplomatic Security Service") is equally clear that LEAP is only available to employees who have SA status by virtue of holding valid credentials issued by the Director of the DSS. This section of the FAM makes no provision for any employee to receive LEAP who does not hold credentials as an SA.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



Gregory D. Loose
Member



Nancy Serpa
Member