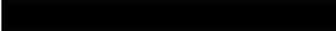


**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

  
Grievant

And

Department of State

Record of Proceedings  
FSGB Case No. 2013-041

July 21, 2014

**INTERIM DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

**John M. Vittone**

Board Members:

**Barbara C. Cummings**  
**Nancy M. Serpa**

Special Assistant

**Lisa K. Bucher**

Representative for the Grievant:

*Pro se*

Representative for the Department:

Dorian S. Henderson  
Grievance Analyst  
HR/G

Employee Exclusive Representative:

American Foreign Service Association

## OVERVIEW

**HELD:** Grievant met her burden of proof in showing that the flawed Area for Improvement in her 2011 EER may have been a significant factor in her not having been promoted, and is entitled to a reconstituted 2013 Selection Board review. In all other aspects, the grievance is denied.

**SUMMARY:** Grievant [REDACTED], a DS agent, appealed the Department's denial of her 2013 grievance claiming an unfair and biased EER for her service at the [REDACTED] a branch of the [REDACTED]. In its agency-level review, the Department agreed that the EER's Area for Improvement (AFI), which, contrary to regulation contained no examples, was flawed, and agreed to excise the AFI. The Department also reconstituted a 2012 Specialist Tenure Board to review grievant's corrected file after deletion of the AFI. That board tenured grievant. In response to grievant's request that her file be reviewed for promotion in 2013 by a reconstituted Selection Board, the Department declined to reconstitute such a board, citing the statistical unlikelihood that grievant would have been promoted by one.

The Board found that deletion of the AFI may in fact have been a significant factor in grievant's failure to have been promoted. In support of that position, the Board notes that the Specialist Tenure Board deferred a decision on grievant's file containing the flawed AFI, but a reconstituted tenure board granted tenure when the EER was corrected. Accordingly, the burden of proving that she would not have been promoted shifts to the Department under 22 CFR § 905.1(b). The Board is not persuaded by the Department's statistical arguments in that regard. We thus order a reconstituted 2013 Selection Board.

With respect to grievant's request for further redaction and changes in the same EER, the Board declined to order those changes, in that grievant failed to show the original language was inaccurate, falsely prejudicial, or otherwise contrary to regulation. Grievant's claims of race- and gender-based discrimination and a hostile work environment, raised in her initial appeal but abandoned in her Supplemental Submission, were denied as untimely filed.

## **I. THE GRIEVANCE**

Grievant [REDACTED] appeals the Department's partial denial of her grievance in which she sought: extensive changes to her Employee Evaluation Report (EER) for the rating period April 16, 2010, to January 3, 2011; financial reimbursement for her out-of-pocket expenses, as well as reimbursement of annual leave taken to participate in the [REDACTED] [REDACTED] conference; reimbursement for medical expenses incurred as a result of the hostile work environment she experienced; attorney's fees if warranted; and all other relief deemed just and proper. In her Supplemental Submission, grievant revised her relief request to include only changes to her 2011 EER (she added a request that a checked box be changed to show "recommended for tenure"); a reconstituted 2012 Specialist Tenure Board (SPTB); and, if tenured before summer 2013, a reconstituted 2013 Selection Board (SB) to review her corrected file for promotion to FS-03.

## **II. BACKGROUND**

Grievant joined the U.S. Department of State (the Department, the agency) Foreign Service as an untenured FP-04 Diplomatic Security (DS) Special Agent in September 2009. After training, she was assigned to DS's [REDACTED] specifically to the [REDACTED] [REDACTED] in April 2010. Her immediate supervisor, Supervisory Special Agent [REDACTED], worked with grievant in the [REDACTED] office. Her second- and third-line supervisors were physically located at a different location, the main [REDACTED] [REDACTED].

Grievant claims she was subjected to a hostile work environment by her immediate supervisor, who was biased against her because of her race ([REDACTED]) and gender. She

claims he denied her certain career-enhancing temporary duty (TDY) opportunities, and unfairly criticized her work.

As a result of this situation, grievant sought a transfer to the main [REDACTED]. She was transferred there in January 2011. At the end of her assignment at the [REDACTED] satellite office, her supervisor prepared an EER on her for the rating period April 16, 2010, to January 3, 2011. That EER was completed and transmitted to Washington in June 2011. It contained a statement in the Area for Improvement (AFI) section noting grievant's weaknesses in communications and interpersonal skills, but contained no examples of these weaknesses.

On March 5, 2013,<sup>1</sup> grievant filed an agency-level grievance in which she sought some redress for the hostile work environment she claims to have endured, expunction of the low-ranking she received from the 2012 Foreign Service Selection Board (SB),<sup>2</sup> certain changes to the text of her 2011 EER, reconstitution of a 2012 Specialist Tenure Board (SPTB), attorney's fees if warranted, and all other relief deemed just and proper.

On June 24, 2013, the Department issued a decision in grievant's case, in which it denied all relief requests except for expunction of the AFI of her January 2011 EER. Citing the fact that, contrary to agency regulations, the AFI contained no examples of grievant's weaknesses, it ordered the AFI expunged in its entirety. Because the 2012 SPTB's Tenure Deferral Statement relied heavily on that AFI, the Department also ordered expunction of that statement from personnel records. Moreover, it advised that, should grievant not be tenured by the Summer

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<sup>1</sup> Grievant repeatedly refers to her grievance as having been dated "March 5, 2012," but, in response to a query from this board, agreed that the date was incorrect, and the grievance had in fact been filed on March 5, 2013.

<sup>2</sup> As grievant was ineligible for promotion review by an SB in 2012 because she had not met time-in-grade requirements, we assume no such low-ranking statement exists, and that grievant is instead referring to the 2012 Specialist Tenure Board's Tenure Deferral Decision.

2013 SPTB, the Department would grant an additional tenure review by means of a reconstituted 2012 SPTB.

In its agency-level decision, the Department also found that grievant's claims of a hostile work environment and her discrimination, financial, and leave reimbursement claims were untimely, in that they were not filed within the two-year time limit imposed by the Foreign Affairs Manual (FAM).

Grievant was not tenured by the Summer 2013 SPTB, so, in accordance with its agency-level decision, the Department placed grievant's corrected performance file before a reconstituted 2012 SPTB. That Board recommended grievant for tenure, and she was tenured retroactive to the date on which her peers were tenured by the original Summer 2012 SPTB, August 8, 2012. Grievant was not formally notified of the tenure decision until February 11, 2014. Meanwhile, the Summer 2013 Selection Board convened on June 6, 2013, and reviewed grievant's uncorrected file for promotion. Her file was corrected (i.e., the AFI in her 2011 EER was replaced by a standard notice) on August 25, 2013.

Grievant appealed the remaining items of her complaint to this Board on August 23, 2013.<sup>3</sup> After discovery, she filed a Supplemental Submission on January 27, 2014, and an addendum thereto on February 5, 2014. The Department filed its response to the Supplemental Submission on February 19, 2014. Grievant advised this Board on March 11, 2014, that she would not file a rebuttal to the agency's response. After the Board requested and received additional information from the parties, the Record of Proceedings (ROP) was closed on April 8, 2014.

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<sup>3</sup> In her grievance appeal submission, [REDACTED] included relief requests for repayment of travel to a conference and of medical expenses. These items were not included in her Supplemental Submission.

### **III. POSITIONS OF THE PARTIES**

#### **A. The Grievant**

In her initial appeal, as noted above, grievant's requests for relief included claims for reimbursement of out-of-pocket expenses for conference attendance and medical care, both of which she claimed were a direct result of her supervisor's unfair and biased treatment. She made these claims in addition to her request for modification of her January 2011 EER, and reconstitution of the Tenure and Selection Boards that had reviewed that EER. Grievant claims she was invited to speak at the [REDACTED] Conference in [REDACTED] but when she asked her supervisor to authorize her attendance on government travel orders, he denied her request. As a result, she took annual leave and paid her own way to the conference. The medical bills were incurred as a direct result of the stress of the alleged hostile work environment she was experiencing at the [REDACTED] office, and should be reimbursed for that reason.

In her requests for relief listed in her Supplemental Submission, grievant seeks redaction of a paragraph on page 3 of her EER, which reads:

In this, her first rating period, Special Agent [REDACTED] has performed the duties expected of entry level agents during her first year at the [REDACTED] ([REDACTED]). The manner in which she executed her continuing responsibilities and special objectives showed that she has the ability to satisfactorily manage the tasks assigned to her as well as a desire to move beyond them. Given the performance she has demonstrated thus far, the contribution of additional experience under the direct supervision of her future rating officer will almost certainly find [REDACTED] ready to be tenured.

She also seeks two word changes (replacement of "nascent potential" with "ability," and striking of the words "as promising") on page four of the EER. Finally, she adds a request for a change in the check box in the EER's Section V-A, changing that check mark from "Candidate is likely to serve effectively but judgment is contingent on additional evaluated experience," to "Candidate is recommended for tenure and can be expected to serve successfully across a normal

career span." She claims these changes are necessary to remove the discriminatory and prejudicial effects of her supervisor's treatment of her during the rating period.

In the "conclusion" section of her Supplemental Submission, grievant appears to have abandoned her claims for reimbursement for out-of-pocket expenses noted above, as she no longer lists them under her requests for relief. She also added the following statement on the last page of her supplemental submission:

I am grieving EER [sic], not hostile work environment or discrimination. However, discrimination and prejudice were the reason for [REDACTED] biased and false evaluation and a non-recommendation for tenure, I am asking the Board to recognize the effects discrimination had on my evaluation and recognize the fact that [REDACTED] had done the same to other female agents (please see attached statement), a pattern of behavior that should never have been tolerated by the [REDACTED] management and Department of State.

**B. The Agency**

The Department contends that it has already granted to grievant all the relief to which she is entitled. That is, it deleted the AFI section of her January 2011 EER, deleted from her record all reference to the Tenure Deferral Statement issued by the Summer 2012 SPTB (because that statement was based in large part on the AFI in the January 2011 EER), and, when she was again deferred for tenure by the regular Summer 2013 SPTB, the Department reconstituted a 2012 SPTB, which reviewed her corrected January 2011 EER and granted her tenure retroactive to August 2012. With respect to her request that she be granted a reconstituted 2013 Selection Board to review her file for promotion, the Department claims that grievant has not shown, and it finds no reason to believe, that, given the relatively small percentage of Special Agents promoted from FS-04 to FS-03 in 2013, she would have been promoted by a reconstituted selection board looking at her corrected file.

The agency further contends that grievant was not treated unfairly with respect to being denied TDY assignments while she was assigned to the [REDACTED] satellite office and supervised by

██████████ She was, in fact, assigned to several domestic TDY assignments, including a 60-day stint on the Secretary's Protective Detail and other assignments. The Department acknowledges that she was denied the opportunity to serve TDYs in ██████████ and ██████████ but states that there were business-related, non-discriminatory reasons she was not assigned to those TDYs.<sup>4</sup> Moreover, it claims that a backlog of the office's ongoing casework, as well as multiple requests for agents to serve on protective details around the country, meant that overseas TDYs were not always possible for every agent.

As to grievant's claims that her EER unfairly diminished her work and contained too much "blank space," the Department contends that grievant did not take issue with these alleged shortcomings in her EER at the time it was written. She neither provided evidence of having insisted that her rating officer correct what she believed were errors in the rating, nor addressed them herself in her own Rated Officer's Statement. It found no evidence that grievant's rater intentionally used language or innuendo to diminish her accomplishments. The agency contends that grievant has not met her burden of showing that these EER statements were inaccurate or falsely prejudicial.

#### **IV. DISCUSSION AND FINDINGS**

In all grievances except those involving discipline, the grievant bears the burden of showing, by a preponderance of the evidence, that the grievance is meritorious.<sup>5</sup> In this case we find that grievant has partially met that burden.

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<sup>4</sup> The Department asserts that grievant did not have the qualifications or training required for the ██████████ TDY, and that management in the ██████████ denied her request for the ██████████ TDY based on the fact that she had already performed one TDY in 2010, and because she had already volunteered for a change in permanent assignment and might shortly be leaving the ██████████ satellite office.

<sup>5</sup> 22 CFR § 905.1(a)

We first address the issue of timeliness, a key element in several aspects of this case. With respect to her apparently abandoned claims of a hostile work environment caused by racial and gender bias, we find those claims would be untimely even if grievant were still pursuing them.<sup>6</sup> Given that she left her assignment at the WLA satellite office in January 2011, and did not file her agency-level grievance until March 13, 2013, grievant failed to complain within the two-year time limit set out in 22 CFR § 1104(a). We therefore do not address, because they are untimely, grievant's earlier requests for reimbursement of conference attendance and medical expenses, or her contentions of racial and gender discrimination and a hostile work environment.

However, as acknowledged by the Department in the relief it offered, the grievance concerning her EER for the rating period ending January 2011 is timely filed. Because that EER was not signed or completed until June of 2011, grievant's March 2013 complaint complies with the two-year time limit imposed by the regulations.

In her supplemental submission, grievant made three requests for relief, all concerning modification of her January 2011 EER:

1. Correction and removal of certain statements as outlined in her original grievance appeal submission.<sup>7</sup>
2. Changing the check box in Section V-A to "recommended for tenure."

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<sup>6</sup> In support of her having dropped her grievance concerning a hostile work environment, we cite again a statement in her Supplemental Submission, quoted in its entirety on page 7 of this decision.

<sup>7</sup>Grievant's four specific requests for corrections in her EER were "a. Redaction of the first paragraph on page three of the EER, reading: 'In this her first rating period, Special Agent [REDACTED] has performed the duties expected of entry level agents during her first year at the [REDACTED]. The manner in which she executed her continuing responsibilities and special objective showed that she has the ability to satisfactorily manage the tasks assigned to her as well as a desire to move beyond them. Given the performance she has demonstrated thus far, the contribution of additional experience under the direct supervision of her future rating officer will almost certainly find [REDACTED] ready to be tenured; b. replacement of the words 'nascent potential' with 'ability' in paragraph one ('Leadership Skills') on page four of the EER; c. Redaction of the words 'as promising' from the fifth paragraph 'Communications and Foreign Language Skills' on page four of the EER; d. Redaction of the Areas for Improvement section in its entirety."

3. Reconstitution of the 2012 Tenure Board to review her corrected OPF. If already tenured by the time the summer 2013 Selection Boards meet, reconstitution of a 2013 SB to review her corrected file for promotion to FS-03.

We note that the Department, perhaps unknown to grievant at the time she filed her Supplemental Submission, had already agreed to portions of these requests. Namely, the agency agreed to remove from grievant's EER the entire text of the Area for Improvement section of the EER, and it granted a reconstituted Summer 2012 SPTB to consider her corrected file. In all other respects (the requested wording and checkmark changes of the EER, and a reconstituted 2013 Selection Board), the Department denied grievant's requests for relief.

With respect to the requested wording changes and deletions from the 2011 EER, the Board declines to order further expunctions to or changes in the 2011 EER. While we do not find compelling the Department's argument that, because grievant failed to show that she objected to inclusion of these remarks or to insist on their redaction at the time the EER was still in draft,<sup>8</sup> her grievance is somehow less valid, neither do we find that the record shows the remarks are inaccurate or falsely prejudicial. Grievant has not provided evidence that her rater failed to include performance items or accomplishments that she sought to have in her EER. Nor has she shown that her rater's arguably tentative wording was either inaccurate or falsely prejudicial, or that it was based on discrimination or hostility. In that regard, we note that the EER at issue covered the grievant's first rating period (after completion of training) in the Foreign Service, and that it reported on only a nine-month period. We cannot conclude that the rater's tone constituted anything other than tentative praise for an agent completing the first nine months of her first tour in the Foreign Service. In short, in the absence of grievant's having

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<sup>8</sup> The Board notes that there is no requirement or regulation stating that a grievant must show that he or she objected to inclusion of comments before an EER was finalized. In fact, the two-year complaint "window" outlined in 22 CFR § 1104(a) would indicate that there is no such requirement or obligation.

provided evidence (other than her personal opinion) that her rating was inaccurate or prejudicial, we must deny her request for wording changes to the EER.

Neither can we agree that the box checked in Section V. A. on page 4 (Evaluation of Potential) of the EER should be changed to “candidate is recommended for tenure.” Grievant’s assertion that her rating officer had “no supporting facts to justify his non-recommendation for tenure” is her opinion, but she offers no preponderant evidence to counter her supervisor’s apparent conclusion that recommendation for immediate tenure was unwarranted. The Board notes that, in its view, the rater’s checkmark on that EER is not a “non-recommendation for tenure” as checking either of the other two boxes in that section<sup>9</sup> could have been interpreted. Rather, this checkmark could be simply a statement about the brevity of a candidate’s time in the Foreign Service. Moreover, we note that grievant was granted tenure by a reconstituted 2012 Selection Board, which reviewed her first EER without the specific “recommended for tenure” box having been checked.<sup>10</sup>

Finally, we come to grievant’s request for a reconstituted 2013 Selection Board to review her corrected file for promotion. We note that the Department advised the Board on March 28, 2014, that the agency’s directive to expunge grievant’s 2011 AFI was issued June 24, 2013, weeks after the 2013 SB had convened, so that the 2013 SB saw grievant’s uncorrected file, with the improper AFI in it.

In our view, there are three basic arguments about whether the inclusion of the now-redacted AFI may have been a significant factor in grievant’s failure to have been promoted.

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<sup>9</sup> Other choices are “Unable to assess potential from observation to date” and “Candidate is unlikely to serve effectively even with additional experience.”

<sup>10</sup> While it is true that grievant’s having been tenured could be seen to have mooted her argument about changing the tenure check box, we address this request because the EER will remain in her OPF and the check mark will be seen by future selection boards.

First, we note the Department's statistical argument about the unlikelihood that grievant would have been promoted in 2013 if her corrected file had been before that year's promotion panel. While the 113 promotion opportunities available for 413 Security officers recommended for promotion denotes a very competitive process, we believe it possible that an SB reviewing grievant's corrected file might at least have moved her file into the group of those recommended but not reached for promotion.

Second, we are not persuaded by the Department's argument that grievant's time-in-class (TIC) was well below the average of the TIC for those promoted. In our view, her TIC fell well within the range for the average TIC of those actually promoted in 2013 – that is, any group whose average TIC was 2.2 or 2.5 years might have contained members whose TIC was the same as grievant's.

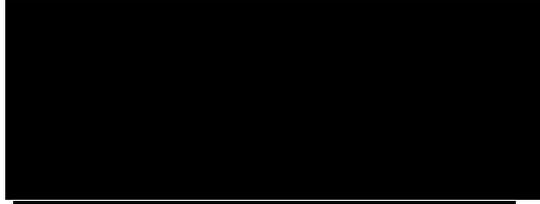
Third, and most important, we find significant the fact that grievant was tenured by a reconstituted SPTB when the AFI in question was deleted. This Board understands that a tenure decision and a promotion decision may be two entirely different considerations, but, given the evidence before us, we conclude that the AFI deletion may have been a substantial factor in the decision not to promote grievant in 2013, a conclusion that shifts the burden of proof back to the agency to show that she would not have been promoted even if the Selection Board had seen her corrected file, under 22 CFR § 905.1 (b). Thus, we order a reconstituted 2013 Selection Board. In the event the reconstituted SB recommends grievant for promotion, that promotion shall be made retroactive to the date for which all specialist promotions to FS-03 were effected in 2013.

## **V. INTERIM DECISION**

The grievance is denied in part and sustained in part.

The Department shall reconstitute a 2013 Selection Board to consider grievant for promotion to FS-03, and shall report back to the Board within 60 days with that Board's results.

**For the Foreign Service Grievance Board:**



John M. Vittone  
Presiding Member



Barbara C. Cummings  
Member



Nancy M. Serpa  
Member