

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████
Grievant

and

Department of State

Record of Proceedings
FSGB No. 2013-048

June 8, 2015

FINAL DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Member:

William J. Hudson

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Raeka Safai, AFSA

Representative for the Department:

Meg McPartlin
HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

Held: Grievant has failed to show by a preponderance of the evidence, pursuant to 22 CFR 905.1, that he should be given an additional year of overseas service followed by another tenure board review or that any costs associated with his grievance should be reimbursed by the Department of State (Department, agency). Grievant's requests are all denied.

OVERVIEW

██████████ (grievant) is an untenured FP-04 Entry-Level Officer who joined the Foreign Service in the Department in July 2009. ██████████ served in two overseas posts as an Information Specialist: two tours in ██████████ and a partial tour in ██████████, which was curtailed when he did not receive tenure in 2013. Grievant was first reviewed for tenure by the Fall 2011 Commissioning and Tenure Board (CTB) which deferred its decision on tenure to the Fall 2012 CTB. In 2012, the CTB also deferred its decision to a third tenure board, but issued a counseling statement concerning grievant's performance. The 2012 Selection Board (SB) also issued a Low-Ranking Statement (LRS) to grievant. The Summer 2013 CTB reviewed grievant's file and denied tenure. Because grievant did not receive tenure after three reviews, the agency moved to separate him from the service.

Grievant filed an agency level grievance, challenging the denials of tenure and requesting interim relief from separation. The agency denied the grievance in full in November 2013. On appeal, the Foreign Service Grievance Board (FSGB, Board) granted interim relief and after review of the appeal, concluded that grievant's 2012 Employee Evaluation Report (EER) was imbalanced and biased and may have been a substantial factor in the decisions of the Fall 2012 and Summer 2013 CTBs not to tenure grievant as well as the decision of the 2012 SB to low-rank him. In an interim decision, the Board ordered the agency to suspend its efforts to separate grievant and to expunge both the 2012 EER and the 2012 LRS. The Board remanded the grievance to the agency to submit evidence that without the inclusion of the 2012 EER, grievant would still not have been tenured by the 2012 CTB or, alternatively, upon agreement of the parties, to convene a reconstituted CTB to review grievant's redacted Official Performance File (OPF). On December 9, 2014, the Department informed the Board that grievant's OPF was reviewed by a reconstituted CTB that did not recommend him for tenure.

Grievant acknowledges that the agency acted in good faith in arranging two reconstituted tenure boards (2012 and 2013), as well as a reconstituted SB (2012);¹ nonetheless, he claims that the process was flawed because with the removal of his 2012 EER, his OPF was "virtually empty" and did not have sufficient material for the reconstituted tenure boards to make an adequate assessment of his work performance and potential.

The Board concluded that grievant failed to establish by a preponderance of the evidence that he should be granted additional relief in this matter.

¹ The reviews by the reconstituted Summer 2013 CTB and the 2012 Selection Board were not specifically ordered as relief in the Board's interim decision. At the same time, they were not precluded by the decision.

FINAL DECISION

I. THE GRIEVANCE

After the FSGB ordered one EER expunged from grievant's OPF and required the State Department to either prove that it would have denied grievant tenure in the absence of the expunged EER or offer him a reconstituted tenure board review, grievant now contends that despite having agreed to having his OPF reviewed by two additional reconstituted tenure boards and one SB, his redacted OPF was bereft of sufficient evaluative service for these reviews to be meaningful. Therefore, he claims, he should be awarded one additional year of overseas service, followed by an additional tenure review. Grievant also maintains that he suffered significant professional harm as a result of the agency's actions, including adverse effects on his promotion possibilities and a financial toll on him and his family. He contends that if he is recommended for tenure after an additional year of overseas service, he should be reimbursed for all fees, including attorney's fees that he incurred as a result of being returned early to Washington from his post in [REDACTED].² The Department opposes these requests, arguing that grievant has received all of the relief required by the Board's interim decision.

II. BACKGROUND

[REDACTED] is an untenured FP-04 Entry-Level Officer who joined the Foreign Service in July 2009 on a limited career appointment that was set to expire on September 19, 2013. Grievant has a B.A. degree in Geography/International Relations and an M.A. in Instructional Technologies. He served in [REDACTED] for the Peace Corps for two years (1992-1994) and thereafter as a School District Technology Coordinator and an Education Technology Consultant before he joined the Foreign Service.

² Grievant also alleges that he incurred \$12,000 in attorney's fees when he filed his agency-level grievance.

Grievant received training from July 20, 2009 to November 13, 2009. The record does not reveal what if any assignment he held from November 14, 2009 to December 9, 2009. Grievant then served two tours in [REDACTED] from December 10, 2009 to April 15, 2012. He received one EER from December 10, 2009 to April 15, 2010 and another from April 16, 2010 to April 15, 2011. Grievant did not have evaluated performance from April 16, 2011 to August 14, 2011 in part because his rater left post; therefore, grievant's next EER was dated August 15, 2011 to April 15, 2012. The record does not reveal what, if any, assignment grievant held from April 16, 2012 until he began serving a tour in [REDACTED] from October 5, 2012 to September 18, 2013.³

In the fall of 2011, grievant was reviewed for tenure, but that CTB deferred its decision until the following year. The 2012 CTB reviewed grievant's OPF and again deferred a decision on tenure to a third tenure board. The 2012 CTB also issued a counseling statement about grievant's performance. In addition, a 2012 SB reviewed grievant's OPF for possible promotion and concluded that he should be low-ranked. On his third review by the Summer 2013 CTB, grievant was denied tenure. His limited career appointment expired on September 19, 2013 and the agency proposes to terminate his employment.

On August 22, 2013, with the assistance of counsel and support from the employee union, the American Foreign Service Association (AFSA), grievant filed an agency level grievance, contesting the validity of his 2012 EER, claiming that it was prejudicial and unbalanced. He requested several remedies:

- (1) expungement of the 2012 EER,
- (2) nullification of the denials of tenure with removal of all records of the tenure reviews,

³ This tour was divided between October 2012 to April 2013 (the end of the rating period) and then from April 2013 to October 2013. He was curtailed in mid-September 2013.

- (3) nullification of the 2012 LRS and an award of all within-grade increases that were denied because of the LRS,
- (4) rescission of the pending separation,
- (5) an award of tenure, promotion and within-grade increases as of the date when the majority of candidates were tenured in 2012 with back pay.
- (6) alternatively, two reconstituted Tenure Board reviews after at least one year of additional overseas evaluated experience,
- (7) locality pay for the time grievant has been on interim relief in the U.S.,
- (8) housing and utility costs in the U.S. for the 12.5 month remainder of grievant's tour in [REDACTED]
- (9) attorney's fees and costs, and
- (10) any other remedies deemed just and proper.

On November 15, 2013, the agency denied the grievance in full. On December 2, 2013, grievant filed an appeal of the agency's decision with the FSGB and requested continuation of his interim relief until the appeal is decided. The Board granted grievant's request for interim relief from separation over the agency's objection; determined that the 2012 EER was prejudicial and unbalanced in its description of grievant's performance; and remanded the case to the agency to develop and submit evidence that without the inclusion of the 2012 EER, grievant would not have been tenured by the 2012 CTB or, alternatively, if the parties agreed, to convene a reconstituted CTB to review grievant's redacted OPF. The Board retained jurisdiction over this matter to entertain the positions of the parties on whether the grievant is entitled to any additional relief if he was recommended for tenure by the reconstituted tenure board.

Grievant and the agency subsequently agreed that his OPF would be immediately reviewed by the following reconstituted boards: Fall 2012 CTB, 2012 Selection Board and Summer 2013 CTB. The parties do not state whether they discussed grievant's request for one additional year of overseas service before such reconstituted boards were established. The Department thereafter advised the Board that none of these reconstituted boards recommended grievant for tenure or promotion. On January 15, 2015, grievant filed the instant requests for

additional relief and the agency filed its opposition on April 15, 2015. The Record of Proceedings (ROP) is closed with this decision.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant acknowledges that the agency acted in good faith in arranging the reconstituted boards; nevertheless, he complains that the process was not equitable since, with the removal of his 2012 EER, the Board has allegedly rendered his OPF virtually “empty” of sufficient evaluated work performance for meaningful tenure board consideration. He asserts that the reconstituted Fall 2012 and Summer 2013 CTBs did not have “sufficient evaluative material to make a decision on my ‘demonstrated potential, assuming normal growth and career development to serve effectively as a Foreign Service Officer over a normal career span, extending to and including class FS-01’”⁴

Grievant points out that his OPF contained only the following material for the reconstituted boards to consider:

- a Training and Evaluation Report without narrative (July 20, 2009 to November 13, 2009);
- an EER (██████) covering 4 months (December 10, 2009 to April 15, 2012);
- an EER (██████) covering a full rating period (April 16, 2010 to April 15, 2011);
- a gap memorandum covering April 16 2011 to April 15 2012;⁵ and
- an EER (██████) covering 6 months (October 5, 2012 to April 15, 2013).⁶

⁴ See, form DS 1829.

⁵ A gap memorandum was placed in grievant’s OPF to document the time period (2011-2012) in lieu of the expunged 2012 EER and in the absence of any other evaluative material. The memorandum includes the cautionary language to the reviewing boards that the member’s overall standing should not be discounted because of a period of performance that was not rated in an EER.

⁶ There was also an EER (██████) covering 5 months (April 16, 2013 to September 18, 2013) that was placed in grievant’s OPF; however, this EER was not in the OPF when it was reviewed by the Summer 2013 CTB or the reconstituted 2013 CTB.

He asserts that only 1 year and 10 months of the four year period (2009 to 2013) is covered by these documents. Grievant also claims that the one EER covering a full rating period (2010-2011) was written by the same supervisor who “the Board determined was biased and prejudiced against [him].”⁷ Grievant therefore requests that the Board order the Department to provide him with one additional year of overseas service in order to allow him to obtain supplementary evaluative material and thereafter to submit his supplemented OPF to the next scheduled CTB.

In further support of his claims, grievant includes a memorandum from his then Principal Officer (PO) to the agency’s Director General in which the PO points out a number of alleged agency errors, including a claim that his first [REDACTED] EER, while positive, was prepared by two “relative inexperienced specialists” and was poorly written. Grievant acknowledges that this first 2013 [REDACTED] EER described his work as “satisfactory or better” and recommended him for tenure. According to grievant, this proves that the quality of his work was not the reason he was not recommended for tenure; rather, it was the lack of information – that is, evaluative material – in his OPF that he claims prevented him from being tenured.

Grievant argues that after his curtailment from [REDACTED] and after being denied tenure by the reconstituted 2012 CTB, the Department did not provide him with assignments that would have allowed him to supplement his OPF. As a consequence, he states he sought out opportunities for meaningful work by acquiring additional IT certifications at the Foreign Service Institute (FSI) as well as “finding my own [Temporary Duty] TDY opportunities.” Grievant states that he served seven months as a General Services Officer (GSO) in [REDACTED] and is seeking a domestic

⁷ In its interim decision, the Board specifically eschewed any finding that grievant’s rater created a hostile work environment or was biased against him. We specifically stated:

[T]he Board’s judgment on the validity of the 2012 EER does not rest on grievant’s assertion of a hostile working environment or even a strained and hostile relationship with his reviewer. (Footnote omitted). Rather it rests on the content of the EER narrative which does not provide a fair, accurate, or balanced picture of grievant’s performance.

Information Resource Management (IRM) position in an effort to obtain additional evaluative material that is relevant to his IRM specialty. Grievant posits that the addition of these potential evaluative documents to his OPF and another review by a CTB would “place [him] in a position more comparable to his colleagues.”

THE AGENCY

The Department notes that after receipt of the Board’s Interim Order, grievant consented to submitting his OPF to two reconstituted CTBs as well as one reconstituted SB, which was beyond what was specifically ordered by the FSGB. The agency also notes that grievant did not grieve his 2010-2011 EER, even though he now asserts that this EER was prepared by the same rater who he claims the Board determined was biased and prejudiced against him. (However, see footnote 7 above). Moreover, the Department asserts the 2010-2011 EER rated grievance’s performance as “satisfactory or better” and grievant’s rating officer stated that grievant is “likely to serve effectively but judgment is contingent on additional experience.”

The agency claims that with the insertion of the gap memo in place of the expunged 2011-2012 EER, grievant’s OPF is not “empty.” For the reconstituted 2012 CTB review, grievant’s OPF included:

- a July to November 2009 training report;
- a December 10, 2009 to April 15, 2010 EER;
- an April 16, 2010 to April 15 2011 EER; and
- an April 16, 2011 to April 15, 2012 Gap Memorandum.

In addition, the 2013 reconstituted CTB reviewed all the same materials as well as a favorable EER from [REDACTED] (October 5, 2012 to April 15, 2013). The agency notes that the [REDACTED] EER was quite positive and, contrary to grievant’s assertion, both the rating and reviewing officers were knowledgeable specialists with 11 and 12 years’ of experience with the agency, respectively.

The agency asserts that these two experienced employees wrote a complimentary EER providing glowing assessments of grievant's accomplishments in [REDACTED]

IV. DISCUSSION AND FINDINGS

Under 22 CFR 905.1(a), because the instant grievance does not pertain to discipline, grievant bears the burden of proving by a preponderance of evidence that this grievance is meritorious. After careful review of the ROP in this appeal, the Board concludes that grievant has not carried his burden of proof as explained in the following analysis.

In this appeal, grievant raises many issues, but his main request for relief is based on a late assertion that with the Board-ordered removal of the imbalanced prejudicial 2012 EER, his OPF does not have sufficient evaluative material for any tenure board, reconstituted or otherwise, to make a decision on his potential to serve a full career in the Foreign Service. He also complains that the one EER in his OPF that documents a full year of evaluated work performance ending in 2011 was written by the same rating officer who the Board found wrote the prejudicial EER ending in 2012.

Grievant is correct that the Board concluded that the 2012 EER was prejudicial and imbalanced and, therefore, we ruled that it must be removed from grievant's OPF. The Board did not conclude, however, that grievant's rater was biased against him. Moreover, at no time during this appeal, did grievant raise any issues concerning the 2010-2011 EER. Indeed, although even now grievant complains that the same person wrote the 2011 and 2012 EERs, he does not make a case that the 2011 EER is in anyway prejudicial, biased or imbalanced. The Board concludes that by failing to raise any claims he had concerning the 2011 EER in the

agency-level grievance or initially on appeal, grievant waived the claims.⁸ We therefore express no view on this matter.

In addition, grievant submits a memorandum written by his PO that states that the [REDACTED] EERs were prepared by two “relatively inexperienced specialists” and were poorly written. To the extent that grievant is challenging the quality of the 2013 [REDACTED] EERs, we note again that grievant did not raise this claim when he filed the agency grievance or when he first filed this appeal. Accordingly, we conclude that any such claims were intentionally and knowingly waived. *Johnson v. Zerbst, supra*; FSGB Case No. 1996-019 (January 15, 1997). Moreover, the Board does not agree with the PO’s assessment of the 2013 EERs. We note that the first [REDACTED] EER that was reviewed by the Summer 2013 CTB was very positive, well documented, detailing significant accomplishments by the grievant, and recommended him for tenure. According to the Department, the two specialists who rated and reviewed grievant’s performance in [REDACTED] were experienced officers with over 11 and 12 years of experience respectively. Grievant did not challenge in his reply submission the Department’s assertion about the experience of his [REDACTED] rater and reviewer.

We next observe that under 3 FAM 4412, a grievance may not include a challenge to

the judgment of a Selection Board ... or equivalent body established by laws or regulations which similarly evaluate the performance of members of the Service on a comparative basis, including a merit promotion selecting official, except that alleged procedural violations of law, regulation or collective bargaining agreement or prohibited personnel practice(s) arising under those procedures are grievable.

⁸ “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). We conclude that, apart from the timeliness of this concern, grievant was certainly as aware of his right to grieve the 2010-2011 EER based on his assertions of his rater’s bias against him as he was his right to grieve the 2012 EER based on the exact same allegations. Accordingly, by remaining silent about the 2011 EER concerns, we deem them to have been waived.

Grievant presents no allegations of procedural violations of law or regulation by any of the boards that reviewed his file. Accordingly, these claims are not grievable. Regarding grievant's assertion that the denials of tenure resulted from a lack of evaluative material in his OPF, the Board finds nothing in the ROP to support that claim. We do not agree that grievant's OPF is prejudicially impoverished. The EERs that were reviewed by the CTBs contained significant assessments of grievant's work performance in more than one overseas post. In addition, the 2013 [REDACTED] EER strongly praised grievant's talents and abilities and recommended him unequivocally for tenure. We are persuaded that grievant's OPF as reviewed by the reconstituted tenure and promotion boards contained sufficient evaluated performance to support a decision granting him tenure.

We are particularly concerned about the timing of the arguments that grievant now makes. We recognize that in the agency-level grievance and on appeal, grievant requested an additional year of overseas service before he received an additional CTB review. In the interim decision, however, the Board did not address grievant's request for an additional year of service, ordering first that the 2012 EER be expunged and requiring the Department to preliminarily meet its burden of proving the impact of the prejudicial EER on grievant's tenure prospects. The interim decision did not address grievant's further requests for relief, given that we first sought the Department's input on whether it would elect to submit proof that grievant would not have been tenured even in the absence of the expunged EER and LRS. We expressly left to the parties whether, as an alternative to that proof, they would reach agreement about submitting grievant's OPF to a reconstituted tenure board with the 2012 EER removed. We expressly stated in the interim decision the following:

We recognize that the offer of a reconstituted tenure board might not be an acceptable remedy given that tenuring is not a comparative evaluation of

multiple employees and a reconstituted tenure board might well be troubled by a significant undocumented performance period, from July 2, 2011 to April 2012, in grievant's file.⁹ The agency and grievant are in the best position to resolve on remand any such issues that may arise.

The Board thereby underscored that with the interim remedy of expungement of the 2012 EER, as requested, grievant should be wary that his OPF was without evaluated performance for a "significant" period of time. Grievant was responsible for knowing what was in his OPF and therefore, should have been aware before agreeing to immediate reconstituted tenure and promotion boards, that his OPF had a total of 22 months of evaluated service (December 10, 2009 to April 15, 2011 and October 5, 2012 to April 15, 2013) over a 42-month period (July 20, 2009 to April 15, 2013).

The Board expressly left to the parties the issues whether there would be any reconstituted tenure and/or promotion boards; if so, how many; and most importantly, when they would occur, that is, before or after any additional service overseas. Grievant was therefore empowered by the Board's interim decision to negotiate with the Department whether he would receive reconstituted tenure and promotion boards before or after he completed additional overseas service. We note that grievant retained his AFSA representative throughout the grievance appeal, although he appears not to have retained his attorney during the appeal process. If he reviewed his OPF and concluded that he needed another year of overseas service before his OPF would be adequate for meaningful tenure review, he and his representative could have and should have raised that issue with the Department before agreeing to participate in three immediate reconstituted board reviews of his file. Moreover, if the parties were unable to reach an agreement, the Board left the appeal open to receive their concerns. We stated:

⁹ This was erroneous. In fact, grievant's OPF, after expungement, was without evaluated performance from April 16, 2011 to October 5, 2012. Again, neither party explained what grievant was assigned to do during the six months from April 16, 2012 to October 5, 2012.

The case is remanded to the agency to develop and submit evidence that without the inclusion of the 2012 EER, the grievant would not have been tenured by the 2012 CTB. Should the parties agree to present grievant's redacted OPF to a reconstituted tenure board, they should establish a mutually agreeable timetable for convening the board. Otherwise, the agency is to provide its arguments and evidence within 30 days of receipt of this interim decision. ... The Board takes no position, at this time, as to whether any additional relief is warranted until the agency responds and/or the tenure board, if any, has had an opportunity to review grievant's file. ...

At the very least, grievant should have raised the issue of the perceived lack of evaluative material in his OPF before he agreed to permit it to be reviewed by all of these reconstituted boards. Instead, he accepted the agency's offer to submit his OPF, with the gap memorandum in place, to two additional tenure reviews by reconstituted boards (Fall 2012 and Summer 2013 CTBs) and to another promotion review by a reconstituted 2012 SB. Grievant therefore knowingly accepted the benefits of the Department's offer of a multi-review process without reasserting his demand for any additional overseas service and, only after these reviews were unfavorable to his quest for tenure, does he now renew his request for additional overseas service to supplement what he claims is an impoverished OPF. He essentially seeks a further delay in his separation from service and a sixth tenure review – including the three he received in 2011, 2012, and 2013, the two reconstituted tenure reviews, and the one he now requests after an additional year of overseas service. We conclude that grievant simply cannot justify this many tenure reviews and may not now return to this Board to complain about a process in which he voluntarily acquiesced that involved multiple reviews of his OPF whose contents, including the addition of a gap memo in lieu of the EER that he challenged, were known to him at all relevant times. We conclude that by participating in the tenure and promotion review process as agreed with the Department, grievant knowingly and intentionally abandoned and relinquished his

request for an additional year of overseas service as a prerequisite to additional tenure reviews. *Johnson v. Zerbst, supra.* He is therefore entitled to no further relief on this claim.

Finally, because we find that grievant has failed to establish preponderant evidence that he is entitled to any additional overseas service or any additional tenure reviews, we conclude that he is entitled to no additional monetary relief, including attorney's fees.¹⁰

V. DECISION

Grievant's requests for one additional year of overseas service, one additional tenure review and financial relief, including attorney's fees, are all denied.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



William J. Hudson
Member

¹⁰ Grievant would be entitled to attorney's fees only to the extent that he established that his grievance was meritorious and/or that he was the "prevailing party." See, 22 U.S.C. § 1107:

If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department – ...

(5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board [MSPB] under section 7701(g) of title 5, United States Code

5 U.S.C. §7701(g) provides:

the [MSPB] ... may require payment ... of reasonable attorney fees incurred by an employee ... if the employee ... is the prevailing party and the Board ... determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.