

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between



and

Department of State

Record of Proceeding

FSGB No. 2013-048

September 15, 2014

**INTERIM DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member

Susan R. Winfield

Board Members:

Lois E. Hartman  
William J. Hudson

Special Assistant:

Joseph Pastic

Representative for the Employee:

Raeka Safai, AFSA

Representative for the Agency:

Margaret McPartlin,  
Attorney, HR/G Staff

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**Held:** Grievant has established by a preponderance of the evidence that his 2012 Employee Evaluation Report (EER) was falsely prejudicial, unbalanced and inaccurate. The Board ordered that it and a 2012 Low Ranking statement be expunged from grievant's Official Performance File (OPF). The case is remanded to the agency for further action. The grievance remains open and jurisdiction is retained.

## OVERVIEW

██████████ (grievant) is an untenured FP-04 Entry-Level Officer who joined the Foreign Service in the Department of State (the Department, agency) in July 2009. ██████████ served in two overseas posts as an Information Specialist: two tours in ██████████ and a tour in ██████████ that was curtailed because he did not receive tenure in 2013. Grievant was first reviewed for tenure by the Fall 2011 Commissioning and Tenure Board (CTB) that 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 also issued a Low-Ranking Statement to grievant. The Summer 2013 CTB reviewed grievant's file and denied tenure. Because grievant was not granted tenure after three reviews, the Department argues he must be separated from the Service due to the expiration of his limited career appointment on September 19, 2013.

Grievant filed a grievance with the Department, challenging the denial of tenure and requesting interim relief from separation. The agency denied the grievance in full in November 2013. On appeal, the Grievance Board granted interim relief and upon review of the appeal, concluded that grievant's 2012 EER was inaccurate, unbalanced and falsely prejudicial. The Board further reviewed the information that was before each of the tenure boards and concluded that the falsely prejudicial 2012 EER may have been a substantial factor in the decisions of the Fall 2012 and Summer 2013 tenure boards, as well as the decision of the 2012 Selection Board to low-rank grievant. The Board therefore ordered the agency to suspend its efforts to separate grievant; expunge the 2012 EER; expunge the 2012 low-ranking statement; and submit evidence that even without the inclusion of the 2012 EER, grievant would not have been tenured by the 2012 CTB. The Board ordered that the parties could mutually agree to submit grievant's redacted OPF to a reconstituted tenure board and reach agreement on a date for doing so. The Board deferred the question whether any additional relief is warranted until the agency responds and/or the reconstituted tenure board, if any, has had an opportunity to review grievant's file. Lastly, the Board ordered that if grievant is granted tenure, the parties should attempt to agree on whether any additional relief is warranted; however, if they are unable to do so, they may return with their respective positions regarding additional relief. The case was ordered to remain open with jurisdiction retained to address any such future filings.

## **INTERIM DECISION**

### **I. THE GRIEVANCE**

██████████ (grievant), an FP-04 career candidate Information Management Specialist with the Department of State (Department, agency), filed a grievance alleging that his 2012 Employee Evaluation Report (EER) was inaccurate, unbalanced and falsely prejudicial. He claims that this 2012 EER prejudiced him before the Fall 2012 and Summer 2013 Tenure Boards that deferred and denied his applications for tenure, respectively. Grievant also challenges the low-ranking he received from the 2012 Selection Board, arguing that it was the direct result of the falsely prejudicial 2012 EER. Grievant requests that the Foreign Service Grievance Board (FSGB, Board) provide the following relief:

- Removal of the 21012 EER, in its entirety, with expungement of all mention of it from all personnel records, including the CDO file, except for the HR/G confidential grievance record.
- Nullification of the denials of tenure by the Fall 2012 and Summer 2013 Tenure Boards, with removal of all records pertaining to the reviews from all personnel records, including the CDO file, except for the HR/G confidential grievance record.
- Nullification of the 2012 Low Ranking with expungement of all mention of it from all personnel records including the CDO file, except for the HR/G confidential grievance record.
- Rescission of the pending separation, with expungement of all mention of it from all personnel records, including the CDO file, except for the HR/G confidential grievance record.
- Tenure, promotion and within-grade increases as of the dates a majority of candidates were tenured by the Fall 2012 Tenure Board, with back pay.
- Without waiving the greater remedy of tenure, two reconstituted Tenure Board reviews after at least one year of additional overseas evaluated experience.
- Locality pay for period Grievant has been on interim relief in the U.S.

- Housing and utility costs in the U.S. for a period commensurate with the 12.5 month remainder of Grievant's tour in [REDACTED] that was curtailed due to the pending separation.

## 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 served two tours in [REDACTED] from December 2009 to October 2012 and one tour in [REDACTED] from October 2012 until he was curtailed in September 2013. In the fall of 2011, grievant was reviewed for tenure, but the Commissioning and Tenure Board (CTB) deferred its decision until the following year. In the fall of 2012, grievant received an EER from his rater and reviewer that he claims was unbalanced and falsely prejudicial, based on a hostile relationship with his reviewer. The 2012 CTB reviewed grievant's Official Performance Folder (OPF) that contained the 2012 EER and again deferred a decision on tenure to a third tenure board, and issued a counseling statement about grievant's performance. In 2012 as well, the Selection Board 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, grievant filed a grievance with the agency, contesting the validity of his 2012 EER and requesting: expungement of the EER and the Low-Ranking Statement, rescission of the pending separation, an award of tenure, promotion and within-grade increases as of the date when the majority of candidates were tenured in 2012, and back pay. 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 Foreign Service Grievance Board (FSGB, Board) and requested continuation of his interim relief until the appeal is decided. The Board

granted grievant's request for interim relief from separation, pending a decision on the merits of this appeal. The ROP remains open to receive further information from the parties as ordered below.

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

#### **GRIEVANT**

Grievant maintains that his 2012 EER has many falsely prejudicial statements; does not provide a balanced assessment of his performance; and overshadows all other EERs in his OPF, including two favorable ones from █████ in 2013. He alleges that his 2012 EER unfairly prejudiced his final opportunity for tenure with the 2013 Summer Tenure Board. Grievant further argues that he was provided a third tenure review because the agency recognized that his file documented strong work performance that could lead to tenure with additional evaluated experience. He notes that his subsequent 2013 EERs from █████ are positive and both recommended him for tenure.

Grievant claims that his reviewing officer on his 2012 EER subjected him to a hostile work environment and coerced his rating officer into changing what initially was a favorable and more balanced performance assessment. He complains that his 2012 EER is "relentlessly negative," omitting any mention of any positive accomplishments. Grievant maintains that the rating and reviewing officers failed to comply with instructions for preparing EERs that require the use of examples to illustrate the employee's "performance and accomplishments."<sup>1</sup>

In response to the Department's argument that the 2012 EER was accurate and that grievant was frequently counseled for deficient work performance, grievant contends that the counseling statements he received during the 2012 EER performance review period were flawed

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<sup>1</sup> See DS-1829 Part IV c.

because they did not adequately apprise him of any perceived shortcomings, or provide him with sufficient information to allow him to correct any deficiencies.

Grievant argues that the 2012 EER may well have been a substantial factor in the deferral and denial of tenure both in 2012 and in 2013. He asserts that it should be removed from his OPF because it is unbalanced and falsely prejudicial. He also asks that the 2012 low-ranking be removed from his file because the low-ranking decision was the direct result of the falsely prejudicial 2012 EER. Grievant further contends that with the removal of the 2012 EER and the low-ranking statement, his record would likely have been viewed as sufficiently strong to warrant being awarded tenure by one of the CTBs.

#### **THE AGENCY**

The agency argues that the 2011 and 2012 tenure board reviews consistently identified in their counseling statements, areas of performance that grievant needed to improve upon before a decision to tenure him could be made. The Department contends that the 2011 CTB highlighted a criticism of grievant's performance that was noted in his 2011 EER. The CTB stated that the 2011 EER "describes [a] serious security oversight ... and Operational ineffectiveness .... Overall the most recent [2011] EER describes the inability to perform, above a marginal level." The Department also notes that in grievant's second review by the CTB in the fall of 2012, another counseling statement was issued that identified problems in the areas of management, intellectual and substantive skills "well documented in several EERs from different raters ...." The agency maintains that the extensive record supports the ultimate decision not to tenure grievant. The agency also notes that the summer 2013 CTB had before it, and presumably reviewed, grievant's 2013 EERs from [REDACTED] that recommended tenure.

The Department argues that grievant has not shown by a preponderance of evidence that the 2012 EER, which is at the core of his grievance, was unfair or unbalanced; that his reviewing officer was biased against him or created a hostile work environment; or that his rating officer was coerced by the reviewing officer to change his original rating statement. The Department maintains that grievant's performance record, backed by numerous counseling statements, supports a finding that the evaluations in the 2012 EER by the rating and reviewing officers are accurate, fair, balanced and well documented. The agency claims that grievant's 2012 EER satisfies the Board's standard that an EER "need not be perfect, but rather must provide a balanced assessment of an employee's performance."

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

In all grievances, other than those involving disciplinary actions, grievant has the burden to show, by a preponderance of the evidence that the grievance is meritorious. 22 CFR § 905.1 (a). Pursuant to 22 CFR §905.1(b):

Where a grievant establishes that an evaluation contained falsely prejudicial material which may have been a substantial factor in an agency action, and the question is presented whether the agency would have taken the same action had the evaluation not contained that material, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

Grievant claims that his 2012 EER is falsely prejudicial and the unremittingly negative description of his performance prejudiced his ability to receive tenure. The key issue in this grievance is whether the 2012 EER is fair, accurate and balanced.

The standard applied by the Board in assessing the adequacy of EERs was set forth in FSGB Case No. 1993-015 (December 23, 1993) and FSGB Case No. 1999-048 (January 11, 2001) which state that as a general matter, EERs must meet reasonable standards, although

perfection is not required. What is required is that the evaluation be accurate, fair, reasonably well balanced and documented.

As a general matter, EERs must meet reasonable standards; perfection is not required. The critical test is whether an EER fairly and accurately describes and assesses performance and potential with adequate clarity and documentation to constitute a reasonably discernible, objective and balanced appraisal.

FSGB Case No. 2003-017 (October 25, 2005), citing FSGB Case No. 2002-005 (April 2, 2002); see also, FSGB Case No. 1993-015, *supra*.

The Board finds that grievant's 2012 EER fails this test on several levels. First, we find that grievant's 2012 EER is stunningly negative. Among the negative statements made by the rater about grievant's performance are the following:

[M]y observation was that his performance was below the level of a first tour Information Management Specialist, with two years of experience ....

██████████ keeps copious notes to document the procedures required to accomplish tasks within the office, however, when given a technical task for which he does not have prior documentation, the research and documentation of the steps can lead to an excessive increase in the time required to complete the task. [Examples of this deficient performance follow.]

[A]n item bound for one destination ... had actually been sent to another destination .... After three hours of research in the pouch vault, ██████████ response was that he took the address on the package literally .... ██████████ has been the pouch coordinator since March. ... [T]he fact that five separate pouches were all addressed to [overseas location] and then incorrectly sent to Washington, D.C. shows a lack of understanding, of a core piece of the IPC [Information Program Center]'s work requirements.

My initial assessment still stands. ... ██████████ has shown that he can accomplish tasks that have little or no technical level of expertise required, if given sufficient direction and a specific deadline. Without a deadline tasks are not completed, or the completion date falls well outside of standard parameters.

Moreover, what few positive statements are made about grievant's accomplishments are all immediately followed by negative comments about his skills, abilities, or performance. We find this to be unfair, imbalanced and inaccurate. For example, the rater compliments grievant on "his ability to manage the communications assistant," but, immediately follows with the statement, "he has not yet shown the ability to manage his own operational effectiveness." In another example, the rater notes that grievant's "interpersonal skills when working with customers ... are excellent," but follows this statement with the comment, "however, he has not been able to maintain the same level of communication with his supervisors." The rater also states: "██████████ exhibits excellent communication skills," but then hints at a weakness when he finishes with the comment, "when speaking on topics that he is comfortable with." As we found in a similar case, "[T]he report is severely unbalanced and does not . . . provide the objective assessment of . . . performance required by the regulations . . ." FSGB Case No. 1986-079 (July 6, 1987).

We also find that there were accomplishments that grievant achieved during the rating period that could have been mentioned, but were not, with no explanation provided for this omission. In this regard, grievant states that before he received the final draft of the negative evaluation, his rating officer sent him a partial draft of the EER that contained several positive statements about his accomplishments.<sup>2</sup> This initial draft detailed grievant's successful completion of a project to install new "Fiber Optic cabling" within the Mission's Executive Office and commended him for training a new communications assistant on all Classified Pouch operations. The Department attempts to explain why many of grievant's accomplishments were

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<sup>2</sup> Grievant states that he participated in seven training courses while in ██████████ and he submitted to his rater, a six-page draft detailing nine accomplishments. Unfortunately, the rater's mention of a few of these accomplishments in the EER was in each instance accompanied by a negative comment. Most of the accomplishments were not mentioned in the EER at all.

removed from this initial draft and were not included in the final 2012 EER. The agency states that HR counseled the reviewer against it.<sup>3</sup> According to the reviewer, based on the advice from HR, most of grievant's accomplishments could not be mentioned in the EER because "90% of them [were] examples that [occurred] prior to the start date of his [rater], August 15 [2011]."<sup>4</sup> Unfortunately, the excluded material would have provided balance to what became an extremely negative final 2012 EER.

We note, however, that despite these instructions from HR, grievant was permitted to mention the very same accomplishments that the reviewer was told could not be included in the EER. In addition, grievant wrote about several accomplishments that occurred during the rating year after his new rater arrived, but were not mentioned by his rater or reviewer. These accomplishments included: (1) completing a step-by-step guide on setting up and activating an alternate communications center in the event of a disaster similar to the previous year's [REDACTED] (2) completing a project to establish communications with international schools in [REDACTED] including a survey of each school, a compilation of data and maps for each school, and training school staff in how to use communications radios; (3) successfully training the new communications assistant and IMS [Information Management Specialist] regarding classified pouch procedures<sup>5</sup>; (4) creating a detailed step-by-step manual on the pouch process made available to all IPC members; (5) correcting anti-virus issues on computers in two locations in [REDACTED] increasing the mission's technical rating; (6) successfully managing one of

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<sup>3</sup> The Department states that when grievant's former rating officer departed post on July 1, 2011 after being grievant's rater for 45 days, his reviewer assumed rating officer responsibilities, from July 2 until the new rater arrived on August 15, 2011 (44 days). Unfortunately, because the reviewer did not discuss grievant's work requirements with him while serving as interim rater, HR instructed that he could not properly write an evaluation as a rater. HR advised that "discussion of accomplishments should be for the specified rating period which started when the new rater arrived and established [a] WRS [Work Requirements Statement]."

<sup>4</sup> We note that neither the HR employee, nor the agency cite to the FAM, the FAH, or any other policy, regulation or statute as authority for this advice.

<sup>5</sup> This was one of the accomplishments originally mentioned in the first draft of the EER.

the Department's largest COMSEC (Communications Security) accounts;<sup>6</sup> (7) training for an examination leading to the Security+ technical certification in preparation for a future role as a post ISSO [Information System Security Officer]; and (8) being the only First and Second Tour (FAST) Specialist asked to speak to visiting U.S. graduate students about working in an embassy. The Department does not dispute grievant's statement of accomplishments or explain why the rater and reviewer failed to mention any of these achievements, while conceding that at least some of these positive accomplishments occurred within the time period being reviewed by his current rater. It does not appear to the Board that 90% of grievant's accomplishments occurred prior to the start date of his rater. In addition, the early drafts of the EER appraised grievant's overall performance as "Satisfactory." The final draft changed this appraisal to an unsatisfactory rating. The Department does not explain this change and grievant asserts he had no warning that he would receive an unsatisfactory rating. This is in direct violation of regulations found in the Foreign Affairs Handbook; see, 3-FAH-1 H-2814.3, which reads:

A rating officer may not assign an overall rating of unsatisfactory ... unless the rated member has previously been advised of the areas of performance which are inadequate and has been given a reasonable opportunity (ordinarily 30 to 60 days) and adequate guidance to remedy the deficiencies. If a reasonable opportunity has not been provided as of the end of the regular rating period, the scheduled rating may be delayed for up to 60 days to provide an opportunity for improvement.

The agency maintains that grievant should have been aware that he would receive a negative EER, (perhaps also an unsatisfactory rating), given the number of counseling statements he received during the rating year. However, 3 FAM 228.2-1(a) provides:

[N]o post or bureau will submit an unsatisfactory report on a candidate unless the candidate was given notice in writing of the areas of

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<sup>6</sup> Grievant notes that according to an auditor's cable, he received the following tribute: "[C]ustodian [REDACTED] is on his first tour of duty. Post COMSEC records and materials are superbly managed at this post and are deserving of a special recognition." In addition, the auditor praised grievant's COMSEC performance at a different consulate. He wrote: "Post was fully prepared and maintains an excellent account."

performance which are deficient and was given a reasonable opportunity to demonstrate satisfactory performance.

This Board has held:

the difference between an example and a general critical statement is a matter of specificity. Specificity is required so that the officer being criticized is given a fair opportunity to answer the criticism or to use it as a basis for self-improvement.

FSGB Case No. 2001-215 (June 15, 2001). The Board recognizes that the key factor in assessing the adequacy of counseling in determining whether an EER is fair is whether the grievant had adequate notice of what was expected of him/her, so that critical comments in a subsequent EER do not come as a surprise. FSGB Case No. 2007-043 (February 12, 2008). The test is whether grievant was, or should have been, aware of an area where his performance needed improving. FSGB Case No. 2003-048 (May 5, 2006); FSGB Case No. 2005-023 (October 7, 2005); FSGB Case No. 2005-068 (September 11, 2006).

In this context, the counseling statements covering the rating period for the 2012 EER present a mixed picture - one which an untenured employee on his first overseas tour might find hard to fully comprehend. The counseling certificates often repeat that grievant should improve his “across-the-board” performance by adhering to the Core Precept Matrix; then the certificates quote verbatim from several precept elements. The Board finds that these statements contain no specificity at all; i.e., they fail to advise grievant what specific behavior(s) or performance(s) failed to meet the quoted elements. The statements also do not advise grievant what he needed to improve or what specific actions he needed to take to show improvement.

Some of the counseling statements give specific performance examples, such as the November 3, 2011 counseling certificate. In that certificate, grievant was cited for failing to solve a problem where a new employee was unable to log onto her computer. Grievant was

asked to address the issue; however he had not done so several days later. The rater was able to connect and logon to the computer “within five minutes.” No specific information or guidance is offered to show grievant how he might improve his performance. The certificate simply reads: “It is my hope that with the addition of the communications assistant position and the newly implemented training plan, [REDACTED] performance will continue to show improvement.” In a December 8, 2011 counseling certificate, grievant’s performance is judged to be “adequate,” however the rater continues, “the issues related to technical tasks that go beyond the daily scope still show the same limited initiative and reporting issues.” (Emphasis added.) This certificate does not explain how grievant’s “active listening, critical thinking, technical and professional expertise skills” needed improvement. In this same counseling certificate, the rating officer notes that grievant had been given “tasks with very specific guidance and timelines, which he has been able to *complete successfully*.” (Emphasis added.) Despite this comment, the rater maintained that grievant’s performance during the month showed “no noticeable improvement in his overall precepts. ... [and] [T]he issues related to technical tasks that go beyond the daily scope still show the same limited initiative and reporting issues.” The January 13, 2012 counseling certification contains both positive and negative assessments of grievant’s performance. On the one hand, the certification states that grievant’s “customer service continues to be his strong point.” However, it also states:

As always, time management continues to be an issue. ... [REDACTED] performance had highs and lows, with the high point being the completion of the VHF radio survey .... The low point [is] [REDACTED] inability to complete the overview document for the first week that it was requested. So far, though, he has been able to stay on track with providing the documents on Monday and Friday.

The March 12, 2012 counseling certification notes several assigned tasks which were completed while noting that others had not been. The certification states: “[REDACTED] shows the ability to

complete detailed, step-by-step instructional tasks, but often misses key points or contextual areas.” It further states: “The area for improvement remains the same[:] Time Management and an across-the-board increase in the core precepts, with an emphasis on the following: [followed by verbatim recitations of core precepts.”

It is the Board’s view that this extensive record of counseling presents both *positive* accomplishments and negative criticisms of grievant’s performance which could have led him to believe that he would not receive an unremittingly negative EER, his performance would be rated as satisfactory and he would be recommended for tenure. The Board concludes that these counseling certifications were inadequate to accomplish the intent of the regulations because they did not give him specific information of precisely what was deficient in his performance or precisely how he could improve in the core precepts. We also note that despite mentioning several of grievant’s accomplishments in these counseling certifications, the rater did not repeat them in the challenged 2012 EER. This is clear evidence that the EER was unbalanced and unfair.

With regard to grievant’s claim that his reviewing officer created a hostile working environment we conclude that he did not meet his burden of proving that (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was discriminatory based on his protected status; (4) the harassment was so severe and pervasive that a reasonable person would objectively perceive it to be a hostile or abusive work environment; and (5) the employer knew or should have known of the harassment and failed to take appropriate remedial action. *Clark County School District v. Breeden*, 532 U.S. 268, 269 (2001); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Grievant, first, does not allege that he is a member of a protected class. He next

complains of boorish behavior by his reviewer on the unnumbered occasions when he would “yell to ██████ from his office;” bully and threaten most of the employees in the office; make foul, offensive jokes; speak negatively about visitors and other employees in their absence; and express how much he did not like ██████. In addition, grievant cites one occasion (on his birthday) when the reviewer raised his voice and made a number of derogatory statements about him. Grievant speculates that the reviewer did not like him because he had a college degree, while the reviewer did not, and he had not served in the military, while every other IPC office member had. These allegations are insufficient to prove that grievant experienced the level of “severe and pervasive” harassment behavior to prove a hostile work environment. Moreover, there is absolutely no evidence that discrimination motivated the reviewer’s relationship with grievant.

In any case, the 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.<sup>7</sup> Rather it rests on the content of the EER narrative which does not provide a fair, accurate, or balanced picture of grievant’s performance. We conclude that grievant has demonstrated by a preponderance of the evidence that his 2012 EER is falsely prejudicial. This claim is not mitigated by the extensive Counseling Certification record which presents a mixed picture of grievant’s performance, both negative and positive; the positive elements not being found in the 2012 EER.

The question the Board must now address is whether the prejudicial 2012 EER was of such import that it may have been a substantial factor in the decisions of the 2012 and 2013

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<sup>7</sup> We recognize that hostility from a rater or reviewer can undermine the balance and fairness of an EER. See, FSGB Case No. 2009-016 (December 30, 2010); FSGB Case No. 2000-048 (November 28, 2000) (Evidence of several falsely prejudicial statements in the EER made in the context of a demonstrably strained and difficult supervisory relationship, has thrown much doubt on the balance and fairness of the entire EER.)

CTBs. The Board notes that the agency offered grievant three reviews for tenure, in lieu of the normal two reviews, because his record was seen as sufficiently strong that with additional evaluated performance, it was possible he might receive tenure. Grievant establishes by a preponderance of evidence on the record that the flawed 2012 EER “may have been a substantial factor” in his not being granted tenure by the 2012 and 2013 CTBs. The 2012 CTB relied on statements made in the 2012 EER. In the counseling statement, the CTB stated:

The [tenure] Board also found problem areas, specifically in managerial, intellectual and substantive skills. [Grievant’s] inability to complete tasks, to absorb the training he is given and to apply it, to follow directions, and to communicate effectively with his chain of command is well documented in several EERS from different raters (from Embassy ██████████ covering the periods December 10, 2009 to April 15, 2010 and April 16, 2010 to April 15, 2011, and August 15, 2011 to April 15, 2012.) In his most recent EER, his rater states that he held monthly counseling sessions, documented in writing.

This CTB was not informed of any positive accomplishments that were acknowledged by the rater. . The rater’s assessment as reviewed by the 2012 CTB was exclusively negative.

Similarly, the 2012 Low-Ranking statement by the Selection Board relied almost entirely on the 2012 EER. Literally every sentence, save one, describes performance deficiencies noted in the 2012 EER.

The 2013 CTB reviewed grievant’s OPF that by 2013 included two positive EERs, both of which recommended grievant for tenure. We conclude that given how strongly critical the 2012 EER was along with the presence of the low-ranking statement, these documents may well have been a substantial factor in the final decision to deny grievant tenure.

Under 22 CFR 905.01(b) and *Reiner v. United States*, (Civil Action No. 78-0616, Slip op. at 7 (April 30, 1979), because grievant has established preponderant evidence that his 2012 evaluation contained falsely prejudicial material and may have been a substantial factor in the

agency decision to delay and deny tenure and to low-rank him, the burden of proof shifts to the agency to show that had the falsely prejudicial EER not been included in his OPF, it would have taken the same actions to low-rank him and to deny him tenure.

FSGB Case No 2012-028 (April 12, 2013). As in the cited case, the Board recognizes that in lieu of such proof, the agency might offer to convene a reconstituted CTB to review grievant's file. 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. The agency and grievant are in the best position to resolve on remand any such issues that may arise.

## **V. DECISION**

The agency is directed as follows:

1. Suspend its separation action;
2. Expunge the 2012 EER and the 2012 Low Ranking Statement;
3. 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. Grievant shall respond to any submission by the agency within 10 days of the submission.

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. If grievant is granted tenure, then the parties shall first attempt to agree on

whether any additional relief is warranted. If the parties are unable to agree, they may return to the Board with their respective positions regarding additional relief. This case shall remain open and jurisdiction is retained to address any such future filings.

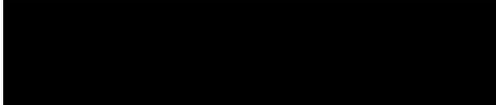
**For the Foreign Service Grievance Board:**



Susan R. Winfield  
Presiding Member



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