BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]	Record of Proceedings
Grievant	FSGB Case No. 2013-049
and	April 11, 2014
Department of State	**ORDER: INTERIM RELIEF**
	EXCISION

For the Foreign Service Grievance Board:

Presiding Member:	William E. Persina
Board Members:	Bernadette M. Allen
	Lois E. Hartman
Special Assistant:	Lisa K. Bucher
Representative for the Grievant:	*Pro se*
Representative for the Agency:	Margaret E. McPartlin, HR/G
Employee Exclusive Representative:	American Foreign Service Association

ORDER: INTERIM RELIEF

I. THE ISSUE

This Order addresses the request of untenured FS-04 Entry Level Officer (ELO) [redacted] (grievant) for continuation of interim relief (IR) from separation due to the expiration of his Limited Career Appointment (LCA). The Department of State (Department) opposes grievant's request.

II. BACKGROUND

Grievant joined the Foreign Service in July 2009, and completed two overseas assignments, in [redacted] (Embassy [redacted] and [redacted] (Embassy [redacted] as an Information Management Specialist. He was first considered for tenure by the Fall 2011 Specialist Tenure Board (SPTB), which deferred its tenure decision to the Fall 2012 SPTB. The Fall 2012 SPTB again deferred its tenure decision to the Spring 2013 SPTB, which denied tenure to grievant. Accordingly, his LCA expired, and his separation was scheduled for July 19, 2013.

The Fall 2012 SPTB, in deferring its decision on tenure, said in its counselling statement that it found grievant to have "problem areas, specifically in time management, prioritization, and attention to detail." In support it cited to comments in grievant's July 2012 Employee Evaluation Report (EER) from his service at the [redacted] embassy. The SPTB characterized these EER comments as indicating that grievant "requires close supervision to ensure tasks are completed properly and on time, when he should be able to work independently." The Fall 2012 SPTB also referred to comments in the Area for Improvement (AFI) section of grievant's 2012 [redacted] and 2011 [redacted] EERs, which the SPTB said

pointed out that grievant's "listening and communication skills need improvement." The Fall 2012 SPTB expressed the hope that, with another six months' time, grievant would exhibit improvement in the performance areas indicated. The Spring 2013 SPTB, however, denied grievant tenure without issuing a statement that contained any additional rationale, and thus appears to have based its decision to deny tenure on the reasons set out in the Fall 2012 SPTB's counselling statement.

Grievant filed his grievance with the Department on July 15, 2013, and supplemented it on August 14, 2013. He argued in his grievance that the Fall 2012 SPTB unfairly and prejudicially mischaracterized the statement in his July 2012 EER when it said that the EER showed grievant's need for "close supervision." Grievant also claimed that the AFI sections in his 2011 and 2012 EERs were either procedurally defective or unfairly and prejudicially characterized by the Fall 2012 SPTB. He also said that the Spring 2013 SPTB failed to consider his most recent EER, issued in February 2013, which grievant said was very favorable to him, when it decided to deny him tenure. The Department denied the grievance on October 17, 2013, holding that the Fall 2012 SPTB fairly and accurately construed the 2012 EER; that the AFI sections of the 2011 and 2012 EERs were neither procedurally defective nor mischaracterized by the SPTB; and that grievant had not shown by a preponderance of the evidence that the Spring 2013 SPTB failed to consider grievant's 2013 EER.

Grievant appealed the Department's denial of his grievance to this Board ("FSGB" or "Board") on December 16, 2013. He has requested the following remedies:

1. A one-year extension of his LCA;
2. Continuation of interim relief;
3. Redaction of the AFI section of his 2012 EER;
4. A reconstituted Fall 2012 Specialist Tenure Board;

5. A reconstituted Spring 2013 Specialist Tenure Board; and
6. Any other relief deemed appropriate.

The Department filed its opposition to grievant's request for continued IR on January 10, 2014, and grievant responded to the Department's opposition on January 17, 2014.

III. POSITIONS OF THE PARTIES

A. GRIEVANT

Grievant argues that he has met the standard of proof for interim relief, that is, that he can establish under FSGB precedent that there is a likelihood that he will prevail on the merits on at least one of his claims. Grievant argues first that there is a likelihood that he will be able to establish on the merits that the Fall 2012 SPTB's reliance on his 2012 EER for its conclusion concerning his alleged need for "close supervision" is unfounded. Specifically, the Fall 2012 SPTB said that grievant's 2012 EER establishes that grievant "requires close supervision to ensure tasks are completed properly and on time, when he should be able to work independently." Grievant argues that the only possible basis for this conclusion in his 2012 EER is his rater's statement that grievant "was given new responsibilities, and with some close supervision was able to complete them. As a second-post IMS, he is still mastering some of the various duties and responsibilities which fall under the Information Programs Center (IPC)." Grievant asserts that this EER statement is unrelated to the SPTB's conclusion.

Grievant next argues that the 2012 EER's AFI section does not support the Fall 2012 SPTB's conclusion. The AFI section states as follows:

> [redacted] should strive to remain focused in order to complete multitask projects. He needs to develop a more thorough understanding of Post IRM operations to help him judge the operational impact of a particular task. Also, he needs to listen

> effectively and take clear notes when receiving instructions or requests from customers.

Grievant asserts that there is nothing in this AFI comment that addresses the alleged "time management, prioritization, and attention to detail" problems that the Fall 2012 SPTB referenced as its basis for deferring a decision on tenure.

Grievant next argues that it is likely he will be able to establish on the merits that both the 2011 and 2012 EER AFI sections are procedurally defective. The 2011 EER AFI section discusses grievant's need to improve his communications skills in dealing with "customers" of the Embassy. Grievant argues that, contrary to FSGB precedent, there were no specific examples provided to support this conclusion. He also claims that he was not adequately counselled on these supposed performance deficiencies referenced in the 2011 EER AFI section. Grievant also argues that the 2012 EER AFI statement did not include sufficiently specific examples to support the performance areas cited for improvement. Further, grievant says that, contrary to the Fall 2012 SPTB's conclusion, the two AFI sections do not address the same performance issue. The 2012 EER AFI section deals with listening skills, while the 2011 AFI section concerns giving clear instruction or guidance to Embassy customers. Finally, grievant asserts that the Spring 2013 SPTB failed to consider material in his 2013 EER that supports the conclusion that he had successfully addressed the performance areas that were of concern to the Fall 2012 SPTB.

B. THE DEPARTMENT

The Department argues that there is no likelihood of grievant prevailing on the merits of his grievance, and therefore his request for continued IR should be denied. In this connection,

the Department states that the Fall 2012 SPTB's comments concerning grievant's performance are accurate and supported by the 2011 and 2012 EERs.

The Department first argues that the rater's comment in the 2012 EER, concerning grievant's "new responsibilities" that required "some close supervision" to enable him to complete them, supports the Fall 2012 SPTB's statement that grievant "requires close supervision" to ensure that tasks are completed properly and in a timely manner. The Department also points to the sentence in the 2012 EER after the "close supervision" comment as support for the 2012 SPTB's comment. This sentence provides that "[a]s a second-post IMS" grievant is "still mastering" some of the duties and responsibilities of the Information Programs Center. Thus, the Department claims, although the Fall 2012 SPTB did not precisely quote the 2012 EER comments, the SPTB's conclusions drawn from the 2012 EER were reasonable constructions of the EER comments.

The Department next argues that the 2012 EER AFI comment, set out above, also supports the Fall 2012 SPTB's conclusions. In this connection, the Department asserts that grievant agreed with the rater's comments in the 2012 EER about areas of his performance that were in need of improvement. Further, the Department says that the 2012 EER AFI comments directly relate to and support the Fall 2012 SPTB's observations concerning grievant's need to improve his listening and communication skills. The Department also points out that grievant was counselled on time management and communications issues, further giving support to the Fall 2012 SPTB's conclusions.

The Department next rebuts grievant's claim that the 2011 EER AFI section is procedurally defective. It argues in this regard that the AFI comments are sufficiently specific as

to provide grievant with guidance on the areas of his performance in need of improvement. The Department also asserts that the counselling grievant received prior to issuance of the 2011 EER was sufficiently specific in addressing the areas for improvement in communications skills eventually referenced in the EER. Further, the Department claims that evidence establishes that grievant himself agreed that his communications skills were in need of improvement. Finally, the Department argues that the evidence shows that the Spring 2013 SPTB did consider grievant's 2013 EER, but that the SPTB nonetheless did not believe that grievant's record taken as a whole warranted granting tenure. In conclusion, the Department states that the Fall 2012 SPTB's conclusions, relied on by the Spring 2013 SPTB, were exercises of judgment by those Boards, and are not properly the subject of a grievance.

IV. DISCUSSION

Subject to some limitations, this Board has the authority to direct an agency to suspend an action against an employee that is related to a grievance pending before the Board. Section 1106(8) of the Foreign Service Act of 1980, as amended (22 U.S.C. § 4136(8)) and the Board's implementing regulations (22 CFR § 904.4) authorize the Board to grant interim relief in cases of involuntary separation such as the instant case. In exercising that authority, we have generally held with respect to untenured career candidates that interim relief from separation should be granted only in cases where grievant has shown a reasonable likelihood of prevailing in the grievance appeal.[1] Grievant must be able to show preliminarily that he has a reasonable prospect of attaining relief that will result in his being retained in the Service for some remedial period of time.

[1] See FSGB Case No. 2012-012 (Order dated August 9, 2012); FSGB Case No. 2009-006 (Order dated April 10, 2009); FSGB Case No. 1997-031 (Order dated June 10, 1997). Compare FSGB Case No. 1997-104 (Order dated February 24, 1998), wherein the Board noted that interim relief is granted to tenured officers absent extraordinary circumstances and irrespective of a showing of a reasonable likelihood of success on the merits.

Given the early stage of the appeal at which this determination must be made, it is of necessity based on preliminary information, without the benefit of full discovery and supplemental submissions by the parties. We emphasize that our assessment of the merits included herein is preliminary and tentative and is based only upon the record as it now stands. A final decision is subject to the closing of the Record of Proceedings (ROP). We recognize, of course, that supplemental submissions may well produce new relevant evidence that may influence a final decision.

We also note that the FSGB has held that an untenured grievant in a case like the present one need only demonstrate a likelihood of prevailing on one or more, but not necessarily all, of his claims in order to warrant a continuation of IR.[2] For the reasons that follow, we conclude in this case that grievant has demonstrated a reasonable prospect of obtaining relief on the merits on one of his claims, and therefore he is entitled to a continuation of interim relief pending our final decision on the merits of this case.[3]

The Board had held that a grievance claiming a broad misinterpretation of an EER passage is a grievable procedural claim. See FSGB Case No. 2005-010 (Interim Decision dated October 31, 2005). In this connection, we conclude that there is a reasonable prospect that grievant will be able to prevail on the merits of his claim that the Fall 2012 SPTB's statement concerning grievant's need for "close supervision to ensure tasks are completed properly and on time" is not supported by the passage in the 2012 EER relied on by the SPTB. More specifically, the Department does not dispute that the Fall 2012 SPTB relied in part on the rater's statement in

[2] FSGB Case No. 2006-044 (Order of March 14, 2007).

[3] In reaching this result, we make no suggestion as to grievant's likelihood or lack thereof of prevailing on the merits of his other claims, such as the alleged procedural deficiencies in the 2011 and 2012 EER AFI section, or the Spring 2013SPTB's alleged failure to consider his 2013 EER.

grievant's 2012 EER that grievant was given "new responsibilities" during the period covered by the EER, and with "some close supervision" was able to complete them. From this statement, the Fall 2012 SPTB concluded that the EER provides that grievant required "close supervision to ensure tasks are completed properly and on time, when he should be able to work independently."

The EER and SPTB statements, in our view, address two separate and distinct matters. The EER statement refers to a very specific set of situations in which grievant required "some close supervision," that is, in connection with the "new responsibilities" that he was given during the reporting period. The SPTB statement, in contrast, alleging that grievant required "close supervision" does not limit the "close supervision" remark to grievant's new responsibilities. In short, the SPTB comment suggests that based on his EER, grievant required close supervision at all times during the rating period and as to all his responsibilities. Accordingly, we believe that there is a reasonable likelihood that grievant will be able to show that contrary to its Precepts, the SPTB did not base its "close supervision" comment on the record before it.

Contrary to the Department's argument, we also believe that grievant may be able to show on the merits that the sentence in the 2012 EER that follows the "new responsibilities" sentence does not support the SPTB's "close supervision" comment. As previously indicated, this second sentence says that "[a]s a second-post IMS, [grievant] is still mastering some of the various duties and responsibilities which fall under the Information Programs Center." Again, this sentence in our view appears to have an "apples to oranges" kind of connection with the SPTB's "close supervision" comment. Saying that an employee is "still mastering" certain job responsibilities does not necessarily connote that the employee requires close supervision to perform those duties properly.

It may be argued that even if the "close supervision" passage in the Fall 2012 SPTB's counselling statement is stricken, other EER passages and record evidence are sufficient to support the SPTB's comments concerning grievant's alleged performance deficiencies. We believe, however, that it is premature to reach such a conclusion at this point in the case. The Fall 2012 SPTB's reliance on the 2012 EER passage concerning "some close supervision" being needed in connection with his "new responsibilities" was a central feature of its decision to defer its tenure decision, and in turn for the Spring 2013 SPTB to deny grievant tenure. Accordingly, we believe there is a significant likelihood that, if grievant prevails on the merits on his claim concerning the SPTB's reliance on the 2012 EER, this Board may grant relief to grievant on this basis alone. For example, the Board may direct that the disputed passage of the 2012 SPTB's counselling statement be stricken, that a reconstituted SPTB reconsider its tenure decision, and that grievant's LCA be extended while the reconstituted SPTB considers the matter. While we do not intend to indicate that such a result on the merits is certain in this case, it seems a reasonable likelihood. And that likelihood is sufficient at this point in the case to continue IR while the case proceeds to a disposition on the merits.

V. ORDER

Grievant's request for interim relief pending the Board's decision on the merits of his grievance appeal is granted.

For the Foreign Service Grievance Board:

[redacted]

William E. Persina
Presiding Member

[redacted]

Lois E. Hartman
Member

[redacted]

Bernadette M. Allen
Member