

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[REDACTED]

Grievant

Record of Proceedings

FSGB Case No. 2014-010

And

July 21, 2014

Department of State

DECISION

EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

J. Robert Manzanares

William B. Nance

Special Assistant

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Robert E. Polistena

Grievance Analyst, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD: Grievant has failed to show by a preponderance of evidence pursuant to 22 CFR § 905.1 that his 2012 EER documenting his performance while serving as Director of International Narcotics and Law Enforcement at U.S. Consulate General [REDACTED] contained inaccuracies, omissions, errors and falsely prejudicial information that prevented him from being promoted in 2012. The Board finds the grievance without merit and denies it in its entirety.

SUMMARY: The Grievant, an FS-01 consular-coned officer who has been with the Department of State since 1991, appeals the agency's denial of his request for another promotion review by the 2012 or 2013 Senior Threshold Boards to consider promotion into the Senior Foreign Service. Grievant maintains that his 2012 EER, which rated his performance of his tour in Consulate General [REDACTED] where he served as the Director of International Narcotics and Law Enforcement, contained falsely prejudicial language and that a procedural error was committed by [REDACTED] by mandating standardized language in the Special Circumstances Section (Section VI. C) for all posts in [REDACTED]. Grievant argues that the standardized special circumstance language did not accurately reflect the extraordinarily difficult hardship conditions at Consulate General [REDACTED]. Grievant argues that both of these errors were substantial factors in his not being promoted in 2012.

The Board found his 2012 EER to be positive, noting that grievant in fact was recommended for promotion; however, he was not ranked high enough on the list to make the promotion list given the relatively low numbers that were promoted in 2012 both class-wide and by cone.

The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

Grievant claims that his Employee Evaluation Report (DS-5055) for the period of September 15, 2011 through April 15, 2012 (2012 EER) contains inaccuracies, omissions, errors and falsely prejudicial information, which, he claims, prevented him from being promoted in 2012 in spite of having been recommended for promotion by the Senior Threshold Board. Grievant asserts that a sentence in his EER that states, “With time and continued effort, I believe he will merit promotion into the Senior Service,” is a criticism. The rater stated that the intent of the sentence was to remark on the quality of grievant’s work as opposed to the quantity. Grievant finds this sentence objectionable, as there were no examples of low quality work to support the judgment that he claims. He claims also that the sentence is contrary to a statement in the special circumstances section that states that employees worked extremely long hours, seven days a week. Grievant claims further that the “Special Circumstances” language contained in Section VI. C of the Employee Evaluation Report (EER) did not adequately describe the extraordinary hardship circumstances faced in [REDACTED] and that [REDACTED] committed a procedural error by mandating standardized language in the Special Circumstances section of the EER for all posts in [REDACTED]

For relief the grievant asked for the following:

- a. Retroactive promotion to the Senior Foreign Service as if he had been promoted by the 2012 Senior Threshold Board;
- b. Deletion of the sentence containing the allegedly falsely prejudicial comment; and, if the Foreign Service Grievance Board has not seen fit to grant his request for retroactive

promotion, consideration of his corrected file by a reconstituted 2012 Senior Threshold Board (STB); and, if not promoted by a reconstituted 2012 STB, consideration by a 2013 reconstituted STB;

- c. If promoted retroactively, back pay as provided by the Back Pay Act (5 USC § 5596);
- d. If promoted retroactively, that Time in Class rules for the Senior Foreign Service be applied prospectively to his 2013 EER and 2014 EER;
- e. That the FSGB order the Department to identify and offer appropriate remedy to all employees with EERs that contain inaccurate special circumstances language;
- f. That the FSGB recommend that the Department consider issuing guidance addressing how and when it may be appropriate to standardize special circumstances language and reminding rating and reviewing officers of their responsibility to independently assess the accuracy of such language as they prepare an EER.

On January 31, 2014, the agency issued its decision denying grievant's request for relief. On March 31, 2014, he appealed the Department's decision. The Department responded on April 30, and the record of proceedings was closed on June 17, 2014.

II. BACKGROUND

Grievant is an FS-01 consular-coned officer who has been employed with the Department of State since 1991. He is grieving the contents of his 2012 EER, which pertains to his tour of duty as Director of International Narcotics and Law Enforcement (INL) at U.S. Consulate General [REDACTED]

Grievant alleges that his rating officer made a falsely prejudicial statement in his 2012 EER that may limit his career and future promotions. He also alleges that the section of the 2012 EER delineating special circumstances influencing the work program contains inaccuracies, omissions and errors, does not accurately reflect the realities in [REDACTED] and is likely to affect his promotion potential. Specifically, grievant claims that [REDACTED] committed a procedural error by imposing standardized language in the special circumstances section (Section VI. C) of the DS-5055 for all Foreign Service employees serving at the Embassy and the Consulates. Grievant contends that the instructions for the DS-5055 call for rating, reviewing and rated officers to develop the language for the section jointly, as they are in a position to more accurately and realistically reflect the hardship and working conditions of their specific post.

The agency disagrees with the grievant and claims that having standardized language accurately and fairly documented the exceptional hardships faced by [REDACTED] personnel and kept employees from including inaccurate statements to the detriment of others, particularly in an optional portion of the EER.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant alleges that the DS-5055 (EER) at issue in this case contains inaccuracies, omissions, errors and falsely prejudicial information, any of which would be sufficient to prejudice his promotion prospects. He claims the falsely prejudicial information is contained in the last sentence of the second paragraph of Section VIII. A: “With time and continued effort, I believe he will merit promotion into the Senior Service.”¹ Grievant claims that the penultimate sentence of Section VI. C (which states: “Extremely long work hours, frequently seven days per

¹ DS-5055 Employee Evaluation Report, Section VIII. A, second paragraph, last sentence.

week, remain the norm”²) is recognition and verification of the long hours worked at Consulate General [REDACTED] and therefore any implication that his effort was in some way lacking is false. Grievant claims the specific sentence in paragraph VIII. A was meant as a criticism of his effort.

The grievant also alleges that a procedural error occurred when the special circumstances language for Consulate General [REDACTED] employees was established by a September 28, 2011, [REDACTED] Staff Notice titled, “EER Special Circumstances Language.” Grievant claims that Department instructions for preparing form DS-5055 (EER) charge the rater, reviewer and rated employee with completion of Section VI parts A, B, and C.³ He claims that nowhere in the instructions for preparing special circumstances language or in 3 FAM or 3 FAH is mention made of other officials having the authority to dictate language that must be used. He claims the procedural error was magnified because the default language supplied for [REDACTED] supervisors to use was the following:

Consulate General [REDACTED] operates under a constant high security risk. The Consulate is located within what was a [REDACTED] [REDACTED] compound is regularly under rocket [sic] and this is unlikely to change. Attacks against U.S. vehicles and threats against western interests are common. Living conditions are Spartan, with all staff residing in Containerized Housing Units (CHUs) and eating in communal facilities. (As appropriate: Incumbent’s work requires travel outside the wire in heavily armored vehicles and the use of Personal Protective Equipment (PPE) nearly every day.) [REDACTED] is in the hottest part of [REDACTED] with temperatures regularly topping 130 degrees Fahrenheit. Extremely long work hours, frequently seven days per week, remain the norm. [REDACTED] is an unaccompanied post.⁴

² DS-5055 Employee Evaluation Report. Section VI. C, penultimate sentence in paragraph.

³ Tenured Class FS-02, FS-01 and Senior Foreign Service Employee Evaluation Report DS-5055I. Preparation Instructions, Section by Section. Section VI. C: In this section, the rater may describe any special circumstances or conditions that affected accomplishment of the work requirements during the rating period. These might include a wide range of circumstances from the political situation in the host country to problems of staffing the mission/office. Completion of this section, while optional, can provide useful insights.

⁴ [REDACTED] [REDACTED] Staff Notice Number 011-383. Subject: EER “Special Circumstances” Language, dated 9-28-11.

Grievant claims that since the special circumstances language was taken verbatim from the Mission [REDACTED] staff notice it failed to reflect the reality on the ground in [REDACTED] during the chaotic months leading up to and following the [REDACTED] in [REDACTED]. He claims that even the first sentence was inaccurate; it reads: “Consulate [REDACTED] operates under a constant high security risk.” In contrast, grievant contends that the following language he proposed -- “Consulate General [REDACTED] sitting less than 20 miles from [REDACTED] was a critical threat post for the entire rating period” -- is a more accurate description of the risk in [REDACTED].

Grievant further claims the special circumstance language failed to address what happened once [REDACTED] from [REDACTED] in [REDACTED]. Because the U.S. lacked a formal land use agreement, the Consulate compound was sitting in the middle of an [REDACTED] military base, preventing the [REDACTED] army from taking full possession of facilities built by [REDACTED]. Delays in contracting and earlier-than-expected departure of [REDACTED] left the security perimeter of the Consulate compound unfinished, with access controlled by use of armored vehicles in place of gates and stacked containers substituting for guard towers.

Grievant claims that while only one rocket attack occurred after the [REDACTED] [REDACTED], the Consulate General staff’s larger threats were kidnappings, infiltration, suicide bombing and mass attacks, all omitted in the generic language of the [REDACTED] Staff Notice.

Grievant claims that living conditions at Consulate General [REDACTED] needed “considerable improvement” to be able to meet the Webster’s Dictionary definition of “Spartan.” Grievant claims that the essentials were frequently lacking at the consulate. Grievant alleges that water was often in critically short supply and that food was an issue, with the dining facility short-staffed and only a single serving line open to serve 1500 people, leaving employees waiting in

line for an hour to get served a hot dog and rice. Grievant claims many employees chose to eat military-provided packaged meals (MREs) rather than wait in line.

Grievant also claims that using the military euphemism -- "Containerized Housing Units" (CHUs) -- instead of plain language to describe Consulate General [REDACTED] housing obscured the fact that [REDACTED] housing consisted of shared, reconditioned trailers.

Grievant also claims that using another euphemism, "Personal Protective Equipment," did not provide the clarity required to accurately depict the situation when employees were required to wear heavy body armor.

Additionally, grievant claims the use of "anodyne" language to describe the hardship of working in [REDACTED] high temperatures does not provide the proper context of the extreme hardship of working in daily 110 degrees Fahrenheit with periodic highs of 120 degrees, all while working with protective gear. Finally, grievant states that the special circumstances language understates the isolation experienced at [REDACTED] with sandstorms, radio interference, and interrupted internet and phone service making it difficult to contact family members.

B. THE AGENCY

The agency maintains that grievant's claims are without merit and should be denied.

The agency contends that EERs, as a general matter, must meet reasonable standards; perfection is not required. It further states, "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. 1993-015 (December 23, 1993) and FSGB Case No. 1999-048 (January 11, 2001)." In

the instant case the agency claims that grievant's 2012 EER provides a "fair, accurate and balanced assessment" of his performance.

Alleged Falsely Prejudicial Statement

Regarding the rating officer's statement in Section VIII. A of grievant's 2012 EER, "With time and continued effort, I believe he will merit promotion into the Senior Service," the agency maintains it is not a criticism of his performance but rather simply represents the rating officer's perception of grievant's promotion potential and as such cannot be considered "falsely prejudicial." The agency claims that grievant, citing the disputed special circumstances language in Section VI. C and claiming he often worked seven days a week as a counterpoint to the rating officer's statement, does not imply that the rating officer found his performance lacking. The agency believes the rating officer's statement that her comment was intended to evaluate the "quality of his work" as opposed to "quantity." The rating officer stated the phrase "continued effort" clearly indicated that she found the grievant was putting forth effort and simply desired that he continue to put forth effort for an additional time period prior to recommending him for promotion into the Senior Foreign Service. Thus, the Agency claims that the rating officer was properly exercising her judgment in assessing his demonstrated potential for promotion into the Senior Foreign Service.

Special Circumstances Language

The agency maintains that the instructions for Section VI. C, Special Circumstances, clearly places the responsibility for completion with the rating officer, and notes that the section is optional. The purpose of the section is not to exhaustively document the conditions at post, but to provide useful insights into the circumstances or conditions that affected the

accomplishment of the work requirements during the rating period. The agency claims that having standardized language accurately and fairly documented the exceptional hardships faced by [REDACTED] personnel and kept employees from including inaccurate statements to the detriment of others, particularly in an optional portion of the EER. The agency asserts the language is factual and conveys the hardship and danger faced at post. They believe that the statement, as written, accurately reflected the living and working conditions in [REDACTED] and grievant's objection to some of the words chosen underscores, in the Agency's view, the importance and rationale behind having standardized language.

Furthermore the agency states, even if the requested changes were made to Section VI. C, Special Circumstances, of the grievant's 2012 EER, that should not influence a Selection Board. Special Circumstances as set forth in Section VI. C of the EER form are not directly related to the precepts considered by the Senior Threshold Board for promotion into the Senior Foreign Service. It is provided solely to convey insight into circumstances that might have affected the accomplishment of work requirements during the rating period.

Finally, the agency contends, in the instant case, there is no evidence to warrant granting another promotion review for the grievant either by the 2012 or 2013 Senior Threshold Boards (STB). Based on a review of the grievant's record in conjunction with the 2012 Foreign Service Promotion Statistics, the agency contends there is no reason to believe the outcome of the grievant's record would differ from his original review by the 2012 and 2013 STBs. Grievant was recommended for class-wide promotion by the 2012 STB, but was ranked 126 out of the 136 officers recommended. Promotion into the Senior Foreign service is very competitive, the agency professes, and only 28 officers were promoted class-wide in 2012. Grievant was mid-ranked in his cone in 2012. In 2013 he was not recommended for promotion. It is not plausible,

the agency contends, that even if his EERs were amended to his liking, he would have been promoted into the Senior Foreign Service.

IV. DISCUSSION AND FINDINGS

In all grievances, other than those involving discipline, the grievant bears the burden of proof in establishing, by a preponderance of the evidence, that his grievance is meritorious.⁵ After carefully reviewing the ROP in this appeal the Board concludes that the grievant has not established that his 2012 EER contained inaccuracies, omissions, errors and falsely prejudicial information that prevented him from being promoted in 2012.

The core of this appeal rests on grievant's claim that his 2012 EER contained one sentence by the rating officer that was falsely prejudicial and that in grievant's view the statement amounted to unfair criticism. The troublesome sentence for the grievant is the rating officer's statement (Section VIII. A), "With time and continued effort, I believe he will merit promotion into the Senior Service." The grievant claims that this sentence is inconsistent with language in the Special Circumstances Section (VI. C), where it is noted that employees frequently worked long hours seven days a week. The rating officer claims it was not intended as criticism and that she was commenting on the quality of his work, not on the quantity. The Board finds that the above-referenced comment in and of itself is not criticism. In the context of a positive, well balanced EER, her language does not stand out as a negative. In the Board's view, the rating officer exercised her prerogative and gave an honest assessment of the grievant's potential. She stated that he merited promotion to the Senior Service. Perhaps she could have stated "promote him now" or "promote him this rating cycle," but nothing would have guaranteed the promotion of the grievant in 2012. Also, the reviewing officer recommended he

⁵ 22 CFR § 905.1 (a).

be promoted as recognition for his “exemplary performance in difficult circumstances.” The Board concludes that the preponderance of evidence demonstrates that both rating and reviewing officers viewed grievant’s performance as positive.

The record demonstrates that grievant did make the overall list of those recommended for promotion, which is an indicator that the 2012 STB saw his 2012 EER as documentation of a strong positive performance for that rating cycle. The 2012 STB recommended him for class-wide promotion, but he was ranked 126 out of the 136 officers recommended. The STB would not have known how many promotion opportunities would be available either class-wide or by cone, but their review of his 2012 EER shows that they viewed it as a positive EER that merited placing the grievant on the list of officers recommended for promotion. Due to limited promotion opportunities into the Senior Foreign Service, he just did not make the cut.

With regard to the Special Circumstance language, the Board agrees that with so many Foreign Service Officers serving in [REDACTED] it was not unreasonable for [REDACTED] to develop standard language that would be consistent and fair for all employees serving in [REDACTED]. Conceivably, officers in the same section could claim differing degrees of hardship, based on differing personal perceptions of what constitutes hardship. Clearly that is what grievant is arguing with regard to his situation. The Board finds no error with [REDACTED] taking the initiative in developing language that rating officers could use to describe special circumstances at their individual posts.

The Board also notes that the language was not as ironclad as grievant claims. [REDACTED] language included an option of allowing employees, with the consent of the rating officer, to include the frequency with which employees had to work outside the wire, which presumably would be an extra hazard for those employees. After consultation with his rating officer grievant

included this sentence to document the additional danger he faced that presumably other employees did not as a factor of not having to leave the security of the compound.

Grievant claims the [REDACTED] committed a procedural error in his EER by unilaterally developing standardized Special Circumstances language. He claims that the instructions to the DS-5055 mandate that the language be developed by the rating, reviewing and rated officers. The Board disagrees. The instructions are clear that the responsibility for development of the language is the rating officer's. And it is an option solely provided to offer insight into circumstances that might have affected the accomplishment of the employee's work requirements. In our view, the rating officer was not required to have the employee's consent, but in the instant case there is evidence that the rating officer and the grievant discussed and negotiated language to include recognition of the grievant working outside the wire. The Board also notes that the grievant had an opportunity to comment about the situation in his EER (Section X) Optional Statement by Rated Employee, and he chose not to exercise this option.

Grievant also requests that the Board order the Department to identify and offer appropriate remedy to employees who have standardized special circumstance language; and that the Board recommend to the Department when it is appropriate to standardize special circumstances. The Board has previously stated in FSGB Case No. 2011-010 (Order dated June 16, 2011) and FSGB Case No. 2001-026 (December 5, 2001) that it has no jurisdiction over matters that deal with management practices, policy concerns or other systemic matters, as opposed to allegations of specific harm to the individual grievant. This Board finds no reason in this record to deviate from previous findings in the instant case.

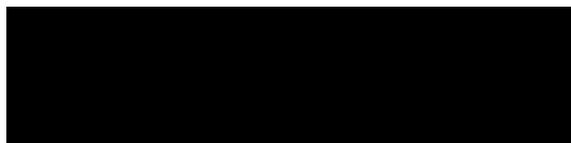
V. DECISION

Grievant has failed to show by a preponderance of evidence that his 2012 EER documenting his performance while serving as Director of International Narcotics and Law Enforcement at U.S Consulate General [REDACTED] contained inaccuracies, omissions, errors and falsely prejudicial information that prevented him from being promoted in 2012. The Board finds the appeal without merit and denies it in its entirety.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



J. Robert Manzanares
Member



William B. Nance
Member