

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

And

Department of State

Record of Proceedings

FSGB Case No. 2014-029

June 11, 2015

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

Gregory Loose
Nancy M. Serpa

Special Assistant

Joseph Pastic

Representative for the Grievant:

Neera Parikh, AFSA

Representative for the Department:

Melinda Chandler, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD: Grievant, has failed to show by a preponderance of evidence pursuant to 22 C.F.R. §905.1 that her 2013 Amended EER documenting her performance while serving as Principal Officer/Consul in [REDACTED] contained inaccuracies, omissions, errors, or falsely prejudicial information to such an extent that it must be expunged in its entirety. The appeal is denied in part and granted in part, but only for a remand with instructions to delete one phrase in the Amended EER. No other relief is granted.

CASE SUMMARY: Grievant, Senior Foreign Service Officer, class of Counselor (FE-OC), appeals the agency's denial of grievant's demand for total expungement of her 2013 Amended EER and the substitution of a gap memo. Grievant maintains that the Amended EER, the product of a demand for relief in the original grievance, remains falsely prejudicial in several respects. Grievant asserts that the criticism for soliciting a birthday gift of positive statements about her from her subordinates was falsely prejudicial, because such statements do not meet the FAM definition of a prohibited gift. Grievant also challenged as "falsely prejudicial" the rater's criticism of grievant for using a disparaging term in an email to the rater concerning the staff. In that email, grievant had remarked that certain employees at post had mishandled a certain matter and needed to "grow a pair."

The Board found that the rater's criticism regarding the email was not falsely prejudicial, but that the specific word "gift" should be deleted from the Amended EER to preclude any prejudicial effect as a document concerning grievant's behavior. Likewise, since the solicitation of a "gift" was deemed by the rater to demonstrate a failure to "set the standard of integrity," the Board also ordered the Department to delete this phrase from the Amended EER. The Board found that the rater legitimately criticized grievant for soliciting any positive statements by her direct reports, as it gave the appearance of pressuring subordinates even though the statements did not technically constitute a prohibited gift.

The grievance appeal was granted in part and denied in part.

DECISION

I. THE GRIEVANCE

Grievant is a Senior Foreign Service Officer, class of Counselor (FE-OC). She appeals the Department's partial denial of her grievance in which she seeks the following relief: expunction from her Official Performance File (OPF) of her 2013 Amended Employee Evaluation Report (EER); extension of her time-in-class by one year; and a reconstituted 2014 SB to consider her file, if in fact she was low-ranked by the 2014 Promotion Board based upon her 2013 Amended EER.

II. BACKGROUND

Grievant joined the Foreign Service in 1987 as a Political Officer, and has had tours both overseas and in Washington. She has served in a variety of increasingly senior positions, including Deputy Chief of Mission (DCM)/Charge d'affaires in [REDACTED] Principal Officer in [REDACTED] and Special Advisor to the Assistant Secretary in the [REDACTED] Bureau in Washington. The recipient of a number of awards throughout her career, she was also recommended for Performance Pay while serving as Principal Officer/Consul General in [REDACTED]. Grievant describes herself alternatively as "autistic" and a person who suffers from a disability known as Asperger's Syndrome (a condition on what is known as the autism "spectrum").

Grievant arrived in [REDACTED] in 2011, where her rating officer was the DCM in [REDACTED]. The disputed EER covers grievant's second rating period as Principal Officer in [REDACTED] the period from April 16, 2012 to April 15, 2013.

Grievant disputes the EER because she claims it is inaccurate, unbalanced, falsely prejudicial, and minimized or omitted material accomplishments.

The contested statements concern two incidents, the basic facts of which are not in dispute and are summarized below. One incident involved grievant's solicitation of favorable statements about herself from subordinates. The other incident arose from a remark grievant made to her rater, expressing grievant's views of her own colleagues and using language that the rater deemed inappropriate.

The Solicitation of Statements from Subordinates. The first incident arose when grievant asked her locally-engaged (LE) assistant to gather from other LE staff written statements in which staff would describe what they liked about grievant, or how they viewed her as a boss. On December 15, 2012, grievant sent an email to her LE assistant asking that "each employee who is able or wants to do so" submit something written stating "if they liked working for me or something they liked about me as a boss." Grievant asked her assistant (██████) to compile such favorable comments for presentation to the grievant at the time of grievant's upcoming birthday. In this email, grievant characterized the employee statements as "a *gift* I can keep with me always."¹

When the DCM learned of grievant's actions, she accused grievant of soliciting a gift from subordinates. The DCM issued a Letter of Admonishment to grievant, citing the email of December 15, 2012 to ██████ asking for a "gift" from subordinates on the occasion of grievant's birthday.² In the Letter of Admonishment, the DCM instructed grievant to rescind that request. In an email of January 14, 2013, the DCM transmitted to grievant a copy of the Letter of Admonishment, directing grievant to comply with the instructions in the Letter, and to sign the Letter and return it to her. Grievant responded

¹ Email to ██████ from grievant, December 15, 2012 (emphasis added). A copy of this email is in the record of this appeal as Attachment 4 to grievant's Supplemental Submission.

² A copy of the Letter of Admonishment is in the record as an attachment to the agency's Response.

with a refusal to implement the instructions. She sent a reply email, complaining that the rater had failed to specify the nature of the “gift” and asserting that the rater was interfering with grievant’s right to grieve. She also stated that the rater was either retaliating against her for seeking an unnamed “reasonable accommodation” of her Asperger’s condition or was retaliating against her for grievant’s response to a pre-EER counseling session. In addition, grievant asserted that she was awaiting advice from her lawyer before responding further. The rater sent another email on the same day, repeating the directive to rescind the request to the subordinates and reiterating the following:

██████ the fact that you asked for a gift is not in dispute. You made a clear request in your email of December 15 that your subordinates give you a birthday gift.

With this email, I am instructing you to follow the instructions in the letter of admonishment.³

Subsequent to the rater’s reply, grievant failed to respond any further, and never complied with the directive.

Where the EER is concerned, grievant’s refusal to rescind the solicitation was cited by the rater in two places in the amended EER.⁴ One, on page four in the section on “Interpersonal Skills,” the rater states, “██████ refused to follow my instructions on rescinding her solicitation of a gift of positive statements from her direct reports and in doing so, did not set the standard for integrity.”⁵ Two, in the AFI section, the rater

³ This email exchange is in the record of this appeal, as Attachments 13 and 14 to grievant’s Supplemental Submission.

⁴ A copy of the original EER is in the record as Attachment “A” to grievant’s initial Appeal Submission. A copy of the Amended EER is in the record as Attachment “A” to the agency’s Response to Grievant’s Supplemental Submission (hereinafter “Response”).

⁵ In context, we interpret the term “direct reports” to denote grievant’s subordinates at post.

specified that the competency needing improvement was “Interpersonal Skills.”

Specifically, the rater elaborated:

Professional Standards: On January 14, 2013, I gave [REDACTED] written instructions to rescind her solicitation of a gift of positive statements from her direct reports. She refused my instructions, so I repeated them to her. She compounded her poor judgment with failure to follow my instructions, which are reasonable and appropriate to her action. I expect an officer of her rank and experience to follow instructions from her supervisor.

Grievant’s Remarks About Colleagues. The second incident concerns an email grievant sent to the DCM in preparation for a visit by the Secretary of State of [REDACTED]. Locally-engaged [REDACTED] staff would be coming to [REDACTED] to support the visit. The scarcity of hotel rooms or accommodations for them became a pressing issue. In an email of August 6, 2012, to the DCM, grievant expressed her frustration that [REDACTED] American management staff, the Management Officer, and the General Services Officer (GSO), were not doing enough to secure such accommodations. Grievant wrote, in pertinent part:

For months and even during the current pre-advance, I have been trying to get the [REDACTED] people to focus on finding hotel space or working with the [REDACTED] government to find hotel space for the support staff. They refused to do so. Instead, they are living under the fantasy that they will be able to force the USG, with less than a month to go, to accredit FSNs as members of the US delegation and they will be able to stay with other members of the US delegation on [REDACTED].

Both you and I know that the USG is not going to accredit FSNs. If you are not accredited, you are not going to sleep on [REDACTED]. Even if they want to continue to entertain this fantasy, check out hotels as a plan B. However, MGT says they have a plan B – staying in the Consulate’s non-existent TDY housing (LOL), bunking with Consulate officers (NO!), or sleeping through the night at the Consulate (H\$*# to the No!).

One problem is that when the American officers broach the subject with FSNs, the FSNs refuse to look at hotel options, because the FSNs want to be accredited. GSO needs to grow a pair.⁶

In the EER, the rater in effect criticized grievant's use of the term "GSO needs to grow a pair." Alluding to her attempt to counsel grievant concerning this email, the rater stated in the section on "Intellectual Skills,"

██████ was not open to my constructive comments on contributing to a climate of respect within the Mission and thereby did not accept responsibility for herself in this regard. In an email to me, she referred in disparaging terms to Embassy colleagues. When I asked that she exercise greater respect in her communications, she asserted that her language was not disrespectful because the email had been sent to me only and her Embassy colleagues were unaware of her language.

After several attempts to amend the wording of the EER, grievant and her supervisor were unable to reach a mutually satisfactory agreement on the wording. Grievant was low-ranked by the 2013 Selection Board, largely on the basis of the disputed EER.

Pursuit of Relief from the EER. Grievant filed her agency-level grievance on July 22, 2013, seeking expunction from her OPF of that entire EER, and she supplemented it with filings on August 13, 2013, and November 5, 2013. In its decision dated July 8, 2014, the Department agreed to modify the reference to a "gift," and to reverse grievant's low ranking by the 2013 Selection Board. The agency agreed to amend the results of the promotion board to reflect that grievant had been "mid-ranked."

The modification of the EER was effectuated in the following way. The agency issued an Amended EER. In the section on "Interpersonal Skills," the phrase "solicitation of a gift" was replaced with the phrase, "solicitation of a gift of positive statements from her direct reports." Likewise, in the AFI section, the phrase "solicitation

⁶ This email is reproduced as part of Attachment 15 to grievant's Supplemental Submission.

of a gift” was replaced with the phrase “solicitation of a gift of positive statements from her direct reports.”

Dissatisfied with the Amended EER, grievant appealed the Department’s decision to this Board on August 21, 2014. She filed a Supplemental Submission on September 22, 2014, to which the Department responded on October 22, 2014. Grievant then filed a rebuttal on November 5, 2014, and the Record of Proceedings was closed on November 13, 2014.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant contends that her Amended EER for the period of April 16, 2012 to April 15, 2013, still contains falsely prejudicial and inaccurate information, and that it still reflects numerous material omissions of her professional accomplishments.

As presented to the Board, the various claims and arguments of the grievant appear in multiple places in her filings and are intermixed with each other. Thus, for ease of reference, we separate grievant’s arguments into two distinct categories: (1) allegedly falsely prejudicial and inaccurate statements in the EER and (2) the lack of balance and omission of material accomplishments in the EER. Here, we summarize the essence of those arguments, citing further details in our discussion of the issues. To be clear, wherever we henceforth use the term “EER,” we refer to the Amended EER.

Falsely Prejudicial Statements in the EER. Grievant essentially contends that the Amended EER does not reflect an effective remedy. She points out that the statements she desired to receive from her staff did not meet the definition of a “gift” in the agency

regulations and, therefore, the continued use of that terminology in the newly-inserted language leaves the same prejudicial impression.

Grievant relies on the following definition of a “gift” in the pertinent regulation governing this agency:

Anything with an ascertainable market value for which the recipient does not pay market value including donations of cash, goods, services, and real property.

2 FAM 961.4.

In addition, grievant argues that her request to her staff did not violate the broad prohibition (applicable to all federal employees) against directly or indirectly receiving a gift from an employee receiving less pay than himself or herself. *See* 5 C.F.R.

§2635.302(b). In this regard, the regulations of the Office of Government Ethics define a “gift” as follows:

Gift includes any gratuity favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value . . . It does not include: . . . Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation.

5 C.F.R. §2635.203(b) (italics in original).

As an alternative theory of why she is entitled to expungement, grievant complains that she was entitled to ask for letters of “support” for an anticipated grievance relating to her quest for reasonable accommodation for her autism issues. She points to the regulations that bar retaliation against an employee for engaging in a grievance and exercising his or her right to marshal witness statements in support of a grievance. *See* 3 FAM 4424; 3 FAM 4426.3. Here, grievant alludes to her accusations about the rater,

made to an EEO counselor in December of 2012, but not yet in the form of a formal grievance as of the time the EER was issued.

Grievant contends that the only way to repair the damage created by the continued, inaccurate use of the term “gift” is to expunge the EER entirely and to replace it with a gap memorandum.

As a second reason for demanding expungement, grievant focuses on the rater’s statement concerning grievant’s refusal to heed the rater’s advice to her. Such advice was conveyed to grievant during their counseling session of December 2012. Grievant states, in pertinent part:

I did not make a disparaging remark directed *towards* a colleague as my rater inaccurately stated in my evaluation. . . .The email was sent only to [the rater] and never shared or conveyed to the [REDACTED] colleagues. . . . I must reiterate that this was one, lone email for which I was negatively and unfairly criticized for in my EER. I maintain that my rater’s comment about my alleged disparaging remarks about colleagues is wholly inaccurate and must be expunged from the evaluation.

Supplemental Submission at 7 (emphasis added).

Grievant further emphasizes that the rater had said nothing to her about this email until the counseling session of December 2012 and, even at that time, the rater did not provide her with any “examples . . . of alleged disparaging comments or of a lack of climate of respect. . . .” *Id.* Finally, grievant adds, “There are no counseling statements that mention specific examples of me not exercising respect in my communications subsequent to that date (or prior).” [alluding to the August 2012 email]. Supplemental Submission at 8. In short, grievant believes that the email reflected a *de minimus* episode that was unfairly included in the EER.

Lack of Balance and Omission of Material Accomplishments in the EER. In her Supplemental Submission, grievant gave no details concerning this allegation, except to note that her original grievance contained an assertion that the EER “was not balanced, minimized, or omitted accomplishments” Supplemental Submission at 2. However, grievant did make more specific contentions in her Rebuttal, after the agency, in its Response, highlighted the lack of particulars. Referring to attachments to the Rebuttal, Grievant states:

I continue to maintain that the 2013 EER was not balanced. Attachment 1 is of [*sic*] the list of my activities and accomplishments from April 16, 2012 to April 15, 2013. It includes more than 200 different meetings with local and provincial officials, press or outreach events, representation and travel, as well as meetings with American businesses and advocacy. [The rater] was aware of all these events as I reported them to her in weekly phone calls, reported them in cables, posted information about them on our Facebook page and on my official blog, as well as tweeted them. They are recorded and preserved forever on the Internet. In addition, I continue to have on my personal camera the pictures that I tweeted as well as hundreds and hundreds more from my official visits and events from that time period. Attachments 2-14 show a small sampling of those pictures as well as some published in the press. The tremendous amount of work that I did during that rating period is not fairly reflected in the 2013 EER.

Rebuttal at 1.

THE DEPARTMENT

Where the agency is concerned, we also summarize its position as to both categories of allegations in the appeal.

Falsely Prejudicial Statements in the EER. With respect to the original EER, the Department points out that it provided relief to grievant by issuing the previously-described Amended EER that modified the reference to a gift. The modification essentially gave a description of exactly what type of gift was involved, to clarify that the

gift did not consist of what is technically prohibited (*i.e.* that it was not something of monetary value). In its Response to grievant's Supplemental Submission, the agency points out that it "found that the 2013 EER contained items which had the potential to be falsely prejudicial. Therefore, the grievance was granted in part and denied in part."

Response at 2.

The agency defends its choice of the new wording, contending that the statements from subordinates were specifically solicited as a birthday gift, in the commonly used sense of that word. In short, the agency contends that it has already solved the problem of the reference to a "gift."

Second, as to the problematic email containing the phrase "grow a pair," the agency argues that this phrase was objectively disparaging. It refers to undeveloped or missing male sex organs, implying that the [REDACTED] management staff was lacking in that regard. The Department points out, "Referring to a colleague as immature in an emasculating manner can obviously be considered disparaging." Response at 8 (ROP 005, page 116). Furthermore, the agency identifies several reasons why the grievant has mis-characterized what the rater actually said in her criticism and that she misunderstands the nature of her inappropriate comment.

One, the rater did not accuse grievant of saying anything disparaging "directed towards" a colleague. Rather, the rater explicitly pinpointed "an email *to me*" (Emphasis added).

Two, the agency contends that grievant erroneously claims that she did nothing untoward simply because her colleagues were not recipients of the email. In the

Department's view, the fact that the email was transmitted only to the rater is irrelevant to the character of its text. Moreover, the Department states:

The request that she [grievant] exercise great respect in her communications is an example of constructive comments on contributing to a climate of respect within the Mission. Her continuing failure to acknowledge the inappropriateness of the statement, or agree not to make such a statement again, constitutes a failure to heed her supervisor's advice.

Response at 8.

Since grievant does not deny that she refused to admit that she had used disparaging language in complaining about her colleagues, the Department argues that the rater was entitled to criticize grievant for openly rebuffing the rater's advice. Thus, according to the Department, this is why this passage in the EER is neither a singular falsehood nor falsely prejudicial.

Lack of Balance and Omission of Material Accomplishments in the EER. On the whole, the agency urges the Board to reject the broad complaint about "lack of balance," because it is conclusory, lacking meaningful specifics, and because the assessment did include positive comments and numerous examples of grievant's accomplishments.

IV. DISCUSSION AND FINDINGS

Because this appeal does not concern a proposed disciplinary action, grievant bears "the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious." 22 C.F.R. §905.1. Based upon the following analysis of the record and applicable legal principles, the Board concludes that the grievant has met her burden of proof as to one issue, but not all issues. Sifting through the details, the Board ultimately concludes that there is insufficient reason to discard the entire EER, but good reason to

remand the case with instructions to further modify certain language in the Amended EER. We set forth below our findings.⁷

Falsely Prejudicial Statements in the EER. For the sake of clarity, the Board will state its findings separately as to the references to soliciting a “gift” and the rater’s comments regarding grievant’s problematic email concerning colleagues.

References to Soliciting a Gift. Grievant’s focus on the technical definition of a prohibited “gift” raises a very close question. This appeal (as with the underlying grievance) does not challenge the issuance of a Letter of Admonishment itself. Grievant was not suspended for soliciting a gift, or punished in any way. Yet, grievant complains about the use of that term claiming it reflects negatively on her. In particular, the rater observed in the AFI section that grievant refused to follow the rater’s instructions in a Letter of Admonishment, concerning something that was labeled a “gift.”

The Board has no doubt that the collection of positive comments about grievant does not technically constitute a “gift” as defined in the FAM. We are persuaded that the FAM definition of “gift” does not cover intangible social benefits of a “memory book” or birthday wishes reduced to writing. In the Letter of Admonishment, the rater did not cite any specific provision of the FAM or any other authority, but only made the generic observation that the Department “prohibits supervisors from soliciting a gift from Subordinates.” The use of the word did not mis-state the commonly understood meaning of “gift,” because even the grievant referred to those statements as a “gift” that she could keep with her “always.” She clearly knew that she was soliciting some type of gratuity

⁷ Throughout her Supplemental Submission and Rebuttal, grievant has included contentions that go far beyond the EER, which is the jurisdictional basis for the appeal to the Board. Consequently, we do not attempt to render any opinion or decisions on those subjects herein. Likewise, we do not mention any photograph or attachment that is not helpful, relevant, or critical to the decision herein.

from her subordinates, even though it had no monetary value. Nonetheless, the Board concludes that the use of the word “gift” (while not false in a literal sense) conveys a false impression that grievant violated the FAM, is prejudicial or is likely to have a prejudicial effect if not corrected. For example, members of a future Selection Board might presume that the term “gift” refers to a type of gratuity that is actionable as a disciplinary matter. For these narrow reasons, then, the Board concludes that grievant has met her burden of proving entitlement to a limited form of relief, but not to expungement of the entire EER.

The Board has discretion to fashion relief that fits the particular problem. The Board finds that the agency’s issuance of an Amended EER is insufficient to remedy the problem because it leaves in place the term “gift.” Yet, there is no reason to jettison the entire EER, based on the use of the term “gift.” Two modifications will resolve the prejudice issue. First, the reference to “gift” can be deleted easily, without disturbing the remaining statements of the rater, the reviewer, and the grievant. Thus, the Board will remand this case to the agency with instructions to delete the phrase “gift of” in every place in which the EER contains the phrase, “gift of positive statements from her direct reports.” Second, the reference to grievant’s failure to “set the standard for integrity” is inextricably linked to the term “gift.” Citing an officer’s lack of “integrity” is a very strong criticism that could be prejudicial when not based upon a violation of the FAM or some other discrete policy or standard of behavior. We discern a palpable link between the term “gift” and the reference to a lack of “integrity. Looking at the entire context in which the rater highlighted the “gift” episode and chastised grievant for a lapse of “integrity” in the EER, we are convinced that the reference to integrity denotes a breach

of some standard that the rater treated as a violation of the FAM, when in fact no violation of the FAM occurred. While the Board readily recognizes that soliciting proverbial fan letters from staff is inappropriate, we are obliged to provide complete relief for the rater's reversible error. When ordering relief on remand, the Board must fashion the relief that most clearly remedies the entire problem, not merely part of it. For this reason, the Board also will order the agency to delete the phrase "and in doing so, did not set the standard for integrity." The sentence in which it appears should end with the phrase "her direct reports."

The Board concludes that grievant's other arguments are not enough to satisfy her burden of proving that the entire EER, including the AFI section, should be expunged. We summarize below the various elements that underlie the Board's conclusion.

First, the statement in the AFI was not falsely prejudicial. It was not factually false at all. It is clear that grievant does not deny refusing to follow the rater's directive to rescind her request for positive comments. Grievant's swift, dismissive rejection of the rater's instructions was certainly worthy of being labeled an "area for improvement." The improvement needed was to be respectful of ethical issues and the need to remedy what might be viewed as pressuring subordinates.

Second, the AFI comment was an important and valid observation of how an officer of high rank should be more self-aware and respectful of authority. The rater properly observed that grievant was an officer at too high a "rank and experience" level to brush off instructions from her own supervisor. It was not objectively prejudicial to note this disrespectful attitude by a Foreign Service Officer who is herself a supervisor of others.

Third, it is not “prejudicial” to be specific in warning an employee about a clear failure to follow instructions. Pressuring, or even asking, subordinates to produce personal favors for a Principal Officer who is their supervisor (or appearing to do such) is certainly not “promoting the efficiency of the Service.” Thus, it is not prejudicial to warn an employee about appearances of impropriety or pressuring others – even if the employee in question did not intend such. A mere warning or admonishment is not the same as an accusation that the impropriety actually occurred or that it was specifically intended. Thus, when an officer openly and flatly defies a written instruction from his/her supervisor, this signals an unjustifiable lack of respect for a simple warning.

Finally, we are not persuaded by grievant’s contention that soliciting a “birthday” collection of positive statements was actually an effort to gather “letters of support” advised by her lawyer. Grievant alludes to an accusation that she communicated to an EEO counselor on December 13, 2012.⁸ The rater’s alleged bias was the subject of her communication. She implies that her lawyer had advised her to gather “support” for a “grievance.” However, no actual grievance was pending at the time she was soliciting statements for her birthday. There is no evidence of record that the lawyer knew exactly how grievant would go about gathering support for a grievance or that she told the lawyer anything about the birthday statements.

Whether or not an EEO complaint was pending at the time of the EER, the Board finds that grievant’s own evidence debunks her characterization of the staff comments as

⁸ A copy of the counselor’s report is in the record as Attachment 19 to grievant’s Supplemental Submission. Grievant generally claimed to the counselor that the rater had been dismissive of her autism condition and had declined to provide unnamed “reasonable accommodation” for that condition. The report indicates that the counselor advised grievant on March 1, 2013 of the right to file a “Formal Complaint of Discrimination,” but nothing in the record herein suggests that any such process had been initiated as of the time the EER was issued.

“letters of support” of an EEO-type grievance. The following elements lead us to this conclusion.

First, grievant never informed her subordinates that she was planning to initiate a grievance or EEO complaint and never gave them any information concerning her autism. Thus, whatever they wrote could not have been directed to any issue relevant to the rater’s alleged denial of reasonable accommodation for grievant’s autism. Grievant claims that she did not reveal her true intentions of how she wanted to use these statements because she did not want to expose personal issues to her staff. This does not matter, because her private thoughts do not change the nature of what her staff was asked to do. Accordingly, grievant displays no insight into how her solicitation of “birthday” letters could be interpreted as pressuring the staff inappropriately.

Second, grievant has included with her Supplemental Submission a revealing example of one of the so-called “letters of support” collected by ██████ for grievant’s birthday. It is signed by a driver and secretary/protocol assistant, dated January 11, 2013. It reads as follows:

██████ Here [*sic*] is wishing you good luck, success and prosperity today and always. A very Happy Birthday to you!

As your subordinates, we are thankful to you for understanding problems and concerns of working parents of little kids! We appreciate it!

Thank you for opportunities to attend our professional training courses. Those trainings were extremely helpful for us in our every day [*sic*] work at the Consulate and we continue to use those obtained skills and knowledge daily for the benefit of the Consulate!⁹

The text of this note does not remotely constitute a letter to support a complaint about the reasonable accommodation issue. At best, it is a somewhat obsequious letter of

⁹ This letter is reproduced as Attachment 11 of grievant’s Supplemental Submission.

thanks that facially has no connection to grievant's personal condition or relationship with her supervisor.

Finally, as described by [REDACTED] grievant's original plan was to have employees write positive messages about her in a "guest book." This was totally at odds with collecting letters in support of a grievance related to an EEO allegation. We draw this conclusion because [REDACTED] sent an email to grievant on January 28 2013, saying in part:

An idea to arrange it as a Memory Book came to me in January since *you mentioned about a guest book which we use at the CGR during our receptions* as memory [sic] about events. It was my idea to insert these letters in the Memory Book and decorate it with post cards about [REDACTED] info on the Consulate history, articles from the local newspapers re your interviews and trips in the [REDACTED], [REDACTED] summit in 2012, some photos. I thought this scrap book could always remind you about your staying in [REDACTED] and you can always keep it with you.¹⁰

Grievant also provided in her Supplemental Submission two photographs of the "memory book" that [REDACTED] assembled, in lieu of an ordinary "guest book" grievant had envisioned. Those photographs do illustrate what [REDACTED] described. We readily conclude that a travel log or "memory book" of social toasts is not material that a lawyer would prescribe as evidentiary support for a grievance of an EEO matter. Grievant has never suggested that she showed this "memory book" to her lawyer or that she has ever actually used it to support any grievance or complaint. Thus, we find that grievant's characterization of the subordinates' writings as "letters of support" to be self-serving and not credible.

The Problematic Email Concerning Colleagues. The Board concludes that grievant has not satisfied her burden of proving that the rater's criticism was falsely prejudicial, when the rater chastised grievant for her remark that the [REDACTED]

¹⁰ This email is in the record as Attachment 4 to grievant's Supplemental Submission (emphasis added).

management staff should “grow a pair.” The rater’s overall assessment of this remark was reasonable, not reliant on anything that was factually false. For several reasons, we cannot accept grievant’s contention that this key phrase was not “disparaging.” We are also not persuaded by grievant’s contention that the rater failed to identify any “lack of climate of respect” at grievant’s post. Grievant is not entitled to any relief as to this portion of the EER. We find the following considerations to be pivotal.

First, we conclude that the phrase “grow a pair” is commonly understood to be a crude reference to the lack of masculine sex organs, a snide way of verbally emasculating certain employees. Without question this phrase is disparaging, whether characterized by that word or another adjective, such as “denigrating.” The word “disparaging” is used so broadly that any professional person such as a Foreign Service Officer should know what it signals and not try to assert that it does not have its commonly understood meaning.

Second, we do not accept as accurate or convincing grievant’s evidence concerning this word. Grievant attached to her Supplemental Submission, an essay by a college English professor, entitled, “To Grow A Pair.” The essay bears no date, and it is not clear whether it was composed purely for purposes of this litigation. In any event, grievant relies on the professor’s analysis of the phrase in dispute. Grievant argues in pertinent part,

I consulted a linguist . . . , a published expert on American slang and modern idioms, on whether the phrase is disparaging. Dr. . . . does not share [the rater’s] non-expert view on the matter . . . His view is that the saying is not disparaging, because it is just an expression, and it is slang.

Supplemental Submission at 7 n. 1 (underlining in original).

Upon reviewing the entire “expert” essay, however, the Board found that its actual text does not support grievant’s interpretation of it. The professor never wrote or opined that the phrase is “not disparaging.” In fact, the professor allowed that the phrase could be interpreted in exactly that way. He wrote in relevant part,

In suggesting to someone that he should *grow a pair* would place the concept of maturity in a bodily state. . . . [T]here are strong connections between language and emotion. For instance, in the process of reading or listening, our emotions can run the gamut from positive to negative emotions[.] Formal research has been undertaken to document the relationship between language and emotions In response to the statement above, the speaker uses language that could elicit a positive or [sic] negative response on the part of the listener. The question to be asked is this: Should the expression *growing a pair* be considered as a positive or a negative idea or even a disparaging term?

Supplemental Submission, Attachment 16 at 3 (emphasis in original).

Furthermore, the professor acknowledged that “language is used to maintain power. Consequently, the speaker who admonished the listener to or stated that someone should *grow a pair* has accorded to herself or to himself power through language.” *Id.* at 4 (emphasis in original).

Based on the actual quotations of the professor’s analysis of the phrase “grow a pair,” it is very clear to the Board that the rater legitimately deemed it to be “disparaging.” Furthermore, viewing such language as an expression of power over subordinates or other agency employees, the rater did have a basis for noting grievant’s insufficient regard for maintaining an atmosphere of respect within the entire United States Mission in [REDACTED]

Contrary to what grievant suggests, the rater did not accuse grievant of creating a “climate” of disrespect, and she certainly did not accuse grievant of making the disparaging remark “to” anyone on the staff.

For all of the reasons noted above, the Board finds that grievant's contentions concerning the problematic email has no merit.

Lack of Balance and Omission of Material Accomplishments in the EER.

Grievant has failed to sustain her burden of proving that the EER lacked "balance" and that it omitted material or important accomplishments. These two concepts flow together. It is important to bear in mind that "balance" is a principle that applies to the EER as a whole, not merely the portions rendered by a rater and/or reviewer.

Indeed, an EER does not consist of only what a rater and reviewer write about an officer. Each EER contains two distinct opportunities for an officer to influence what is memorialized about him or her. First, each EER contains a designated portion (Section VII) in which the officer alone is directed to identify his or her accomplishments – as they relate to "continuing responsibilities or specific projects from Section VI." Section VI, in turn, is entitled, "Employee's Position and Work Requirements (Established by Rater, Reviewer and Employee)." There, the rated officer collaborates with the reviewer and rater to identify and describe the officer's "continuing responsibilities" and "special projects." According to directions on the form, those items must be linked specifically to the agency's goals.

In the present case, grievant makes a very broad, generic claim that "the EER" was not balanced. We examine this claim in light of the Board's well established articulation of whether an EER is balanced and otherwise sufficient. We have held:

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. This is a question that must be answered in each case based on particular circumstances.

FSGB No. 2012-061 (December 2, 2013) at 17; *see* FSGB No. 99-048 (January 11, 2001); FSGB Case No. 93-015 (December 23, 1993).

As a practical matter, in order to demonstrate that the EER omitted important facts to a meaningful degree, grievant must show that the negative information unnecessarily and intentionally overshadows the positive -- and that this occurred despite her own contributions to the EER. We conclude that grievant has failed to carry her burden of proof for two reasons.

First, grievant's statement is limited to the one paragraph quoted earlier herein. To elucidate that paragraph, grievant attached to the Rebuttal a listing of hundreds of terse blurbs about visits, speeches, visits with dignitaries and business officials, "press outreach," and public appearances. She included photographs of some of those events.

Significantly, grievant has never articulated why or how the portions of the EER composed by the rater and reviewer produced a lop-sided, negative report of grievant's performance. Retrospectively cataloging her activities is not sufficient evidence that the EER was unbalanced.

We stress that no rater or reviewer is required to enumerate or attach a complete, running resume of every known speech, visit, appearance, press conference, etc. of the rated employee. Even assuming that the rater or reviewer was "aware" of the myriad speeches and appearances does not mean that the rater or reviewer was obligated to list all of them or even a percentage of them.

The Board discerns no lack of "balance" on any account. Our examination of the EER reveals that the vast bulk of what is set forth is actually positive. The EER contains virtually nothing negative other than references to the gift episode and grievant's email to

the rater, concerning the [REDACTED] management staff. Moreover, we note that several passages in the EER do mention some of the same activities highlighted in the attachments to grievant's Rebuttal. For example, under the topic of "Management," the rater observed that grievant "had 67 different press and outreach events over the year, including participating in press conferences, other conferences, and roundtables; delivering remarks and giving interviews." Grievant, in the attachment to her Rebuttal, had listed 68 activities or appearances in the category of "press/outreach." Similarly, the reviewer concluded with the following observation:

[Grievant] does a good job of getting out, meeting all sorts of groups, traveling throughout her region, and engaging with the media. I also admire her use of social media. She frequently retweets materials that we send out from [REDACTED] which is exactly the right way to spread our messages.

We are satisfied that the rater and reviewer gave grievant credit for her substantive work and that their comments reflected an awareness of the breadth of grievant's activities. For all of the reasons noted above, we conclude that grievant's claim of lack of balance and omission of important positive accomplishments has no merit.

We note parenthetically grievant's repeated complaint about one word used by the reviewer. Grievant asserts that the reviewer was inaccurate when he used the word "professional" in the following passage of the Review Statement on the last page of the EER:

During my tenure as Ambassador to the [REDACTED], I have only had the opportunity to visit our consulate in [REDACTED] one time. Given the geographical logistics, interaction with [grievant] and her team has been more limited than I would have liked. However, I follow her and the consulate's activities closely. I fully endorse the statement by DCM .

. . . and [grievant's] performance. [The DCM] maintained a *professional* relationship with her.

EER Section IX (emphasis added).

In her filings in this appeal, grievant repeatedly characterizes her relationship with her rater as “toxic.” She implies that the reviewer wrongly used the term “professional,” but she does not explain why a reference to a “toxic” relationship would have been preferable in a document such as an EER. If anything, the term “professional” is complimentary to grievant, or at least neutral. The term “toxic” would only raise questions about grievant’s behavior, as relationships have two sides, not one. Grievant has never explained what she expects the Board to do about the use of one term rather than the other. In any event, the Board cannot grant relief for the use of a term that is manifestly not harmful to the officer.¹¹

V. DECISION

The appeal is granted in part and denied in part. Pursuant to the Board’s findings, the sole form of relief granted is that the case is remanded to the Department with instructions to make two modifications to the Amended EER. One, the Department is hereby ordered to delete the words “gift of” in every place in which the Amended EER contains the phrase “gift of positive statements from her direct reports.” Second, the Department is hereby ordered to delete from the section on “Interpersonal Skills” the phrase “and in doing so, did not set the standard for integrity.”¹²

¹¹ We gauge the likely effect of an EER’s language based on how a reasonable, neutral reader (such as a Selection Board member) would understand it, without assuming a reader’s knowledge of unspoken history between or among the employee, the rater, and the reviewer.

¹² The Board makes no ruling on grievant’s request (in her Supplemental Submission) for review of her OPF by a reconstituted 2014 Promotion Board, because this demand for relief was explicitly contingent upon potential events that had not yet occurred. The Board also does not render any ruling on the demand for an extension of time-in-class (TIC), because grievant never presented any factual or legal basis for such relief and never explained how this was relevant to the EER in dispute.

The Department shall make the required modifications to the Amended EER and place it in grievant's OPF, and within 30 days hereof, shall notify the Board and the grievant that the Department has complied with the remand order.

In all other respects, the appeal is denied, and no further relief is granted.

For the Foreign Service Grievance Board:



Cheryl M. Long
Presiding Member



Gregory Loose
Member



Nancy M. Serpa
Member