

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████
Grievant

Record of Proceeding
FSGB No. 2014-034

And

November 12, 2014

Department of State

ORDER: INTERIM RELIEF

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Bernadette M. Allen
Harlan F. Rosacker

Special Assistant:

Lisa K. Bucher

Representative for the Grievant:

Pro se

Representative for the Department:

Holly T. Colburn
Grievance Analyst, HR/G

Employee Exclusive Representative:

American Foreign Service Association

I. THE ISSUE

This Order addresses the request of [REDACTED] (grievant), an untenured FS-04 Entry Level Officer (ELO) in the Department of State (Department, agency), for continuation of interim relief (IR) from involuntary separation until the Foreign Service Grievance Board (Board) reaches a decision on his appeal of the agency's decision to separate him due to his failure to be recommended for tenure. His Limited Career Appointment has expired, and he has been granted temporary interim relief until the Board reaches a decision on his request for continued IR. The agency opposes the continuation of interim relief during the Board's consideration of grievant's appeal.

II. BACKGROUND

Grievant was appointed to the Foreign Service on March 1, 2009. While he was placed in the Public Diplomacy (PD) cone, his first two-year assignment was to a Consular Officer position at the U.S. Consulate General in [REDACTED]. Thereafter he took 45 weeks of intensive Arabic language training in preparation for his first PD assignment, as the Public Affairs Officer (PAO) at the U.S. Consulate General in [REDACTED]. He arrived at post in August 2012. His rater was the Consul General in [REDACTED]; and his performance was reviewed by the Country PAO (CPAO) in the U.S. Embassy, [REDACTED] -- initially [REDACTED] and subsequently [REDACTED]. His Work Requirements state that he reported directly to both of these officers.

Grievant's raters in [REDACTED] in evaluating his potential for tenure, checked the box indicating that: "Candidate is likely to serve effectively but judgment is contingent on additional evaluated experience." After reviewing his Employee Evaluation Reports (EERs) from [REDACTED]

the 2012 Summer Session of the Commissioning and Tenure Board (CTB) could not make a definitive assessment of grievant's potential for effective service over a normal career span, up to and including FS-01, and deferred a decision on granting him tenure. While noting progress, the CTB found problems in grievant's interpersonal and communications skills.

In grievant's May 2013 EER, covering his first eight-and-a-half months in [REDACTED] his rater again found him likely to serve effectively but needing more experience. The subsequent 2013 Summer Session of the CTB cited strengths in grievant's strong work ethic and positive attitude, but it found problems specifically in his managerial and interpersonal skills and his ability to deal with difficult employees. It deferred a decision on tenure and granted him a third review after another six months. In grievant's November 2013 EER, his rater found that "Candidate is unlikely to serve effectively even with additional experience." The 2013 Winter CTB reviewing that EER as part of his entire performance record declined to recommend tenure, so grievant's five-year Limited Career Appointment (LCA) expired, and he was assigned to Washington, DC, in preparation for separation on May 4, 2014.

[REDACTED] filed a grievance with the Department on April 22, 2014, and was granted IR from separation while his grievance was pending. In his grievance, he cited continuing conflicts between his rater and reviewer over public affairs programming and management and a "relentlessly hostile" working environment. He claimed that: he had not been given timely or comprehensive feedback and counseling; the two EERs he received in 2013 were clouded by his rater's prejudice against him; the ratings ignored his significant accomplishments; and the rater made criticisms that were unfounded and falsely prejudicial, and relied on diluted, faint praise of his performance in order to make a negative assessment of grievant's career potential. Grievant also claimed that his rater indicated orally that he would recommend grievant for tenure, but later

recommended in the November 2013 EER that tenure should be denied. Grievant claimed that the negative appraisal constituted retribution for observations he had made to OIG inspectors during their recent visit to post.

As relief grievant requested a one-year extension of his limited appointment; redaction of the assessment of his career potential in the May 2013 EER; rescission of the November 2013 EER or redaction of the assessment of his career potential; reconstituted Summer 2013 and Winter 2013 Tenure Boards; and any additional relief deemed appropriate.

On August 28, 2014, the Department denied his grievance. Grievant appealed that decision to the Board on September 12, requesting continuation of IR and the same relief sought at the agency-level. He remains on IR pending the Board's decision on his request for continued IR. The agency submitted its arguments opposing continued IR on September 23, and grievant responded on October 2.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant asserts that "he has a reasonable prospect of attaining relief, through this appeal, that will result in his being retained in the Service." He maintains that with additional evidence gained in discovery he will be able to prove by a preponderance of the evidence that the two 2013 EERs on which the 2013 Winter CTB based its decision not to recommend him for tenure were "falsely prejudicial and wrongfully influenced by a rater who [had been] biased against him" from the beginning of his assignment. Grievant was not denied tenure on the second review. Rather he was granted a third review because the CTB saw his record as sufficiently meritorious that "it could lead to tenure with additional evaluated experience." (See generally 3

FAM 2254.3.) In the third review, however, he claims to have been adversely affected by the absence of fair and balanced EERs.

Grievant asserts that conflicts between his rater and reviewer had been evident from the outset. First they disagreed over who would be his rater. The CPAO told him not to have any contact with or take any orders from the CG's office – but rather to communicate with the CG only through him. The CG ultimately prevailed and told grievant: “I don't like to lose and I never lose.” The rater and reviewer continued for a very long time to be “at loggerheads on Public Affairs programming and managerial styles.” At one point the rater warned grievant that the reviewer was seeking to set grievant up for failure in terms of his programming and supervision of staff; but grievant claims it was actually the rater who was undermining him. Grievant claims that while his relationship with the two officers was always professional, he found the working environment “relentlessly hostile.”

Grievant asserts that given the great weight the CTB placed on the rater's assessment of grievant's potential, it is critical that his depiction of grievant's performance be accurate and free from any bias. Grievant claims that both of the EERs he received in 2013 were clouded by the rater's prejudice against him and that the rater used faint praise to make a negative assessment of significant accomplishments that would have shown strength in the management and interpersonal skills that the CTB subsequently found deficient. He maintains that the rater's criticisms in those areas were unfounded and that his observations were falsely prejudicial.

Grievant claims that after he had received his May 2013 EER, the rater assured him that the next one would be better. Moreover, late in the rating period – just before OIG inspectors arrived at post in October – he suggested that grievant would likely be recommended for tenure.

Once the Inspectors were gone, however, the rater completed his EER, and, in assessing grievant's potential, he checked the box indicating that he would be unlikely to serve effectively even with additional experience. Grievant charges that the negative judgment was retribution for his having told OIG Inspectors that the Public Affairs Section in [REDACTED] was not promoting democracy and human rights, despite the CG's urging him not to say so. He asserts that his criticism alarmed the OIG inspector, who said she would take it up with the rest of the team. When the inspector asked whether the rater had mentored him, grievant replied that he had not. In response to further questioning, he replied that the rater "appeared to take no interest in [his] career development and did not demonstrate interest in Public Affairs." After the inspectors left post, the rater not only rated grievant's potential negatively but also told him without explanation that he would no longer recommend him in 360 reviews¹ in connection with two onward assignments for which grievant intended to apply. Grievant asserts that the rater's actions violated 1 FAM 053.2-5, which *inter alia* prohibits retaliation that might inhibit an employee's communication and cooperation with OIG personnel. After the OIG team left, grievant learned that its initial findings had been quite critical, although he had not seen the report himself.

The Summer 2013 CTB cited specifically only the Area for Improvement (AFI) section of grievant's May 2013 EER, in which the rater noted that grievant's counseling of an employee had led her to threaten resignation. Grievant takes exception to the rater's assertion that his performance as a supervisor was uneven.

According to grievant's account, the rater acknowledged from the outset that this employee -- the Cultural Programs Specialist, one of two local employees in the Public Affairs

¹ Bureaus considering an applicant for positions may request that a 360-degree range of supervisors, subordinates, or peers respond to a questionnaire about the applicant's qualifications. Some bureaus require that an applicant provide a list of such references.

Section -- was difficult. As an example, grievant recalls that in late October 2012, she took a three-day leave to another country. She did not return as scheduled, and she did not respond to grievant's emails, texts, and phone calls. The CG questioned her several times a day about her absence in a manner that grievant found unprofessional and bordering on harassment. Ultimately grievant learned that the employee had a medical problem. Immediately after she returned, however, the rater ordered her to find out why she had been gone so long and what had happened to the list for an upcoming Election Night event. Grievant was reluctant to do so, sensing the employee's sensitivity concerning health and other private matters. He asked for the rater's assistance. The rater, however, insisted that grievant deal with it himself. While grievant claims to have discussed the matter with the employee calmly and with concern for her, the latter became very upset and threatened to quit. Grievant immediately consulted with the Management Officer (MO) and the CG about how to proceed. Initially the rater agreed with grievant's assessment, suggested that the employee needed to be reined in, and told the MO that grievant had his support. A few days later in early November 2012, however, the rater asked if he could speak privately with the employee. After doing so, he called grievant and blamed her for the employee's outburst. He later suggested that grievant had taken it upon himself to counsel her. He did not support grievant again in this matter until nine months later, when he also experienced the employee's "unprofessional and insubordinate behavior."

Shortly thereafter the rater pressured grievant to approve the same employee's request for four weeks of leave to participate in a charity-related climb of Mt. Everest – at a time when grievant's only other LES (Locally Employed Staff) was only midway through four months of approved leave and ultimately was gone even longer. Grievant points out that the rater neither commented in his EER on the employee's poor conduct nor praised grievant with regard to how

well he had handled the leave request and managed the section with both of his employees on leave. The rater noted merely that grievant “kept the section running.” Grievant avers that the rater’s omissions were deliberate and show his bias and animosity toward him.

Grievant asserts that he had dealt with the employee “in a professional, calm, and polite manner,” and that it was the rater who had been uneven and unprofessional. Thus, grievant claims that the rater again undermined him by meeting privately with the difficult employee and agreeing to her desire that the Public Affairs Section stop keeping a weekly log of activities – a practice that grievant had found useful in coordinating staff responsibilities and keeping programming on target. By dealing directly with grievant’s LES employees, the rater set in motion a long-range pattern of insubordination whereby the staff chose programs they preferred, rather than following grievant’s “guidance with priorities according to mission goals.”

Grievant’s working environment from early in his assignment made it clear to him that the rater’s negative impression extended to any action that he took. It was ultimately translated into faint praise in his EERs and suggestions that grievant was subpar in comparison to his staff.

Comparing various passages in his May 2013 and November 2013 EERs, grievant cites differences in the tone and language. “The May 2013 EER focused on my performance, albeit generally, whereas the November 2013 EER focuses on others, thus diminishing my role.” He asserts that the rater minimized the significance of his accomplishments by noting that they were done “with the help of” or “in conjunction with” others, were undertaken by his staff, or involved input from the rater. While the rater cited several positive examples of Communication Skills in the May 2013 EER, in November he noted only: “[Grievant] continued to develop his language

proficiency and *bravely delivered* opening remarks in Arabic at the PAS Iftar. *His diligence in practicing his Arabic* was appreciated by many of our contacts” (emphasis added by grievant).

Grievant asserts that additional discovery will reveal further evidence of the rater’s bias and the inaccuracies in his EERs. It will also enable him to show that the negative comments that the rater elicited from supervisors at his previous post are at odds with the feedback and EERs that grievant himself had received from them. Similarly he will show that the impressions about his performance that his rater says he received from senior American officers in the Consulate and the larger U.S. Mission in [REDACTED] were quite different from the feedback that grievant had personally received from them. He avers that the rater simply could not allow his initial negative impression of grievant to be altered.

Grievant points out that the harsh and even more inaccurate and imbalanced November 2013 EER was the additional evaluative material that his third CTB took into consideration in its tenure review. He further notes that 3 FAH-1 H-2326.2 provides that employees not performing at an acceptable level must be counseled and afforded reasonable time to improve, and that the discussions between rating and rated officers should discuss specific areas for improvements. The instructions for preparing EERs further state that: “Criticisms included in the final EER should not come as a surprise to the rated employee.”

Based on the counseling and feedback received from his rater during the second rating period, grievant claims to have been surprised by the rater’s recommendation in the EER that he not be granted tenure. While the Department now explains that the rater was trying to put grievant at ease before the OIG visit and that thanking grievant for his service was a valid confidence-building leadership technique, not an endorsement of the quality of his work, grievant claims that the rater’s comments led him to believe he was performing well and would

be recommended for tenure. He avers that what is important is “what he was led to believe, not what the rater now states was his intention.” In addition, citing FSGB Case No. 1986-079 at 4, he asserts that the rater’s feigned attempts at praising him were “so hedged and qualified as to leave a negative impression.”

The rater’s counseling just before the end of the rating period was limited to one topic – grievant’s interaction with the problem employee. Grievant was led to believe that aside from that issue he was doing well. Without any other criticism, he assumed that continuing on the same path would result in a tenure recommendation.

While the rater did not recommend him for tenure in the November 2013 EER, he did recommend him for tenure in his April 2014 EER. Grievant notes that by then he had been “told by management that post had done everything possible to change the OIG report to be more favorable. I believe this may have been what changed [the rater’s] mood.” His final EER, however, was not reviewed by a CTB, since a decision had already been made not to grant him tenure.

Grievant asserts that the Board should grant him continued IR without being separated during the pendency of this appeal.

B. THE AGENCY

The Board should decline to exercise its interim relief authority to suspend grievant’s involuntary separation based on the expiration of his LCA. In exercising its discretion to extend interim relief to untenured officers, the Board makes an independent determination based on the circumstances involved in each request.

[It] must perceive, in a preliminary assessment of the merits, that the grievant has a reasonable prospect of attaining relief that will result in his or her being retained in the Service. In applying the standard, the Board typically makes a preliminary assessment of whether the grievant has a reasonable likelihood of prevailing on the merits and being granted some remedial period of continued employment.

FSGB Case No. 2009-006 (Order dated April 10, 2009) at 6-7.

The overwhelming record makes it clear that grievant cannot demonstrate a reasonable likelihood of prevailing on the merits. As set forth in the agency-level decision, the comments in grievant's May 2013 and November 2013 EERs with which he took issue "were all well-supported, accurate, and otherwise appropriate." He did not demonstrate that either of the EERs was prejudicial or inaccurate. Rather, both EERs satisfied the Board's standard of being "reasonably discernible, objective, and balanced appraisals of his performance." He has not presented any facts or arguments in his appeal that would alter the conclusions drawn in the agency-level decision. His arguments in his agency-level grievance were "primarily explanatory and exculpatory, but [did] not contest the factual material that [he] complain[ed] about." *Id.* He has not presented "independent, supporting evidence backing [his] assertions or directly refuting the critical comments [he] challenge[d]." *Id.*

Based on the record to date, grievant has not demonstrated a reasonable likelihood of prevailing on the merits. His request for continuation of interim relief is not warranted and should be denied.

IV. DISCUSSION

With some limitations, this Board has authority to direct an agency to suspend an action against an employee related to a pending grievance. Section 1106(8) of the FSA, 22 U.S.C. § 4136(8), and 22 CFR § 904.4, authorize the Board to grant interim relief in cases of involuntary separation such as involved here. In exercising that authority, we have usually held that with

respect to untenured career candidates such as this grievant, interim relief from separation should be granted only where a grievant has shown a reasonable likelihood of prevailing in the grievance appeal. *See* FSGB Case No. 2012-012 (Order dated August 9, 2012); FSGB Case No. 2009-006 (Order dated April 10, 2009). Given the early stage of the appeal at which our determination must be made, it is of necessity based on preliminary information, without the benefit of full discovery and supplemental submissions by the parties.

Based on the information contained in the record to date, we find that grievant has failed to show that he has a reasonable prospect of prevailing on the merits of this appeal.

We preface these findings by noting that grievant found himself in a situation that would be challenging for any Public Diplomacy officer in his first assignment in that specialty. He reported directly to two officers -- the CG (as rater) at the post where he was assigned, and the CPAO (as reviewer) in the capital city about an hour's drive away. The record indicates that these two officers apparently often did not agree on PD program or management matters. Grievant had received only about half the full-time language training that the Foreign Service Institute considers normally necessary for an officer to reach the S-3/R-3 professional proficiency level in a very difficult language like Arabic. Finally, grievant had to deal with problems in supervising his staff that the rater himself conceded were challenging. We also note in the record that the OIG inspection team had suggested preliminarily that in the future a more experienced officer be assigned to this position. We do not find any of these challenges unreasonable for an untenured officer, but we have kept them in mind as we have considered grievant's request for continued IR.

The record as developed so far shows that grievant was given ample warning of the interpersonal relations shortcomings that the rater saw in his supervision of the Cultural Programs Specialist's performance and that were cited by the Summer 2013 CTB. Grievant appears to have worked hard in collaboration with his rater and other colleagues to address these weaknesses in his interpersonal skills. The rater acknowledged grievant's efforts and a moderate degree of success in overcoming these deficiencies. However, grievant so far has not presented persuasive evidence that the rater ever suggested to him that the problem was behind him. The Counseling Certification dated September 17, 2013, clearly shows that it was not. We conclude, based on the record thus far, that he was not only given ample notice of the continuing shortcomings but adequate counsel and continuing assistance from colleagues in dealing with it.

Grievant also claims that the rating officer's recommendation in his November 2013 EER that he not be granted tenure came as a surprise to him. The rater responded to the Department's Grievance Staff (HR/G) that he had told grievant in the weeks before the EER that he was still wrestling with the question of recommendation for tenure. While he may have sought to ease grievant's anxiety about the upcoming OIG inspection, he claims that he never suggested to grievant that he would recommend him for tenure. Grievant has not submitted any documentation to support his recollection. While the rater is required to give a rated employee notice of deficiencies in sufficient time for him to improve – which he did in this case – there is no requirement that he warn the rated employee specifically that he intends to recommend against granting tenure.

Grievant has thus far not persuaded the Board that the rater's continued focus on his difficulties in dealing with the Cultural Programs Specialist was unfounded or that it demonstrated continuing bias. Clearly the issue continued to color the rater's view of grievant's

potential for rising within the ranks of the Foreign Service. But given the increasing supervisory responsibilities that grievant would face as a PD officer, we do not find this emphasis inappropriate. The rater cited grievant's continuing improvement in this area and praised his increasing accomplishments in mounting and managing PD programs -- albeit not as effusively as grievant might have preferred. The accomplishments of any supervisor in the Foreign Service will depend largely on the contributions of staff and on organizational accomplishment. Based on the evidence in the record, we do not find the rater's comments in this regard biased, inaccurate or prejudicial. While grievant has submitted several statements of support from colleagues, none of them suggested that the rater was harsh or unreasonable in his supervisory role or that his conclusions were biased or unfounded.

It may not be entirely unreasonable for grievant to believe that the difference between the positive assurances from the rater that he recalls before the OIG inspection² and the rater's recommendation against tenure after the inspection stemmed from criticism the rater received from the inspectors, possibly based on grievant's negative assessment of his supervision and mentoring. The Consul General as rater, however, submits that "[he] was never informed of the questions [grievant was] asked and/or [his] responses for the OIG inspection, nor did [he] ever seek to obtain information about those questions/responses from [grievant] or anyone else." Moreover, although the OIG team's preliminary or final findings and recommendations based on its inspection of the post are not part of the record, we note that the IG Act and the Whistleblower Act require confidentiality for those responding to surveys concerning post operations in order to promote candid comments from participants and protect them against

² The Consul General denies the assertion that he gave grievant such positive assurances regarding a tenure recommendation. Rather, the rater states that his remarks were merely intended to encourage grievant to improve his performance in areas previously noted as deficient.

supervisory retribution. There is no evidence that OIG personnel breached that duty of confidentiality in this record.

Grievant has not yet provided any independent evidence to support his claim that the reservations he expressed to an OIG inspector about his rater's supervision and program management were subsequently discussed with the rater in a way that would identify grievant as the source or likely source of the criticism. As previously noted, thus far the record also contains no evidence that the rater's descriptions of grievant's performance deficiencies as considered by the CTB were false, inaccurate or misleading.

Grievant has also suggested that it was inappropriate for his rater and the DCM to contact grievant's supervisors at his previous post in [REDACTED] about his performance there. Based on the evidence in the record thus far, we conclude that these contacts were made in an effort to deal with grievant's performance problems in [REDACTED] -- i.e., whether similar concerns had arisen among his previous supervisors in [REDACTED] and, if so, how they addressed them. Grievant has not claimed that these contacts violated any agency regulation. There is no evidence that what these senior officers at his current post elicited influenced the EERs that his rater in [REDACTED] wrote.

Based on the current state of the record, we find that grievant has not demonstrated a reasonable likelihood that he will be successful on the merits of his appeal and thus be granted some remedial period of continued employment.

V. ORDER

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

For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Bernadette M. Allen
Member



Harlan F. Rosacker
Member