

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

████████████████████

Grievant

And

U.S. Agency for International Development

For the Foreign Service Grievance Board:

Presiding Member:

Board Members:

Special Assistant

Representative for the Grievant:

Representative for the Agency:

Employee Exclusive Representative:

Record of Proceedings

FSGB Case No. 2014-035

DECISION

October 6, 2015

REDACTED

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OVERVIEW

HELD: The denial of tenure by the 2014 Tenure Board was tainted by the flawed and falsely prejudicial 2013 Tenure Evaluation Form (TEF) and was also issued in violation of several Agency Precepts. The denial of tenure is reversed and the case remanded to the Agency with instructions to expunge the 2013 TEF, as well as the letters deferring and denying tenure, and to place grievant's updated Official Personnel File (OPF) before the next Tenure Board.

CASE SUMMARY: Grievant, an FS-2 officer, appeals the denial of his grievance in which he challenged the denial of tenure, based upon procedural irregularities and denial of due process. He contends that the January 2014 Tenure Board improperly relied upon a single, noncurrent evaluation that was falsely prejudicial and lacked balance. He further complains that the agency failed to notify him of the deficiencies underlying the evaluation document and failed to provide him the opportunity to address those deficiencies and improve enough to achieve tenure.

DECISION

I. THE GRIEVANCE

Grievant, an FS-2 officer, appeals the denial of his grievance in which he challenged the denial of tenure by the 2014 Tenure Board, on the grounds that a principal document on which it based its decision was fatally flawed. The 2013 Tenure Board had deferred grievant for tenure consideration for one year. Grievant alleges that the recommendation for deferral was based mainly on anonymous, negative 360 degree input that was the polar opposite of grievant's accumulated Appraisal Evaluation Forms (AEFs) and other, positive 360 degree information. When the 2014 Tenure Board rejected grievant for tenure, the Agency decided to terminate him. The centerpiece of his grievance and appeal is the 2014 Tenure Board's alleged improper reliance upon a single, stale and flawed 2013 TEF. Furthermore, grievant complains that the Agency denied him substantive due process because it failed to provide him with reasonably specific and timely notice of his deficiencies and an opportunity to improve his job performance before the denial of tenure.

There are two themes in this appeal, woven throughout various sub-issues. One, grievant complains that the 2013 TEF violated his due process rights by not complying with the established hallmarks of due process that apply to AEFs, *i.e.* being balanced, providing fair notice of professional shortcomings cited therein, and being used as a basis for an adverse personnel action only after the Agency had provided counseling on his deficiencies. Where the 2013 Tenure Board is concerned, grievant contends that the Board deferred his consideration for tenure based only upon the 2013 TEF which contained a surprise that he deems unfair, *i.e.* criticisms of his performance that had never

been set forth in any prior evaluation document. Two, grievant further complains that the 2014 Tenure Board violated its own Precepts by relying on an out-dated and flawed 2013 TEF.

Grievant seeks the following forms of relief: (1) nullification and expunction of the January 2014 Tenure Board's decision to recommend denial of tenure; (2) nullification and expunction of the March 14, 2014 letter denying tenure; (3) nullification and expunction of the 2013 TEF and all Agency records of that document; (4) an affirmative grant of tenure by the Foreign Service Grievance Board; (5) in the alternative to a grant of tenure, an order on remand to prepare a new TEF and any other ordinarily required AEFs for consideration at the next regularly scheduled Tenure Board; (6) and extension of grievant's five-year appointment as a career candidate, if necessary, to accommodate a new Tenure Board review.

II. BACKGROUND

In order to give a useful context to the Board's own analysis, it is necessary to recapitulate the progression of events surrounding the 2013 and 2014 Tenure Boards' consideration of grievant. We juxtapose those historical facts with a summary of the documents utilized by those Boards and the governing regulations and policies that were in effect. We recount the background of the case, step by step, in several categories.

Grievant's Hiring, Training Requirements, and History of Assignments.

Grievant joined the Foreign Service in May 2009 as an FS-2 officer, as part of the Agency's recruitment program to attract mid-career professionals. That program is known as the Development Leadership Initiative ("DLI").

The Agency's particular approach to DLI officers was to fashion individual training strategies, taking into account the previous work experience of the officer and the needs of the Bureau to which the officer would be assigned. Grievant's first assignment was to [REDACTED], working as an engineer. His rater prepared an Annual Evaluation Form ("AEF") for the period of April 1, 2009 to March 31, 2010. She described grievant's training obligations as follows:

[Grievant] is participating in a three-year training program designed to prepare him to assume full FSO duties. While in USAID/Washington, [he] was assigned to the [REDACTED] [REDACTED]. He then proceed[ed] to his first posting in the regional mission in [REDACTED] for the remaining two years of his training. In collaboration with his supervisor, [he] designed and initiated a customized Individual Development Plan (IDP). The IDP, based on a competency oriented framework for new FSOs and Agency Foreign Service employee performance standards, focuses on mastering competencies, working knowledge and skills [Grievant's] key continuing responsibility during this rating period is to develop and make progress towards implementation of his IDP. Training is accomplished through rotations with various USAID/W offices, as feasible, and Mission offices; formal and informal training courses and seminars; self-paced training; and a two-year assignment to an overseas USAID Mission.

Supplemental Submission, Attachment A at 1.

In the mid-point progress review of grievant's performance, the [REDACTED] rater recorded that grievant had completed the initial five-week DLI Orientation and worked with his supervisor to draft a detailed IDP. She confirmed that grievant was "satisfying his IDP requirements primarily through active participation during his rotations and attendance in formal training programs." *Id.* at 2.

After his assignment in [REDACTED], grievant transferred to the [REDACTED] [REDACTED] in Washington, D.C., in preparation for his next assignment to [REDACTED]. He commenced work in [REDACTED] in March 2011 as

Deputy Director of the Energy Office. As this job was described in grievant's 2012 AEF, grievant was "the alter ego of the Office Director and alternatively represent[ed] the Agency before senior Government of [REDACTED] officials involved in the energy sector, especially the Ministry of Water and Power and the Water and Power Development Authority."¹

Following the posting to [REDACTED] grievant worked in Washington, D.C. as a senior emergency officer with the [REDACTED], from May 2012 to July 2013.

Grievant's next assignment was in [REDACTED]. On July 8, 2013, grievant arrived in [REDACTED] to work as the Engineering Officer in the Economic Growth Office. As of the initiation of this appeal, he was still serving at that post.

The Procedural Setting for Tenure Board Decision-Making. Within the Agency for International Development, each Tenure Board is governed by a collection of policies and regulations that cover the critical aspects of its responsibilities. They include, among other things, a delineation of the roles of various officials, an overview of the Foreign Service Tenure System, the application of Chapter 414 "Precepts for USAIDs' Foreign Service Tenure Board," and the use of various performance appraisal documents. Those documents include AEFs and TEFs.

The comprehensive structure and basic requirements of how a Tenure Board performs its duty are described in detail in published Precepts, entitled, "Tenuring of Foreign Service Career Candidates, a Mandatory Reference for ADS Chapter 414." The version of the Precepts governing the disputed TEF in this case was revised as of July 1, 2010. It is found in the record as Exhibit 2, attached to the Agency's Response to the

¹ Supplemental Submission, Attachment E at 1.

Supplemental Submission (hereinafter “Response”). As to a Tenure Board’s fundamental duty, those Precepts provide,

The Tenure Board reviews applicable precepts and regulations and all information in the career candidate’s performance valuation file to determine the candidate’s fitness and aptitude for the work of USAID’s Foreign Service.

This information includes: (a) all Annual Evaluation Forms (AEFs) to date; (b) the Tenure Evaluation Form (TEF) (USAID Form 400-25) detailed in section 6e; (c) any previous Tenure Board counseling letters; (d) a prior TEF (if a career candidate has been deterred by a previous Tenure Board; (e) awards and commendations; (f) reprimands or other disciplinary actions; and (g) the Employee Data Record Form (EDR).

Response, Exh. 2 at 6.

The decisions of a Tenure Board are important, not only because this entity decides whether an officer will be granted tenure, but also because candidates have only two opportunities to be considered by Tenure Boards. Deferral generally means having a second chance, but not a third.²

For career candidates who are recommended for deferral, the Precepts state specifically what type of information the Agency must provide to the candidate, so as to inform him/her of why he/she was deferred and what he/she should do to prepare for a subsequent Tenure Board. On this subject, the Precepts state the following:

Career candidates who are deferred are reviewed by the next scheduled Tenure Board The DAA/HR [Deputy Assistant Administrator/Human Resources] provides counseling letters prepared by the Tenure Board to career candidates reviewed but deferred to a future Tenure Board for a second tenure review. The counseling letter includes the Board’s rationale for deferring a tenure decision and states the date the candidate will be reviewed again.

² See ADS Chapter 414, §3.4(b), which states in relevant part, “A career candidate may not receive more than **two reviews** for tenure by a Tenure Board except in accordance with an order from the Foreign Service Grievance Board, or other authorized judicial body.” (Emphasis in original).

To the extent possible, counseling letters issued by the Tenure Board: [] Give examples of expected changes in behavior and performance and suggest ways in which the career candidate and his or her rater should interact to effect needed improvements in the employee's performance; and [] Indicate that the career candidate should work with his or her rater, as well as with senior management in the respective Bureau/Independent Office (B/O), or Mission, to successfully resolve inadequacies in performance or competencies.

Id. at 9 (emphasis added).

Referring to the AEFs and the TEF, the Precepts cite the sources of instructions for their preparation (for example, citing to ADS Chapter 461, covering AEFs). Where the TEF is concerned, Section 6(e) of the Precepts mandates the functional relationship of the TEF to the AEFs. The Precepts state:

The TEF provides supplemental evaluation material to the Tenure Board to assess a candidate's potential and fitness for career service. It is absolutely essential that there be as much information made available to the Tenure Board as possible regarding the employee's contributions and potential.

AEFs and TEFs must be completed for career candidates being considered for tenure at the end of the rating cycle on March 31st for the summer Tenure Board. The AEFs produced in the normal course of business and TEFs completed for the period ending September 30th will be reviewed by the winter Tenure Board.

Response, Exh.2 at 10 (emphasis added)

Further in Section 6(e), the Tenure Board Precepts provided the following brief directions concerning the evaluative role of the official who issues the TEF:

For career candidates assigned overseas, the Mission Directors/Deputy Directors are responsible for preparing the TEF with input from the rater and providing comments on whether the candidate should be granted career status In addition to a narrative section, the TEF includes a section entitled "Areas for Growth." In this section of the form, the Mission Director or USAID/W Office Director, as appropriate, includes skill areas that the career candidate needs to address to building a successful career. In the narrative section, the Mission Director or USAID/W Office Director, as appropriate, explains how and whether the

candidate meets requirements for the principal skill areas, and whether, in his or her judgment, the candidate demonstrates the potential to achieve full career performance expected of a FSO.

Id. at 11 (emphasis added).

The 2013 Tenure Board Process and Decision. We summarize the basic events that culminated in grievant's deferral for tenure. Certain additional details are elucidated in our later discussion of the issues.

The AEFs Before the Tenure Board. The package of information considered by the 2013 Tenure Board included a collection of three AEFs, covering grievant's performance from April 1, 2009 through March 31, 2010 [REDACTED], from April 1, 2010 through March 31, 2011 [REDACTED], and from April 1, 2011 through March 30, 2012 [REDACTED]. All three were uniformly positive, and they did not include any complaints that grievant was not performing adequately in any skill areas or that he was deficient in any work objective. These AEFs are included in the appeal record with grievant's Appeal Submission, as Attachments A, C, and D, respectively.

The "skill areas" for grievant's assessments in the AEFs included the following four areas that are examined by the Tenure Boards: (1) resource management (procurement and contract/grant management); (2) leadership (direction and vision); (3) technical and analytical skills (professional expertise); and (4) teamwork and professionalism (professional conduct).

The 2013 TEF. This document is found in the record as Attachment J to grievant's Appeal Submission. The author of this January 3, 2013 TEF (hereinafter [REDACTED]) was the Director of the agency's [REDACTED] Office in USAID/Washington. He described himself as "the employee's Office Director for five months," indicating that he

was evaluating grievant's performance for the period of July 2, 2012 to December 19, 2012. He stated specifically that he "relied heavily on the 360 degree input provided by senior tenured officers who observed the employee's performance in his two overseas assignments and his short stay in AID/W." His reference to "360 degree input" denotes a certain type of information that a rater is permitted to obtain in preparation of an AEF. The use of 360 degree sources is also permissible in the preparation of a TEF.³

In the Precepts for the Employee Evaluation Program (ADS Chapter 461) , "360 degree sources" are defined as: "Customers, peers, other managers, subordinates, and other individuals with whom or for whom an employee may have worked who can provide feedback, from their various perspectives, about the employee's performance during any period of performance currently being evaluated." The Precepts contain instructions for how a rater and rated employee must collaborate to select the particular 360 degree sources, some of whom are required to be solicited even if they do not respond.

In the present case, the 360 degree sources were not identified in the TEF and were certainly unknown to the Tenure Boards. Grievant learned their identities during the discovery period of this appeal.

³ At that time that █████ wrote the TEF, the Precepts did not explicitly direct or authorize the inclusion of 360 degree information in a TEF, although such authorization had become explicit by the time the 2014 Tenure Board made its decision. See ADS Chapter 414mad, 3.3.3 ("Responsible officials should use all appropriate sources of information in preparing the TEF, including AEFs, Appraisal Input Forms (AIFs), and 360 feedback."). We infer that 360 degree input was commonly used in TEFs, by custom if nothing else. Grievant has never argued that the use of 360 degree sources was *per se* impermissible. Indeed, in the early stages of the preparation of the 2013 TEF, he suggested sources for █████ to contact. In this appeal, he complains about the lack of "balance" between the negative and positive 360 degree sources. Supplemental Submission at 15-18.

The one-page 2013 TEF contained both negative and positive information about grievant. In his introductory paragraph of the narrative (Section 5 of the TEF form), [REDACTED] wrote:

The TEF evaluator has served as the employee's Office Director for five months and relied heavily on the 360 degree input provided by senior tenured officers who observed the employee's performance in his two overseas assignments and his short stay in AID/W.

[REDACTED] wrote only a brief comment as to what he personally had observed during the five months he worked with grievant. In that regard, [REDACTED] stated only the following:

During the employee's time in [REDACTED], the TEF evaluator notes positive feedback from USAID/Jordan and from the team working on the GAO infrastructure review. In E3, [grievant] also demonstrated a collegial and helpful attitude towards a variety of assignments.

The balance of the Section 5 narrative was a combination of particularly negative statements about grievant (solely from the 360 degree sources) and [REDACTED] recognition of the incongruity between those negative statements and positive observations of the grievant from other 360 degree sources.

In its entirety, the "areas for growth" portion of the TEF (Section 6) reads as follows:

[Grievant] is an intelligent man and a dedicated engineer. Yet, significant questions exist about [his] performance in all FS skills areas. A senior officer who observed his work in [REDACTED] does not believe that he has demonstrated the ability to perform effectively in USAID Mission and USAID/W environments and states, 'In my professional judgment based on 20 years with USAID (14 as a direct hire), I do not support the tenuring of [grievant] as a Foreign Service Officer.' The acting Mission Director for USAID/[REDACTED] summarizes his view, 'To cut to the quick, I would not recommend him for tenuring. I would rate him negative on all of the FS precepts for tenuring' But, such views are not unanimous, as one senior officer noted, 'He is an outstanding officer, with great interpersonal and technical skills.' In addition, input raises concerns about [grievant's] functional abilities and shortcomings to serve as a Foreign Service officer over a normal career span.

[Grievant] needs to show success in all four broad FS skills areas. And, he needs to unquestionably demonstrate the aptitude, fitness, and potential to serve as a Foreign Service officer in USAID's development context. The deficiencies noted by 360 degree input were all in USAID missions overseas. If [grievant] can address all four FS skills areas in an overseas assignment, he will warrant tenure. He cannot address these challenges based in AID/W. Immediate posting overseas, combined with leadership training, including modules on interpersonal skills and working collaboratively, and a very detailed individual development plan to address all four FS skills areas would benefit [grievant]. The Tenure Board can give [grievant] another opportunity to prove himself.⁴

The 2013 Tenure Board Letter of Deferral. On March 20, 2013, the Acting Deputy Assistant Administrator for Human Resources issued a letter to grievant, informing him that the 2013 Tenure Board decided to defer him. The Letter is in the ROP as Attachment I to grievant's Appeal Submission. In pertinent part, the letter stated:

The Board recognizes your contributions and commitment to the progress you made in improving your working knowledge of USAID values and business processes and in other technical areas including engineering, energy, and donor engagement. While encouraged by your efforts, I do not believe that granting tenure would be appropriate at this time. Therefore, I am deferring your tenure to afford you the opportunity to demonstrate success in all four skill areas while serving in an overseas assignment and other leadership roles.

The Board will reconvene during the winter of 2014 and will review your file again. To secure a positive tenure decision at that time, you should ensure your next Annual Evaluation and Tenure Forms explicitly document your increased potential to perform successfully up to and including the FS-01 level in all of the areas captured in the Foreign Service Skills Matrix. The Board will look for significant improvements in the areas for growth, including improvement in time management skills, prioritization of your workload, work-life balance, and continued honing of your adaptability and flexibility skills.

I encourage you to continue to building a productive working relationship with your rater and Mission Director and to share this letter with them as you prepare your work plan for the coming year. I also encourage you to reach out to your USAID Assignments and Performance Counselor and

⁴ Appeal Submission, Attachment J (emphasis added).

work with a mentor at Post to help you continue to building your skills in the areas identified above.

Appeal Submission, Attachment I at 1 (emphasis added).

The 2014 Tenure Board Process and Decision.

The AEF Before the Tenure Board. The only new AEF that was in grievant's OPF for the Board's consideration was issued on November 19, 2013 as a "Mid-Point Progress Review" for the rating period of April 1, 2013 to March 31, 2014. This was a review of grievant's performance in an overseas assignment that did not commence until July 8, 2013, as well as his earlier performance while still assigned to the [REDACTED] [REDACTED] in Washington, D.C. This assessment was uniformly positive.⁵

The 2014 TEF. This December 11, 2013 evaluation was made by the Deputy Mission Director in [REDACTED]. As to "evaluation of potential" for advancement to the FS-01 level, she determined that grievant meets the standards in all four skill areas and "strongly" (her word) recommended that he be approved for tenure.⁶

The 2014 Tenure Board Letter Recommending Denial of Tenure. In a letter of March 14, 2014, the Deputy Assistant Administrator of the Office of Human Resources notified grievant that he would not be granted tenure and that he would be terminated. A copy of this letter is in the record as Attachment M to grievant's Supplemental Submission.

In its entirety, the reasons for the denial of tenure were as follows:

The Board acknowledges and appreciates your strong commitment to development work and your technical competence in engineering and infrastructure matters as reflected in your AEFs. However, the Winter

⁵ A copy of this document is included in the record as Attachment H to grievant's Supplemental Appeal Submission.

⁶ A copy of this 2014 TEF is in the record as Attachment N to grievant's Supplemental Appeal Submission.

2014 Tenure Board found insufficient evidence in the most recent AEF or TEF that you had demonstrated the requisite skills outlined in the Foreign Service Skills matrix under resource management/procurement and contract/grant management at the FS-02 level. The Board was concerned about the extreme inconsistency in your performance in the field and in Washington, D.C. For example, we noted the contrasting opinions as reported in your 2012 Tenure Evaluation Form about your ability to engage positively and respectfully (interpersonal skills) with fellow employees, both American and local hire. In addition, your ability to manage the Agency's resources effectively as a FS-2 Contracting Officer's Representative (COTR) primed for tenure has not been fully demonstrated. The Board was particularly concerned about your resource management performance in [REDACTED] where it was noted that '... as COTR for a \$65 million power distribution project, [grievant] failed to demonstrate the ability to manage the Agency's resources effectively to such a point that Mission management saw fit to remove him as COTR of the task order.' As stated above, this was based on the lack of clearly demonstrated ability relative to oversight of contractor work plans, monitoring their performance and resolving complex issues related to the contract implementation.⁷

The Grievance and Appeal to the Foreign Service Grievance Board. Grievant protested the denial of tenure by initiating a grievance on May 2, 2014. Grievant filed his appeal to this Board on September 22, 2014. Following discovery and briefing by the parties,⁸ the record of proceedings was closed on May 7, 2015.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

Grievant contends that the denial of tenure pivoted on a single document that was not only falsely prejudicial, but one that robbed him of his right to substantive due process. This document was the 2013 TEF, considered by both the 2013 and 2014 Tenure Boards. Grievant asserts that the content of a lawful and sufficient TEF should meet the same due process requirements that apply to an AEF. Specifically, grievant asks

⁷ Supplemental Submission, Attachment M (emphasis added).

⁸ Grievant filed his Supplemental Submission on February 23, 2015. The Agency filed its Response on March 26, 2015, and grievant filed his Rebuttal on April 9, 2015.

the Board to impose the following kinds of requirements for a legally and factually sufficient TEF. One, since an AEF must be balanced, a TEF must be “balanced.” Two, since it is a denial of due process for an AEF to be based solely on 360 degree source material, it is also a denial of due process for a TEF to be based solely on such information. Three, an AEF is designed to put an officer on fair notice of skills deficiencies and where noted, the agency is required to allow an officer the opportunity to improve. Thus, those same rights should apply when a TEF raises issues of poor performance for the first time. These arguments are summarized in more detail as follows.

Grievant complains that the 2013 TEF was not balanced because the vast bulk of its content was negative – and noticeably at odds with uniformly positive AEFs covering the period of time relevant to both Tenure Boards. Grievant asserts that the negative comments did not come from his actual raters or reviewers; rather, they came from miscellaneous, unnamed people whose identities he did not learn until the discovery phase of this appeal.

Grievant points out that the 2013 TEF was the first and only time he had received any official performance assessment that was negative. Grievant relies upon established case law from this Board and from judicial decisions, holding that an officer is denied a “substantive right” when his/her annual performance appraisal (the AEF, for USAID officers and the similar EER for Department of State officers) fails to give the officer sufficient notice of deficiencies and when the agency fails to give that officer a reasonable time to take corrective action before being separated from the service. *See*

FSGB No. 2003-025 (August 10, 2004); *Sandland v General Services Administration*, 23 M.S.P.R. 583, 587 (1984).

Finally, grievant complains that both Tenure Boards improperly relied on negative 360 degree sources as the basis for their decisions. Grievant points out that relevant Precepts required the 2014 Tenure Board to examine the full range of performance documentation in grievant's file, and that this included his accumulated AEFs and the most recent TEF (for comparison to the 2013 TEF). He argues that he was harmed by the reliance of both the 2013 and 2014 Tenure Boards on negative comments contained in a document that was supposed to provide only supplementary information to the agency's assessment of his career-readiness, while the main evaluative documents – his AEFs – were uniformly positive. Indeed, he notes, they were devoid of any indications of his alleged shortcomings in any substantive area. He emphasizes that the 2014 Tenure Board continued to rely on the old, negative 360 degree sources in the 2013 TEF as one of the main justifications for denying him tenure.

With respect to the problem of the 360 degree input, grievant argues that he was harmed by the underlying falsity of some of that information – compounding the impropriety. Grievant states that some of the negative 360 comments were literally false information that during the tenure process no one questioned or compared to the accurate facts as reflected in grievant's OPF. He asserts that the 2013 TEF was falsely prejudicial for this reason and that it tainted the integrity of the decisions of both Tenure Boards. Grievant identifies two examples of prejudicially false information that came to light during the discovery phase of this appeal.

One, grievant learned that one of the originally unnamed 360 degree sources was [REDACTED] who was a Civil Service supervisor of a technical office in the [REDACTED] [REDACTED] in Washington, D.C. The underlying 360 degree source material that [REDACTED] sent to [REDACTED] was a memorandum of December 11, 2012. In it, he opined that grievant did not have the ability to function at the FS-01 level. [REDACTED] added, “The fact that he has been curtailed in his first two overseas assignments in [REDACTED] and [REDACTED] by the Agency reinforces [sic] my recommendation.”⁹ The unchallenged information in the Record of Proceedings in this appeal shows that grievant left [REDACTED] [REDACTED] because he volunteered for a CPC (Critical Priority Country) assignment in [REDACTED]. Then, he left the subsequent assignment [REDACTED] at the end of one year, because one year was the standard length of time for a CPC assignment. Neither departure from post was involuntary or punitive in any way.

Two, another important false statement about grievant came from a 360 degree source later identified as [REDACTED]. In an email of December 10, 2012 to [REDACTED] he described himself as grievant’s “mentor” in [REDACTED]. In part, [REDACTED] stated,

He [grievant] taxed my experience and skills to the max until I finally requested that he be transferred out of our Mission. To cut to the quick, I would not recommend him for Tenuring [sic], I would rate him as negative on all of the FS Precepts for tenuring and I believe that the Agency would be better served employing [grievant] as a PSC. I did not write his AEF but I did have input and discussed his negative performance with his supervisor He refused to do rotations stating that he knew all about the Agency, our rules and regulations and how other tech and support offices functioned. . . . I had him removed.¹⁰

Grievant identifies several false statements about him in this TEF. One, grievant’s AEFs all confirmed that he completed whatever training rotations had been

⁹ A copy of this memorandum is in the record as Attachment AA to grievant’s Supplemental Submission.

¹⁰ Attachment X, Grievant’s Supplemental Submission (ROP 009, page 236) (emphasis added).

prescribed for him. In particular, the April 27, 2011 AEF for the period covering his assignment to [REDACTED] specifically stated, “He performed the office rotations and courses required in his individual Development Plan and was given special assignments to research and design planned new activities in clean emergency and infrastructure.”¹¹

Whatever [REDACTED] may have communicated to grievant’s rater, the rater chose not to incorporate any of it in any AEF. Moreover, [REDACTED] comments reveal a fundamental misunderstanding of grievant’s status as a “mid-level” career candidate, who after the initial few weeks of orientation, was not subject to the types of rotations that applied to “entry-level” candidates. As mid-level, he was assumed to be knowledgeable in his field and was evaluated as a regular employee, not as a trainee – one who, according to his AEF’s, fully met those expectations.

Second, the reference that [REDACTED] makes to having grievant “removed” is ambiguous. It may or may not have meant removal from post (as in forced curtailment) or removal from a particular task or assignment at post. An uninformed reader could well presume the worst of the two interpretations. It is not true that grievant was literally “removed” from post or curtailed, as that term of art is used in the Foreign Service.

While [REDACTED] (who was not the Contracting Officer) may have intended or even asked that grievant be involuntarily curtailed from [REDACTED], the record does not substantiate that any such adverse employment action ever occurred. Moreover, it is doubtful that the Contracting Officer would have been personally empowered to curtail a direct hire. The undisputed facts of record show that grievant departed from [REDACTED] only because he volunteered for a CPC assignment in [REDACTED]

¹¹ Attachment B, Grievant’s Supplemental Submission (emphasis added).

It is a fact that grievant was removed from serving as the COTR (contracting officer's representative) overseeing two contracts in [REDACTED]. Grievant was notified of this decision in a letter of November 11, 2011 from the Contracting Officer ([REDACTED]).¹² In a nutshell, with no elaboration of underlying facts, he tersely told grievant that he (grievant) "may have" overstepped his authority in giving certain directives to "implementing" partners. However, grievant disputes the circumstances that resulted in these actions.¹³

Grievant relies on established decisional law holding that where an officer was low-ranked based upon a Selection Board's exclusive reliance on anonymous source material, the officer was prejudiced and deprived of fundamental due process. *See* FSGB No. 2008-012 (April 17, 2009). He asks this Board to apply the same principle in granting him relief on appeal, because the only negative information in the 2013 TEF came from anonymous 360 degree sources.

Three, grievant argues that the obligation to provide skills counseling to an officer before taking an adverse performance-based action is an obligation of the agency itself, regardless of whether the problem arises with a TEF or an erroneous AEF. Grievant emphasizes the irony that there was no reason for his raters to provide counseling, since his AEFs were all positive and did not identify skills deficiencies. Grievant argues that the agency was still obligated to afford him specific counseling before any Tenure Board could deny him tenure. He articulates the following theory:

¹² A copy of that letter is in the record as Attachment R to grievant's Supplemental Submission.

¹³ Grievant's theory is that he was being pressured to show favor to some of the Contracting Officer's personal friends and that when he resisted, his removal as COTR was done in retaliation. Grievant provides various documents in support of this theory, but we need not weigh the merits of his beliefs in order to adjudicate this appeal.

Examination of grievant's official performance file shows that none of the AEFs preceding, and contemporaneous with, the harmful TEF ([redacted]) wrote presaged any of the criticisms presented in that TEF. Quite the contrary, they were all full of praise. If the alleged [negative] behavior and deficiencies were observed, then, these AEFs improperly provided grievant no warning and no opportunity to improve. AEF writers never presented grievant with any concerns or shortcomings. Quite the opposite. They highly praised grievant's performance and behaviors, and they highlighted his potential to succeed as a Foreign Service officer. If these negative behaviors and deficiencies were evident, then grievant's supervisors provided him no early constructive advice, no previous warning, and therefore no opportunity to improve.

Grievant's Supplemental Submission at 8.

THE AGENCY

The Agency's predominant argument is that grievant's complaints are no more than a legally impermissible challenge to the substantive decision of the 2014 Tenure Board. The United States Code provides in pertinent part that a grievance may not be brought concerning the "judgment of a tenure board," unless that judgment was the product of an "act, omission or condition alleged to violate any law, rule [or] regulation." 22. U.S.C. §4131. The Agency contends that grievant cannot meet the statutory requirement for obtaining relief, because he cannot identify any law, rule or regulation that the Agency violated. We summarize the agency's particular arguments as follows.

One, the 2014 Tenure Board was lawfully entitled to rely on the 2013 TEF because, in light of the deferral by the 2013 Tenure Board, it was one of the documents that the 2014 Board was expected to consider. It would have been natural to use it as the basis for comparison to grievant's post-deferral performance.

Two, there is no legal requirement that the 2013 TEF must mirror the substance of grievant's AEF, as the two documents are designed to serve different purposes. One of

the key functions of a TEF is to provide a viewpoint about the grievant that is clearly not coming from his or her raters.

Three, █████ complied with all requirements for executing the 2013 TEF because he articulated specific guidance to the grievant as to how he could improve his performance to better qualify for tenure. Moreover, █████ included this information in the “areas for growth” section of the TEF.

Four, █████ did not improperly rely on 360 degree feedback, because the regulations and policies then in effect did not require the author of a TEF to refer to or utilize AEFs. In any event, █████ (according to his post-grievance affidavit) reports that he was unable to access grievant’s AEFs for privacy reasons.¹⁴

Five, there is no legal requirement that a TEF be “balanced,” as if it is subject to the balance requirements that apply to AEFs. There is no such requirement in either the regulations or policies relating to TEFs or the Precepts governing the tenuring process.

Six, with respect to the allegedly false scenarios reflected in the 360 degree information from █████, the agency argues that any false or incorrect information is not a reason to discount the decision of the 2014 Tenure Board. The agency states that, “even in the AEF context, there is no legal or policy obligation that the recipient of 360° source feedback independently verify all contents of that feedback – there is a presumption that feedback sources provide honest information.”¹⁵ Furthermore, the Board should not delve into whether the 2013 TEF was “falsely prejudicial,” because the Board decisions granting relief from “falsely prejudicial” evaluations, by their own terms, only apply to

¹⁴ In defending the Agency’s tenure decision, the Agency obtained an affidavit from █████, to further explain how he prepared the 2013 TEF. A copy of that affidavit is appended to the Agency’s Response to Grievant’s Supplemental Submission, as Exhibit 3.

¹⁵ Response at 18.

AEFs and EERs (a similar document utilized by the Department of State); grievant does not allege that any of his AEFs were falsely prejudicial.

Finally, with respect to grievant's criticism of the use of 360 degree sources in the 2013 TEF, the Agency deems this argument to be a "red herring." The Agency urges the Board to reject this particular contention because grievant "cannot provide the Board with demonstrable proof that the Tenure Board decision here actually relied *entirely* on anonymous sources."¹⁶ The Agency points out that the 2014 Tenure Board denial letter referred to grievant's "most recent AEF [and] TEF," determining that those documents did not provide sufficient evidence of grievant's skills in two critical areas.

IV. DISCUSSION AND FINDINGS

Under the provisions of 22 CFR §905.1(a), grievant bears the burden of demonstrating by a preponderance of the evidence that his grievance is meritorious. In this case, that burden requires him to establish by preponderant evidence that the Agency violated a law, regulation, or published policy in denying him tenure.

In an appeal where a grievant alleges that an evaluation document was "falsely prejudicial," the burden shifts according to the evidence that is established. Where the grievant establishes that the evaluation document contained falsely prejudicial material or that a procedural error occurred that "may have been a substantial factor" in an adverse action, the burden shifts to the government agency to prove, by a preponderance of the evidence, that it would have taken the same action even if such error had not occurred. 22 CFR §905.1(b) and (c).

Summary of Rulings. We begin with the recognition that a TEF unequivocally meets the definition of a "personnel record" for purposes of the Foreign Service Act. The

¹⁶ Response at 27 (*italics in original*).

relevant FAM glossary defines “personnel records” broadly, *i.e.* “Any personnel information maintained in a system of records that is: (1) Retrieved by an employee’s name or an identifying number, symbol, or other identifier assigned to an employee; and (2) Needed by management for personnel management programs or processes.” 3 FAH-1 H2351.2 (Personnel Records Defined). A TEF is a very important part of an officer’s performance evaluation file (analogous to the official personnel file or OPF in the Department of State), and the Agency’s Precepts specifically provide that a TEF and AEF are the official forms used in evaluating career candidates for tenure.”¹⁷ Moreover, the Precepts expressly identify a TEF as one of several evaluation documents that must be included in an officer’s “performance evaluation file” for review by a Tenure Board.¹⁸

An officer’s legal right to pursue a grievance involving his or her personnel records is embedded in the basic definition of a grievance, set forth in the Foreign Service Act. While it is well established that an officer does not have the right to challenge the substantive decision of a Tenure Board, an officer nonetheless is permitted by the Act to challenge his or her separation, when that separation is “contrary to laws or regulations, or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member.” 22 U.S.C. §4131(a) (1) (A). In the present case, grievant’s arguments concerning his separation not only include an allegation that the pivotal 2013 TEF was “falsely prejudicial,” he also challenges his separation on grounds that it was “contrary to laws” because of the denial of due process. Success on either point would entitle him to relief. The overarching concept underlying our rulings is that once a document meets the definition of a

¹⁷ADS Chapter 414, §3.3.3.

¹⁸ ADS Chapter 414, §3.3.2.

“personnel record” used as an evaluation instrument, it is subject to all of the legal requirements that pertain to AEFs and EERs. Those requirements include the procedural fairness standards, but also the requirements of substantive due process.

Based upon the following analysis of the record and applicable law, we conclude that grievant proved by preponderant evidence that the Agency denied grievant due process by failing to provide him sufficiently specific and timely notice of deficiencies prior to the denial of tenure. We also conclude that the 2013 TEF did not conform to applicable Precepts governing its content and that this flawed TEF compromised the procedural integrity of the decisions of both Tenure Boards. We also conclude that the 2013 TEF was falsely prejudicial in its content and that such prejudice tainted the decisions of both the 2013 and 2014 Tenure Boards. We further find that the Agency has failed to carry its burden of proving that it would have denied tenure to grievant even in the absence of the falsely prejudicial 2013 TEF.

Apart from the conclusions set forth above, the Board finds that both Tenure Boards violated the Precepts by elevating the 2013 TEF to the primary basis for a tenure decision, rather than using that document only as “supplemental” to all of grievant’s AEFs and other data in his OPF.

The Board further finds that 2014 Tenure Board failed to comply with its own governing Precepts by failing to recognize grievant’s lack of opportunity to produce more evidence of his improved skills.

While the grievant raised myriad other issues in an effort to find every conceivable basis for obtaining relief, we do not address all of them, because it is not necessary to explore or resolve all contentions in order to conclude that grievant’s appeal

is meritorious. Similarly, we also do not pause to analyze the Agency's *post hoc* statements from some of the 360 degree sources to further elaborate on their underlying opinions about grievant. We focus on the salient points that are enough to adjudicate the central issues. We need not address matters that are superfluous to the core of our decision.¹⁹

Denial of Substantive Due Process by the Agency. The overarching reason for granting relief in this appeal is the Agency's denial of substantive due process to grievant. Grievant did not receive substantive due process, because the performance criticisms that were the basis for denying tenure were imposed on him by surprise in the 2013 TEF, without reasonable and timely notice of his alleged deficiencies, without counseling, and without an opportunity to improve. By the term "timely," we mean notice of deficiencies articulated to him during a rating period, so that he would have a fair opportunity to improve his performance and to have such improvement documented in his performance evaluation file. By the term "reasonable," we mean that the skills deficiencies must be articulated with the same level of specificity that is professionally and legally acceptable in an AEF or EER. The description of the skills deficiencies cannot be vague or otherwise in violation of applicable precepts or regulations. In the present case, grievant received neither timely notice, nor reasonable notice, nor counseling.

Genesis of the Due Process Rights. We find herein, as this Board has found in other cases, that the elements of substantive due process clearly require reasonable and timely notices of deficiencies prior to any use of such criticism to deny tenure to an

¹⁹ For example, we need not weigh the merits of grievant's theory that the 2013 TEF was the product of a concerted, back room effort to discredit him professionally and to insure denial of tenure in a manner outside normal channels.

officer. We base this conclusion on a rich mosaic of statutory and decisional law from multiple sources, including Board precedent. We pause to give examples of those authorities.

First, the Board firmly explained the Agency's due process obligations a number of years ago in FSGB No. 2002-040 (May 28, 2003). That decision is compelling precedent. It is instructive to recall the facts of that case and our legal analysis of the due process issue. There, grievant's separation was based upon the decision of a Performance Board (BP) and Performance Standards Board (PSB) to place him in a certain low category ("C").²⁰ That category, the keystone of his separation, resulted from a written recommendation misrepresenting the substance of grievant's 2002 AEF. The PSB had recast as skills deficiencies certain statements from the rater that were merely advice as to how grievant could position himself for advancement.

We determined that "nothing in the ROP show[ed] that the agency provided grievant the feedback required by agency regulation. Indeed, that grievant's AEF asserted, 'Mr. [Grievant] is meeting the skills standards of his class, with particular distinction in quality of work and professionalism.'" *Id.* at 15. Moreover, the Agency made no attempt to refute grievant's claim that he had not received any counseling for the alleged deficiencies. *Id.* at 15-16. On those facts, we concluded that the Agency clearly had violated its Precepts (ADS 462.3.3.2) by not notifying grievant of a skill deficiency in time for him to take corrective action. *Id.* at 21. Thus, grievant was taken by surprise with the negative recommendation of the PSB – just as grievant herein was taken by surprise when he received the 2013 TEF.

²⁰ At that point in time, the Agency had not changed to the current system of utilizing what is known as Tenure Boards. The tenuring process previously involved PSBs and PBs.

Also in FSGB No. 2002-040, we focused on the failure to timely counsel grievant about the alleged criticisms that were sprung on him as “skill deficiencies” only while he was being evaluated for tenure. We concluded that, “the agency’s error in not counseling grievant regarding the two criticisms was not just a substantial factor but the only factor in an agency action adverse to the employee. For this reason, we do not find it necessary to remand the grievance to the agency to present additional evidence and argument that, notwithstanding its error, grievant would have been placed in category “C” [*i.e.* denied tenure] by the 2002 PSB.” *Id.* at 21-22.

In reaching our decision in FSGB No. 2002-040, we were guided by due process requirements articulated in the United States Code as well as an important decision of the Merit Systems Protection Board. Those same authorities also guide our disposition of the present appeal.

First, we observed that the “principle that an employee must be told about any deficiencies and be given an opportunity to improve is not unique to the agency’s evaluation system.” We quoted extensively from 5 U.S.C. §4302, Establishment of Performance Appraisal Systems, wherein the United States Congress mandated every federal agency to develop one or more performance appraisal systems that must provide for, *inter alia*, “assisting employees in improving unacceptable performance . . . [and] reassigning, educating in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.” 5 U.S.C. §4302(b) (5-6) (emphasis added).

Second, we cited and relied upon important case law from the Merits Systems Protection Board: *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587

(1984), holding that the above-quoted statutory right to the opportunity to demonstrate acceptable performance is “substantive, not procedural, and therefore not subject to a harmful error analysis.” FSGB No. 2002-040, *supra*, at 18. The MSPB, in turn, reached its conclusion after a thorough review of legislative history elucidating clear legislative intent to establish this substantive right. As is our longstanding custom, we look to decisions of the Merit Systems Protection Board as persuasive and instructive, even though they are not technically controlling. This is especially appropriate where, as here, we and the MSPB are analyzing the same due process principles.

Third, we also drew support for our due process ruling from a decision of the United States District Court in *Obasiolu v. Brian Atwood, et al.*, C.A. No. 98-2970 (ESH) (D.D.C. August 2, 2000) and our further decision in that case on remand, FSGB No. 2000-060 (May 7, 2001). In that litigation, the grievant was a Foreign Service Officer in USAID who grieved the denial of tenure, partly based upon the failure of the Agency to give him timely notice of certain deficiencies in an AEF and to provide him with counseling on those issues. When the Board denied his request for interim relief, he appealed to the United States District Court, which dismissed his claims except to remand the case to the Board to expressly consider whether the Agency violated its own regulations by failing to provide counseling on the criticisms in the AEF. The District Judge noted that the Agency had conceded that grievant had never been counseled. On remand, we stated the following:

As did the District Court, we reject the agency’s argument that because it was the Appraisal Committee, not the rating official, who determined that the time management deficiencies were of such significance that they should be included in the AEF, no counseling was necessary. The requirement that an employee be counseled and given the

opportunity to improve is an agency requirement, not just a requirement for the rating official.

FSGB No. 2000-060 (May 7, 2001), at 10 (emphasis added).

The decisions of this Board regarding notice, counseling, and the opportunity to improve, have involved AEFs and EERs. Until now, the Board has not had occasion to rule on whether first-time skills criticism in a TEF invokes those substantive due process rights. However, this is merely a function of the issues grievants raise in their appeals. There is no logical reason why the fundamental “agency” obligation to provide these due process rights should vanish simply because the offending instrument is a TEF rather than an AEF or EER. The Agency has not proffered any credible reason for making such an exception.

The failure to counsel grievant and to give him a fair opportunity to improve is a sufficient basis to grant relief from the denial of tenure, even if grievant had received timely notice of skills deficiencies.

The TEF and Deferral Letter as Insufficient and Untimely Notice of Deficiencies.

Grievant includes in his due process arguments a complaint that the TEF did not provide him with timely and sufficient notice of his deficiencies prior to the denial of tenure.²¹

The Agency contends that the deferral letter did constitute sufficient and timely notice.

We give the deferral letter a close look, but conclude that it (like the TEF) did not provide grievant with reasonable and timely notice. The following points support this conclusion, beginning with our analysis of the TEF.

²¹ We infer that grievant focused on the TEF only because it is the only evaluation document that contained negative comments about his performance. In no way do we interpret grievant’s filings not to include a demand for substantive due process, by whatever route he could have or should have received it.

Grievant states that, in the 2013 TEF, █████ did nothing more than reiterate certain criticisms from the 360 degree sources, but did not “outline the specific measures needed to improve and failed to state the criteria that would be used to determine if improvement had taken place.” Supplemental Submission at 11 (emphasis added). We look to our own decisional law on the relationship between 360 degree input and adequate notice.

In a case involving a USAID officer who was denied tenure because of negative 360 degree comments in an AEF, we concluded,

On balance, we find that the regulatory permission to solicit 360 degree input at the end of the rating period does not trump the requirement to put an employee on notice of pending difficulties so that she or he may have an opportunity to improve before the end of the rating period. If such opportunity is not given, it follows that adverse comments from the 360 degree process should not be included in the evaluation Such an admonition has particular salience in the case of an untenured officer, who by definition is on a learning curve and who by his untenured status is in a more vulnerable position than other employees.

FSGB No. 2000-060 (May 7, 2001) at 11-12.

In the above-quoted decision, the offending use of 360 degree information occurred in an AEF. However, it makes no difference whether this unfairness arises in an AEF or a TEF, because the lack of notice has the same unfair, ambush effect on the officer. Changing the label of the notice or counseling document does not neutralize the due process violation.

We are well aware that the 2013 TEF was not silent on the issue of what grievant should do between that point and the next Tenure Board. However, nothing that █████ wrote suffices as reasonable notice of relevant shortcomings, and it was not accompanied by a reasonable opportunity for grievant to improve his performance. █████ gave grievant only generalities. Worse, he told grievant that since all of the deficiencies noted in the

360 degree material occurred overseas, grievant could only “address these challenges” with “immediate posting overseas, combined with leadership training, including modules on interpersonal skills and working collaboratively, and a very detailed individual development plan to address all four FS skills areas” This was the only useful advice that █████ divulged to grievant, and grievant acted quickly to volunteer for a CPC posting. There was no other specific guidance for grievant, guidance that grievant could act upon *before* the next Tenure Board would consider him.

To be clear, we do not hold that a tenure deferral letter – used as a counseling letter – can never be a vehicle for timely and sufficient notice of skills deficiencies. It would be rare for the short hiatus between a deferral letter and the next Tenure Board meeting to be sufficient time for an officer to effectuate (and for supervisors to document) tenure-critical improvements in performance. Realistically, however, the deferral letter in the present case does not come close to sufficing as adequate and timely notice. The following factors support this finding.

We conclude that the Agency violated the Tenure Board Precepts by issuing a counseling letter that was not only misleading as to what grievant had to do to obtain tenure, it was devoid of specific counseling information mandated by the Precepts. We pause to quote the pivotal requirements regarding deferral decisions, in Section 3(c) (1) (a-b) of the Precepts:

For a candidate who is to be reviewed again by a subsequent Tenure Board, the current Tenure Board prepares notice and/or counseling letters which explain the Board’s rationale for deferring a tenure decision. Notice letters alert employees to the Board’s concern over the absence of sufficient information to permit an informed tenure decision. To the extent possible, counseling letters issued by the Tenure Board:

(a) Give examples of expected changes in behavior and/or performance and suggest ways in which the Officer and his/her rater should interact to effect needed improvements in the employee's performance; and

(b) Indicate that the career candidate should work with his/her rater, as well as with senior management in the respective Bureau, Office or Mission, to successfully resolve gaps in performance or competencies.²²

The Agency's counseling letter was only general in its advice as to what grievant should do in order to "secure a positive tenure decision" and yielded nothing specific about "expected changes in behavior and/or performance" in any of the four skill areas that are critical to obtaining tenure. The general advice was that he needed his "next Annual Evaluation and Tenure Forms [to] explicitly document [his] increased potential to perform successfully up to and including the FS-01 level in all of the areas captured in the Foreign Service Skills Matrix." The Foreign Service Skills Matrix covers the following areas (and sub-areas) that an officer must master:

- 1) Resource Management (budgeting and financial management, resource management, procurement and contract/grant management, asset management)
- 2) Leadership (direction and vision, consensus building, motivation and empowerment, staff development, cultural sensitivity and respect for diversity)
- 3) Technical and Analytical Skills (professional expertise, USAID values and business processes, information gathering analysis and problem solving – including knowledge management)

²² Response, Attachment 1 at 7 (emphasis added).

- 4) Teamwork and Professionalism (communication, professional conduct, adaptability and flexibility, diversity, equal employment opportunity, knowledge and implementation)

Inexplicably, the Agency instead advised grievant to improve in areas that the Tenure Board is not supposed to examine. That letter contained only one recommendation about how to improve performance. It was:

The Board will look for significant improvements in the areas for growth, including improvement in time management skills, prioritization of your workload, work-life balance, and continued honing of your adaptability and flexibility skills.

The language above is, on its face, misleading in a material way. This is because none of these categories had been identified previously as a criticism of grievant's performance. Even the negative 360 degree sources do not speak of these issues. The above-quoted topics do not appear in any of the "areas for growth" sections of any of grievant's AEFs, nor do they appear in the narrative of the 2013 TEF. Thus, they were new issues that lacked prior notice as deficiencies. Above all, since these topics do not elucidate any of the four official, designated skill areas (save for the one sub-area of "adaptability and flexibility"), they are not fair game as the basis for an adverse tenure decision.²³

For purposes of due process notice of deficiencies, grievant's deferral letter was ineffectual. Since it stands as the only advice or warning that grievant received from the 2013 Tenure Board, we find that it provided no practical and clear counseling or guidance for grievant. Since his own raters had never complained about his performance

²³ Indeed, for example, the subject of "work life balance" is so idiosyncratic to an individual's personal business that it is not remotely relevant to granting or denying tenure. Where "adaptability and flexibility" are concerned, the only current evaluation feedback was a very complimentary comment in the Mid-Point Review within the 2014 AEF. Nothing negative had emerged on that subject.

in these areas, and since his 360 degree opponents did not even identify such issues, grievant received no legally viable notice of deficiencies from the 2013 Tenure Board. On the whole, we find that grievant was denied substantive due process because of the lack of fair and timely notice of the deficiencies that were pertinent to the tenure decision.

The Falsely Prejudicial and Improperly Executed 2013 TEF. Two substantial problems compromised the legal integrity of the 2013 TEF. We pause to discuss these issues because, even without the due process violation, the 2013 TEF was the foundation for the procedurally flawed 2014 Tenure Board decision. As such, we would be convinced to grant relief to grievant even if he had never broached the due process issue. We set forth our findings on these matters as follows.

Improper Execution by the Author. We conclude that █████ failed to comply with the Precepts in executing the 2013 TEF. The keystone of a TEF is the author's individual, professional analysis of the tenure candidate. While the Precepts governing TEFs were not as detailed in 2013 as they are now, there has always been a bedrock and unmistakable requirement that was violated in this case, *i.e.* that the conclusions in the "narrative" section must be the discernible "judgment" of its author, not the opinions of others. This TEF clearly did not contain any such professional judgment of █████ Rather, instead of articulating his own analysis of grievant's potential, █████ did little more than list what he described as "sharply contrasting opinions" of grievant among various 360 degree sources. Even for the four or five months that he personally observed grievant's work, he made no attempt to assess his potential to succeed in the agency – citing only his opinion that grievant is "an intelligent man" and that overseas recipients of his

Temporary Duty Assignment (TDY) services had commented favorably on grievant's contributions.

The 360 degree comments were so divergent that their sources seemed to be talking about two different individuals. For example, █████ noted one source who praised grievant's "outstanding leadership in █████" (referring to a TDY interval in that country) and "his work in promoting change in high-level multi-donor policy dialogue." However, █████ also quoted another source who claimed that grievant's record was one of "discord, disharmony, and delayed resolution of program implementation issues."

Having noted that the opinions of others were both positive and negative, █████ made no attempt to determine which observations were more likely credible or more important than others, or perhaps more importantly, which observations were more in keeping with his own assessment of grievant's career-readiness as an FSO. His narrative contained no weighing of those opinions; this is an evaluative task that is materially different from merely reporting that there were differences in views about the officer. His personal assessment – the stated reason for completing a TEF – was completely absent with respect to grievant's professional expertise and/or his abilities as measured against the USAID skills matrix.

█████ capitulation to the negative 360 degree sources is corroborated in the affidavit he prepared in support of the Agency's briefing in this appeal. In his affidavit, █████ admitted that he sought out the 360 degree material because he viewed his level of exposure to the grievant as too brief. He wrote that he sent seven emails to solicit 360 degree information and that he received only three responses. In each emailed inquiry, he stated in pertinent part, "I have observed [grievant's] work for 4 months and will

therefore rely very heavily on the written input from 360° sources to draft the TEF.”

Punting the narrative analysis to un-named others was an explicit violation of the Precepts.

We know that the Precepts would not have allowed [REDACTED] to decline to write the TEF, because only Mission Directors and Deputy Directors for candidates serving overseas and Officer Directors of candidates serving in USAID/Washington are authorized to draft a TEF. Yet, despite the strict Precepts regarding authorship, no one can guarantee that a candidate’s Mission Director/Deputy Director or Office Director necessarily has a great fund of knowledge about the candidate. This is why it was incumbent upon [REDACTED] to make up his own mind, articulating his own conclusions. There was nothing wrong with admitting his dearth of personal knowledge about the candidate, but he was still required to form his own opinion. [REDACTED] simply chose not to do that in the TEF. It was likewise incumbent upon [REDACTED] to anticipate that the Tenure Board should compare the 360 degree information to the AEFs that were allegedly not available to him for comparison. Otherwise, the Tenure Board would not know that the AEFs played no role in his recommendation.²⁴ This expectation should have occurred to [REDACTED] when the USAID/Washington personnel office brought the discrepancies to his attention and asked him to reconcile the thrust of the TEF with AEF’s in grievant’s file. *See* discussion below.

²⁴ In our view, denial of access to grievant’s AEFs was strange and should have been questioned by [REDACTED]. The current Precepts (fully revised as of April 25, 2014) explicitly require the author of a TEF to review the candidate’s AEFs, as part of a broad mosaic of information. *See* 414mad_042514, § 3.3.3. We are not aware of any particular privacy laws that actually should have barred [REDACTED] from seeing those documents, only one year earlier. The Agency has cited none. Intellectually, it makes no sense to require a Mission Director or Office Director to make a recommendation while virtually “in the dark” about an Officer’s historical performance.

In any case, █████ failed to articulate in his own words why the negative 360 degree information deserved more weight than anything else. Thus, it is clear that he improperly abdicated his fundamental responsibility as drafter of grievant's 2013 TEF.

The Falsely Prejudicial 2013 TEF. We further conclude that the 2013 TEF was “falsely prejudicial” for three distinct reasons.

One, we have already noted the falsely prejudicial information concerning two, alleged curtailments that never actually happened. For this reason alone, we would conclude that the TEF was falsely prejudicial.

Two, █████ included in the TEF at least one piece of negative information that he should have known was false, *i.e.* the negative 360 degree comment about grievant's refusal to do rotations.

Three, the additional persuasive factor is embedded in █████ affidavit (presented for the first time in the Agency's Response in this appeal). We set forth below more detail about the training issue and the unusual revelation in █████ affidavit.

The False Information Regarding Training. We are constrained to note that █████ faulty preparation of the TEF was exacerbated by his handling of information he learned after soliciting guidance from the Human Resources staff. The record shows that he paused to seek help from the Human Resources staff, sending certain documents for review – including a copy of a draft TEF that he prepared.²⁵ In an email of December 28, 2012, he received a very detailed response from the Chief of the Performance Management Branch. That response pinpointed many items for him to consider and stated why it was important for him to affirmatively grapple with inconsistent information about the candidate.

²⁵ The record does not disclose whether he did this after or before his attempt to see grievant's AEFs.

Particularly with respect to 360 degree source material, [REDACTED] was: (1) warned to “be alert for inaccurate, unfair, or biased sources,” (2) reminded to “balance 360 degree input on both outstanding and poor performance;” (3) put on notice that the 360 degree information was markedly at odds with factual information in grievant’s AEFs; and (4) pointed to a specific, negative 360 degree comment that the Branch Chief knew to be factually untrue (the alleged refusal to do training rotations).

The content of this email regarding grievant’s AEFs is highly important, because [REDACTED] had never seen them, and he was sufficiently experienced to know the significance of AEFs. The Branch Chief wrote to [REDACTED]:

The draft TEF as prepared (using the 360 input) conflicts with [grievant’s] Performance Evaluation File (AEFs, Training, and Awards) which is reviewed by the Tenure Board.²⁶

The Branch Chief flagged the erroneous 360 degree comment that grievant “refused to do rotations stating that he knew all about the Agency, our rules and regulations and how other tech and support offices functioned.” She pointedly debunked this negative statement, telling [REDACTED] the following:

- 360 Degree input in the TEF indicates the employee is required to rotate through various offices in the mission to gain experience.
- ADS 459 state mid-career employees do not have a training program. After completing 5 week orientation program they may receive additional training to fill gaps. Mid-career employees may be hired at FS-04 and above based on prior experience or expertise and are reviewed by the competitive FS/SFS Performance Boards.
- [Grievant] was hired as a Mid-career Officer (FS-02), based on prior work experience (contractor with USAID. His last three (3) FS AEFs indicate he met the standards of class, completed training and rotation assignments successfully. His first two AEFs had DLI Work Objectives for Junior Officers (FS-05/06), which is a disadvantage to him since FS-05/06 are reviewed by an administrative review panel in

²⁶ Supplemental Submission, Attachment BB at 1, (emphasis added).

HR and Mid-career officers are reviewed by the FS Performance Boards. He also received a superior honor group award and a special act award for his performance.²⁷

This email is telling, and not in a way that supports the agency's position. Not only did █████ ignore the Branch Chief's advice as to how to structure his narrative, he decided not to include any of her clarifying information regarding training issues. He decided not to add to the TEF any of this new information about grievant's AEFs (with or without attribution to the Branch Chief), and inexplicably decided to retain the erroneous 360 degree comment regarding refusal to complete training.

Having been told by the Chief of the Performance Management Branch that there was significant factual evidence undercutting the negative 360 degree sources, it was incumbent upon █████ at the very least, to note in the TEF that he had no access to the AEFs and that he could not personally account for why there were 360 degree observations conflicting with those of grievant's actual raters and reviewers. Exposing these major incongruities in the TEF would have been of major importance to a Tenure Board, but also should have been of major importance to █████, himself. Realistically, there was no reason why █████ could not have quoted the Branch Chief as the informant of the issue, even if he could not contribute further details on his own. However, he kept silent about what the Branch Chief had revealed to him. In doing so, he further breached his obligation to formulate his own, useful assessment of the candidate. More than that, he created a document that was bound to be and was prejudicial to the candidate.

By his own account, █████ had prepared TEFs in the past and knew what was required. The agency states that █████ consulted lawyers within the agency after receiving the email from the Branch Chief, and that the lawyers told █████ he could issue the TEF as

²⁷ *Id.* at 2 (emphasis added).

he had first drafted it.²⁸ We do not recognize such advice as a defense to violating the Precepts, and we certainly do not regard consulting lawyers as an excuse for transmitting false information about a candidate to a Tenure Board.²⁹

We conclude that [REDACTED] clear violation of the Precepts is a basis for granting relief, not only by expungement of the 2013 TEF but also by reversing the denial of tenure, as we explain further herein.

The Revelation in [REDACTED] Affidavit. In the affidavit, [REDACTED] not only describes how he obtained written 360 degree material, he admits for the first time that he also made telephone calls to other 360 degree sources, who gave only negative reports of grievant's "corridor reputation." [REDACTED] does not recapitulate what questions he actually posed to these persons or whether they were aware that their statements would be used in a TEF. These verbal comments are not revealed in the TEF.

Objectively, there is no way that either the 2013 or the 2014 Tenure Board could have known, or even would have questioned, the influences that may have formed [REDACTED] impression of grievant. That information was not revealed. Under the totality of circumstances, we infer that the verbal comments that [REDACTED] received from 360 sources – both those he chose to cite and those he chose not to identify - did influence [REDACTED] view of grievant and that they influenced the way he chose to draft the TEF. There being no contemporaneous, memorialized statements of those telephone conversations in the present case, they now stand as no more than gossip.

Using secret, verbal information about an officer in formulating a TEF evaluation is inherently unfair and prejudicial. Combined with the objectively false information

²⁸ Response at 9-10.

²⁹ Nothing in the Record of Proceedings discloses what [REDACTED] actually asked, told, or showed the lawyers.

about the alleged curtailments and other matters, there is no doubt that the agency cannot meet its burden of proving that the 2014 Board would have taken the same action even if these errors had not occurred. For these reasons, any adverse tenure decision that was dependent on that TEF must be reversed.

Other Procedural Flaws in the 2014 Tenure Board Decision. The Board concludes that the 2014 Tenure Board violated the applicable Precepts in certain respects, beyond the bedrock issue of substantive due process, even if the TEF had been properly executed and was not falsely prejudicial. We reached this conclusion based on the following.

Improper Elevation of the 2013 TEF from Supplemental to Primary Information.

Without question, the negative 360 degree information in the 2013 TEF was the overarching basis for the denial of tenure.

The 2014 Tenure Board had before it the 2014 TEF and the most recent AEF available, neither of which contained any explicit notation of skill weaknesses on grievant's part. In fact, the author of the 2014 TEF (dated December 11, 2013) emphatically supported grievant's request for tenure. She wrote, in part:

[Grievant] is a highly effective Foreign Service Officer with proven ability to perform successfully up to and including the FS-01 level. He has demonstrated strong technical and analytic skills, a solid understanding of resource management, and excellent interpersonal and leadership skills. Colleagues, supervisors, subordinates and USG partners all describe him as a strong leader, manager, and technical expert. . . . [Grievant] is serving the USG in [REDACTED] with distinction. I strongly recommend that he be approved for tenure.³⁰

The complete 2014 AEF was not available to the 2014 Tenure Board. Only the Mid-Point Progress Review was available when the Tenure Board convened (accounting

³⁰ Supplemental Submission, Attachment N (emphasis added).

for only four months on grievant's new overseas assignment to [REDACTED]. The 2014 TEF covers a 10-month period, of which only five months of that time was spent in an overseas posting. Nonetheless, both were very strongly worded documents portraying grievant as a stellar employee who had demonstrated in that short time that he met the standards in all four of USAID's skill areas – the same ones that had been highlighted in the 2013 Tenure Board deferral letter. Without articulating why this positive information should be discounted, the 2014 Board specifically referenced - and pointedly quoted – some of the old, negative 360 degree information from the 2013 TEF. We thus infer that no new negative information had surfaced. The TEF remained the sole source of any criticism of grievant in either of these skill areas. Thus, we conclude that but for the continued existence of the flawed TEF in grievant's performance evaluation file, the Agency would have had no basis for denying him tenure.

Violation of the Precepts by Failure to Recognize Grievant's Lack of Opportunity to Improve. Aside from all of the issues involving the 2013 TEF, we examine the only other contributory factor in the denial of tenure, *i.e.* the Tenure Board's terse, conclusory statement that there was "insufficient evidence in the most recent AEF or TEF" that grievant had demonstrated the requisite skills in "resource management/procurement" and "contract/grant management at the FS-02 level." Here, we find that the 2014 Tenure Board violated the Precepts. This violation dovetails into the Agency's due process obligation to provide an officer with an opportunity to improve his performance after adequate notice of his deficiencies.

The Tenure Board Precepts that were in effect when the 2014 Board made its decision contained explicit instructions as to how to fairly weigh the factors of a

candidate's assignments and "demonstrated skills." The objective was to warn Tenure Boards not to presume that a candidate has an actual opportunity to correct his or her deficiencies. The obvious focus was on a candidate's lack of power to control his or her assignments. The Precepts stated the following pertinent admonition:

Assignments.

Different assignment patterns inevitably present candidates with varying opportunities to demonstrate the qualities important to the Board's judgments. All candidates, regardless of specialization, area of assignment, or diversity of experience are to receive equal consideration.

Demonstrated Skills.

There are four areas of skills important for successful performance in USAID's Foreign Service. These skill areas are broken down into four to five sub-skills

No candidate can be expected to have displayed abilities in all of these skill areas and their subgroups; thus the Tenure Board should avoid making negative assumptions regarding skills that the candidate has had no practical opportunity to demonstrate.

Precepts for USAID's Foreign Service Tenure Board, A Mandatory Reference for ADS Chapter 414 2(c) and (d) (414maj_042006_cd44) (emphasis added).³¹

We find that the violation of the above-quoted Precepts occurred when the 2014 Tenure Board cited and relied upon the "insufficient evidence" of skills that grievant could only improve upon if assigned overseas. This was obviously something not within grievant's control.

The 2014 Tenure Board had before it grievant's 2014 TEF – but only the "mid-point review" of grievant's AEF for the relevant rating period (April 1, 2013 to March

³¹ This set of Precepts is in the record as Exhibit 1, attached to the Agency's Response to Grievant's Supplemental Submission.

31, 2014). Attachment H to grievant's Supplemental Submission. We look first at the mid-point review. It was ten lines in length. In pertinent part it stated:

His Washington supervisor notes his strong teamwork and professionalism, and highlighted his ADAPTABILITY AND FLEXIBILITY, excellent technical capacities in the emergency sector and his careful adherence to work timelines. In [REDACTED] [grievant] has done significant analytical work and provided support to the Mission and the [REDACTED] and is already well on his way to achieving his WOs. [Grievant] is providing support to the Washington-driven construction survey, a major Agency-wide effort to identify and evaluate the impact of infrastructure portfolios of selected missions over the past 3 years. He displayed excellent technical and analytical skills throughout his evaluation of the performance of [REDACTED] construction activities, and applied superb COMMUNICATION skills across offices. He provided strategic and sound advice to Mission management in support of the planning and design of the construction portfolio, with an estimated investment of over \$100 million.

Knowing that grievant had only one mid-point review in his most recent AEF, the 2014 Tenure Board effectively held his limited assignment (*i.e.*, the insufficient evidence) against him – in direct contravention of the Precepts. This was exactly what the Precepts warned the Tenure Board not to do.

We conclude that this violation of the Precepts was a fundamental and substantial error, not a harmless error.³² It compounded the Board's more central error of giving pivotal stature to the old 2013 TEF, rather than using it as "supplemental" material in conjunction with grievant's AEFs, award record, and the more recent 2014 TEF.

³² There is no doubt that grievant was harmed by this violation of the Precepts. His rater, with only a few more months of time, could have documented grievant's performance in a vital skill area that had been pinpointed by the Tenure Board. The record contains the fully-executed AEF, issued on May 9, 2014. In substance, it contains the rater's very positive observations of grievant in all skill areas. In particular, the rater highlighted the fact that grievant was assigned to cover multiple important functions, one of which was to serve as "the Contracting Officer's Representative (COR) for the \$24 million [REDACTED] Energy Sector Support Program [REDACTED] and the Activity manager for a Fixed Amount Reimbursement Agreement (FARA) with the [REDACTED] Energy Corporation [REDACTED] for \$9.1 million." The rater noted that grievant "represents the USG to the multi-donor energy sector working group. He represents the USG to the multi-donor energy sector working group. He is a member of the PAI interagency team and frequently briefs and liaises with the Ambassador, GOL and donor officials." Thus, the passage of only a few more months in [REDACTED] was enough time for grievant to establish himself in a highly visible and important role in contract management.

V. DECISION

The denial of tenure is reversed. Looking at the full sweep of events, it is clear that the falsely prejudicial and defective TEF and the cascading violations of the Precepts and principles of due process, separately and together, robbed grievant of a fair chance to obtain tenure. Further, we find that grievant is the “prevailing party” for purposes of seeking attorney’s fees.

Grievant is entitled to be put in the same position he would have been in, if the Agency had not violated its own Precepts or denied him due process. We must take the case as we find it. The grievant has completed his initial five-year appointment. Usually, Agency allows an officer only two opportunities for consideration by a Tenure Board. Yet, we have found that he did not receive fair treatment or due process as to the entire tenuring process, involving two different Tenure Boards.

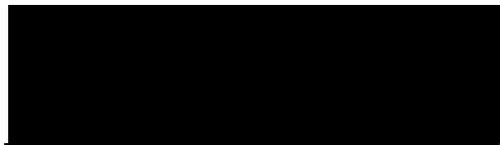
We must fashion relief for a tenure candidate whose ability to demonstrate his worthiness appears to depend on further good performance in an overseas assignment. We are guided by the relief we mandated in FSGB No. 98-033 (October 5, 1999). There, we reversed the denial of tenure to a Department of State officer who also had not received adequate and timely notice of his deficiencies and who had been told that a grant of tenure would depend on improved performance overseas. We stated,

As a practical matter, therefore, in order for [grievant] to have a reasonable time in which to have the opportunity to demonstrate his potential for tenure, he must be extended for two years. This is because he requires service abroad as part of the tenuring requirement, and that requires a two-year assignment.

Id. at 17-18.³³

Under the totality of these unique circumstances, we thus conclude that the proper and effective relief in this case requires the following: (1) that the 2013 TEF be expunged; (2) that all references to grievant's original deferral and denial of tenure be removed from his performance evaluation file; (3) that the Agency present to the next Tenure Board grievant's fully updated performance evaluation file and a current TEF³⁴; (4) that if grievant is deferred for tenure that his personnel file and appropriate new TEF shall be presented to a second Tenure Board; and (5) that grievant's appointment be extended for whatever time is required for him to fully exhaust the entire tenuring process. In other words, grievant must be allowed to commence and complete the tenuring process anew, without delay.

For the Foreign Service Grievance Board:



Cheryl M. Long
Presiding Member



J. Robert Manzanares
Member



William B. Nance
Member

³³ See FSGB No. 2002-040, *supra*, at 21 (“The Agency must return grievant as nearly as possible to the circumstances, in scope and status, he would have been in if he had not been separated for improper reasons.”)

³⁴ We refer here to a “current” or “new” TEF documents for subsequent Tenure Boards considering grievant, but we recognize that given the passage of time the Agency may elect to supplement information presented to the board(s) in some other form, consistent with current regulations and Precepts.