

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

And

Department of State

Record of Proceedings

FSGB Case No. 2014-036

November 16, 2016

DECISION - CORRECTED

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Member:

Nancy M. Serpa

Special Assistant

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

Ambassador Thomas Boyatt

Representative for the Department:

Daniel M. Creekman
Attorney Adviser, HR/G

Employee Exclusive Representative:

Zlatana Badrich
American Foreign Service Association

OVERVIEW

HELD: Grievant failed to show by preponderant evidence that she was subjected to an unfair promotion review process in 2013. The grievance appeal was denied.

CASE SUMMARY

One issue remained to be resolved in grievant's appeal to the Grievance Board (the Board) (the others having been dismissed in previous orders): that grievant did not receive a fair or impartial promotion review in 2013.

Grievant, now a retired Senior Foreign Service Officer, is a former president of the Foreign Service employee union, the American Foreign Service Association. In April 2013, she co-authored with two retired ambassadors a Washington Post op-ed piece about the Foreign Service. In response to that piece, several senior Department officials sent a strongly-worded letter to grievant in which they disagreed with grievant's views as expressed in the op-ed article. One of the originators of the letter, then a Deputy Assistant Secretary (DAS), served later that year on the Selection Board (SB) that considered grievant and others in her class for promotion from FE-OC to FE-MC. Grievant was not recommended for promotion by the SB. She claims in this appeal that the Department should have ensured that the DAS recuse herself from consideration of her personnel file.

The Board concluded that grievant did not prove, beyond speculation, that the DAS held any personal animus or bias against her, or otherwise gave her a biased review. The Board further concluded that grievant failed to exercise her right to request that the DAS be recused from considering her file. Lastly, the Board held that grievant's claim that the agency should have been aware of a need for recusal by the DAS and forced that recusal was unrealistic and not proved. We found that grievant, a 30-year veteran of the Foreign Service and a highly skilled employee union representative, did not explain why she did not learn that the DAS was a member of the SB and exercise her right, under the applicable procedural precepts, to request that the DAS recuse herself from consideration of her file. The Board concluded that grievant did not prove the one remaining claim in this case and the grievance was denied.

DECISION

I. THE GRIEVANCE

Grievant, [REDACTED], a now-retired Senior Foreign Service Officer, has a single claim remaining in the instant grievance appeal, filed on September 24, 2014 – that she was not fairly considered for promotion by a 2013 Senior Selection Board, because one member of that Board was a former Deputy Assistant Secretary (DAS) in the Bureau of Public Affairs (PA), whom grievant argues was biased against her. The Board finds that grievant failed to meet her burden of proving that her claim is meritorious. Accordingly, the grievance appeal is denied.

II. BACKGROUND

Grievant, [REDACTED], was a Foreign Service Officer with the Department of State for more than 30 years. From 2009 to 2013, she served as elected president of the American Foreign Service Association (AFSA), a union of Foreign Service employees. While serving as AFSA president, grievant co-authored, with two retired ambassadors, an op-ed article which appeared in the Washington Post on April 11, 2013. The article criticized a perceived trend in the Department of promoting a growing number of Civil Service employees and political appointees to the agency's highest leadership positions that were traditionally held by career Foreign Service Officers.

On April 24, 2015, Deputy Assistant Secretary (DAS) for PA, [REDACTED], and the Principal Deputy Assistant Secretary (PDAS) for PA, [REDACTED], along with eight other senior Department officials, issued a strongly-worded letter to grievant, responsive to the op-ed, challenging its assertions and conclusions. On May 9, 2013, the Director General (DG) of the Foreign Service also wrote a letter to his colleagues in the Service disagreeing with some of the

statements made by the authors of the op-ed and agreeing with the response letter. This letter was copied to grievant and to the other authors of the op-ed.

During the summer of 2013, grievant was considered for promotion in the annual selection board (SB) process. DAS [REDACTED] was assigned as a member of the SB that considered grievant's file and those of other members of her class. According to the Department, AFSA received notice of the members of the 2013 SB, while grievant was AFSA President prior to the SB's review of grievant's file. Grievant claims that she was not notified by AFSA staff of the names of the SB members and asserts that she was unable to access her email account for a brief period before the SB met.

[REDACTED] did not recuse herself from considering grievant's file and grievant did not request that she do so. Grievant was not recommended for promotion. The Department thereafter advised grievant that because she was not recommended for promotion, she would be mandatorily retired on September 30, 2014, upon expiration of her time-in-class (TIC).¹

[REDACTED] filed a grievance with the agency on June 9, 2014, challenging the actions of the senior officials who wrote the critical response letter, averring that it damaged her reputation and that the ensuing bias of senior Department officials² caused a delay in her receipt of an onward assignment after the AFSA presidency. She also asserted that when [REDACTED] served on the 2013 SB, she should have recused herself from considering grievant's Official

¹ Grievant was subsequently granted interim relief from separation from the service during the pendency of this grievance and appeal. She was on interim relief until her statutorily-mandated retirement (for age) in July 2015.

² Grievant also posited, without providing evidence, that these officials harbored ill-will toward her and AFSA over a number of senior assignment issues.

Performance File (OPF). Grievant lastly claims she was denied a fair promotion opportunity based on [REDACTED] bias against her.³

Grievant requested the following relief:

1. Interim relief from separation based on expiration of her TIC.
2. That an appropriate senior department official be ordered to send a letter to the authors, signers, and recipients of the response letter (with a copy to grievant and AFSA) stating that their action was a violation of 5 FAM 723(5), and enjoining them from any similar action in the future.
3. That the Director General be required to send a letter to the authors, signers, and recipients of the response letter stating that the assertion in the response that “the overwhelming majority of top leadership positions at the DAS level and above are filled by the Foreign Service” is factually incorrect.
4. That her 2013 promotion review be reconsidered, and, if necessary, a reconstituted 2013 SB be convened to give a “fair and unbiased review” of her performance based on the fact that [REDACTED] did not recuse herself. Grievant also asked that she and AFSA be given the right to reject any members of a reconstituted panel that they considered biased against her or the union.
5. That the Department be ordered to inform in writing the Senate Foreign Relations Committee (SFRC) in accordance with Section 1107e (2) of the Foreign Service Act (FSA) of the actions of the authors/signers of the response letter.
6. That the Foreign Service Grievance Board (FSGB, Board) direct the Department to report to the SFRC as required by Section 1107e (2) of the FSA.
7. An extension of her TIC.
8. Any other relief deemed just and proper.

On September 16, 2014, the Department denied the grievance. Grievant filed the instant appeal on September 24, 2014, and requested a hearing. On November 19, 2014, the FSGB held a hearing on the agency’s motion to dismiss the claims and issued oral rulings at the conclusion

³ Grievant amended her appeal on July 24, 2014, adding an allegation that senior officials who wrote the response letter violated agency policy (5 FAM 723(5)) regarding use of email and agency communications systems. That claim was dismissed in an order issued by this Board on December 12, 2014.

of the hearing. A written order granting the agency's motion in part was issued on December 19, 2014.⁴

At that point, two claims remained in this appeal: (1) that senior Department officials committed reprisals against grievant when they failed to provide her a timely appropriate onward assignment after her AFSA presidency and (2) that the Department failed to consider grievant fairly for promotion when it did not require the recusal of [REDACTED] from participating in the SB review of grievant's performance file.

Grievant filed a Supplemental Submission on April 12, 2015 and was mandatorily retired based on her age on July 31, 2015. The Department then filed a Partial Motion to Dismiss on August 19, 2015, seeking dismissal of the claim concerning grievant's onward assignment, because a remedy for that claim (a different assignment) was no longer possible, given her retirement. Grievant filed an opposition to the motion on September 2, 2015, to which the Department filed its response on September 14, 2015. This Board issued an order on December 1, 2015, granting the motion for lack of an appropriate remedy. At that point, only one claim (the Department's failure to consider grievant impartially for promotion in 2013) remained in this appeal.

On December 10, 2015, the agency filed a pleading captioned "Opposition to Hearing Request," arguing that the remaining issue in this appeal did not require a hearing.⁵ Grievant filed a response to the pleading on December 21, 2015, arguing in favor of a hearing. On April 20, 2016, the Board issued an order denying grievant's original request for hearing that had

⁴ Grievant claimed that officials misused the agency email system, contrary to regulation; that she was wrongfully accused of inaccuracies; and that her work environment was damaged as a result. These were the claims that were dismissed by the Board at the hearing on November 19, 2014, and memorialized in the order of December 19, 2014.

⁵ The Board had originally granted grievant's request for a hearing when other claims remained for resolution. Once there was only one claim remaining, the Department submitted its "opposition" to the Board's earlier ruling permitting a hearing.

previously been granted. We found that the issues remaining in this case – the alleged harm to grievant based on [REDACTED] failure to recuse herself from considering grievant’s OPF – did not require a hearing. We stated:

Even assuming, *arguendo*, that all the individuals named by grievant [to be called to testify at a hearing] were biased against her and wished her harm, grievant has presented no allegation or evidence that they (save [REDACTED] [REDACTED]) had any hand in the promotion process or in the deliberations of the SB. We therefore conclude that a hearing is unnecessary to resolve grievant’s claim that she was denied a fair promotion review. The Board therefore declines to order a hearing.⁶

Grievant filed an additional Supplemental Submission, entitled “Grievant’s Closing Statement,” on July 13, 2016. In that statement, grievant reiterated her arguments that she was the victim of bias and reprisals due to her union activities and her involvement in drafting the op-ed article. Grievant also complained about the Board’s prior orders in this appeal. She repeated her demand for a hearing, arguing that “senior management retaliated against the union president.... Those who did the retaliating needed to give sworn testimony. ... There are no precedents for a case of this magnitude.” Grievant disputed the Board’s finding as to what the remaining issue was in the case, claiming “[T]he remaining issue is whether or not senior managers retaliated against [her] through the promotion process and tangentially th[r]ough the assignment process.” She repeated her relief requests (as stated in her earlier Supplemental Submission of April 12, 2015):

1. An order from the FSGB recommending a directed promotion under the unique circumstances of [grievant’s] case and because HR cannot ensure her a fair and impartial reconstituted board; and
2. Any other relief deemed just and proper.

⁶ See, Order: Request for Hearing, dated April 20, 2016, at 7.

The agency filed its Response to the second Supplemental Submission on August 11, 2016. Grievant's final Rebuttal was filed on August 19, 2016, and the Record of Proceedings was closed on August 30, 2016.

III. POSITIONS OF THE PARTIES

A. The Grievant:

Grievant alleges that an Under Secretary of State, the then-Director General of the Foreign Service, a PDAS and a DAS all conspired to manipulate the assignment and promotion processes to punish her. She alleges they did so because she publicly took a position and expressed views that opposed their policies. She stresses that this case has impacted not only her career, but has implications for the Foreign Service as a whole, the Department, and AFSA's ability to function as an independent union.

Grievant reiterated her arguments in favor of a hearing. She claims that because during discovery the agency refused to provide emails she requested between and among certain Department officials, on the ground that the emails were not in the possession of the officials, the only way for her to have developed critical evidence of the officials' bias against her was by means of a hearing. She argues that personal testimony would have been the only means by which the Board could judge their demeanors and credibility. She avers that declining to afford her a hearing denied her full due process, and deprived this Board of a complete set of facts on which to render its decision.

B. The Agency:

The agency argues that, on the only issue remaining in this case, grievant has produced no evidence whatsoever that DAS [REDACTED] was biased against her, even after grievant was afforded (and declined) an opportunity to take additional discovery on that specific issue. The

agency avers that grievant's accusation that [REDACTED] was biased against her was based solely on the latter's participation in writing the response letter to the op-ed that she co-authored. The Department adds that although [REDACTED] was a signatory to the response letter and solicited the signatures of others, she did not draft it.⁷ Moreover, the agency argues, even if she had authored the response letter, that document is not evidence of personal bias against grievant; it is instead a response to the opinions offered in the op-ed. According to the Department, grievant offered no evidence of personal animosity between herself and [REDACTED] and states, "the two were and remain virtual strangers."

The agency also argues that even if the Board concluded that [REDACTED] role in sending the response letter shows a bias strong enough to call into question her impartiality as an SB member, the grievance should still fail because grievant has presented no evidence that [REDACTED] was, in fact, biased, or that her bias affected the outcome of the SB's review of grievant's OPF. Moreover, the Department argues, [REDACTED] took an oath upon becoming a member of the SB in which she swore "to apply the Precepts and promotion criteria without prejudice or partiality" and to report the introduction into SB deliberations of any "nonrecord material" to the Director of the Office of Performance Evaluation. The agency contends that there is no reason to believe, and no evidence to indicate, that [REDACTED] did not uphold her oath or did not apply the precepts and promotion criteria fairly.

Finally, the agency cites part III (C) (4) (h) of the 2013 Procedural Precepts which permits any individual under review for promotion to request the recusal of an SB member who that individual "believes is unable to apply the Precepts fairly and without bias in assessing his/her performance." According to the Department:

⁷ Grievant disputes this claim, stating that [REDACTED] was the "other drafter of the [response letter]." See, grievant's Supplemental Submission at p. 6.

... [REDACTED] placement on the SB was made with AFSA's consent while [grievant was] AFSA president. Prior to being appointed to the SB, all SB member names are sent to AFSA, which [as an organization] may seek to reject any member. AFSA, under your leadership, did not reject [REDACTED] name as an SB member.⁸

The Department states that for reasons that are unexplained, grievant chose not to avail herself of the opportunity to request [REDACTED] recusal before the SB met. The Department claims that, since a procedural protection was available that would have provided complete relief to grievant before the SB considered her OPF, her failure to avail herself of that opportunity mandates that her *post hoc* grievance be denied.

IV. DISCUSSION AND FINDINGS

In all grievances, except those involving discipline, the grievant has the burden of proving, by preponderant evidence, that the grievance is meritorious.⁹ In this case we find that grievant has failed to show that her one remaining claim has merit.

In her final arguments to the Board, grievant's principal dissatisfaction was with earlier rulings of this Board and particularly with our decision denying her request for a hearing. The fact remains, however, that the only issue still to be resolved did not require a hearing. We were unpersuaded by grievant's claim that the Board could not decide this case without allowing her to present sworn testimony from a number of "senior Department officials" whom she insisted were biased against her. Instead, we concluded that the only way these senior officials could have affected the 2013 promotion process would have been to direct or influence an SB member, perhaps [REDACTED], to violate the precepts and give grievant a biased promotion review. Grievant has presented no evidence at all that [REDACTED], or any other SB member, was

⁸ See the Department's decision, dated September 16, 2014, at p. 4, appended to the grievance appeal as Attachment C.

⁹ 22 CFR § 902 (b).

influenced by anyone who held a bias against her. Thus, her insistence on a hearing misses the point.

In addition, the failure to prove that anyone on the SB, including [REDACTED], unfairly influenced the promotion process defeats grievant's last remaining claim. As the agency argued, the entire SB was required to swear an oath to conduct itself "without prejudice or partiality" and promised to report the introduction of any "non-record evidence into the Board's deliberations ... to the Director of the Office of Performance Evaluation." Grievant has presented no evidence that [REDACTED], or any other SB member, violated that oath.¹⁰

Without presenting direct evidence of [REDACTED] bias against her, grievant assumes that this was proved by [REDACTED] involvement in signing the response letter. Grievant also suggests that the agency was obligated to know that [REDACTED] should not be assigned to her SB or, at least, once assigned, to demand her recusal from considering grievant's file. The Board finds that it is unreasonable to expect an agency of many thousands of employees to have knowledge of allegations of personal animus or bias between or among all of its employees, or to be responsible for knowing when every recusal should occur. In any event, even if we assume, *arguendo*, that the Department was, or should have been, aware of the response letter that [REDACTED] signed and the fact that [REDACTED] was subsequently assigned to serve on grievant's SB, we do not reach the automatic conclusions that grievant asks us to reach – that [REDACTED] was biased against grievant merely because she endorsed the response letter, that the Department ought to have forced [REDACTED] to recuse herself, or that [REDACTED] was obligated to recuse herself. We find there is no evidence to prove that [REDACTED] performed her duties impaired by any measure of bias against grievant.

¹⁰ The Department argued that grievant was mid-ranked in 2010, 2011, and 2012, before she was again mid-ranked by the 2013 SB that included [REDACTED]. The Department argued that this is evidence that the results of the 2013 SB was not the result of bias, but consistent with independent reviews by three other SBs in previous years.

We note further that the agency's procedural precepts for promotion allow any employee to request the recusal of any SB member when the employee believes the SB member is unable to "apply the Precepts fairly and without bias in assessing his/her performance." This means that all employees who are scheduled for promotion review can and should find out who is slated to participate in their SB and, if the employee believes that a Board member is not able to apply the precepts fairly and without bias, the employee should request that that member recuse him or herself from consideration of the employee's file.

Grievant does not argue that she was unaware of this precept or her right to seek recusal of any member of her SB. Nor does she argue that she was unaware of the membership of the 2013 SB that reviewed her OPF. She claims, instead, that around the time the 2013 SB was being established, her email was very briefly disabled and that no one brought to her attention the composition of her SB.¹¹ Given grievant's extensive experience in the Foreign Service, particularly her union position, we consider it significant that she does not explain why she was unaware of the composition of her SB when she had at least two different sources for that information – AFSA and her Career Development Officer (CDO). In her Supplemental Submission, grievant acknowledged that AFSA was advised of the names of the members of the 2013 SBs, but she claimed that "[n]either AFSA's State Vice President nor any of several members of the AFSA Labor-Management staff, informed [her] ... of the names of the officers proposed by the Department for the [SBs]." The Board finds this assertion implausible, particularly in a year when grievant's file was scheduled for a last promotion review. We also note that on September 26, 2013, after the SB work was completed, grievant inquired of her CDO about the composition of the SB members and learned in a responsive email from the CDO, dated the next day, which individuals had been assigned to her SB. She does not explain

¹¹ See, grievant's Supplemental Submission at p. 7.

what prompted her to make this inquiry only in late September, rather than before the SB met. We also note that before the SB met and reviewed her file, grievant submitted several letters of support from colleagues along with a “Self-Assessment,” dated June 14, 2013.¹² This proves that she was acutely aware of the ongoing SB process.

In the end, we conclude that grievant has failed to prove that she could not learn the composition of the SB that reviewed her file, or that she could not have requested that [REDACTED] recuse herself, or that there was a legitimate basis for [REDACTED] to do so. Therefore, we conclude that grievant has not proved her final claim that the 2013 promotion review process was biased or otherwise infirm.

V. DECISION

The grievance is denied.

For the Foreign Service Grievance Board:

[REDACTED]

Susan R. Winfield
Presiding Member

[REDACTED]

Nancy M. Serpa
Member

¹² See, Grievance Appeal Submission, dated September 24, 2014, at Attachment A-D.