

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[REDACTED]
Grievant

Record of Proceedings
FSGB Case No. 2014-040

And

May 15, 2015

Department of State

DECISION
EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Warren R. King

Board Members:

Barbara C. Cummings
Jeanne L. Schulz

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

Neera Parikh, AFSA

Representative for the Department:

Dorian Henderson, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant failed to meet her burden to prove that a statement in her EER by her reviewing officer was false or falsely prejudicial or that she had not been counseled regarding poor interpersonal relations with others.

OVERVIEW

Grievant, a Regional Security Officer serving overseas, grieved her 2012 Employee Evaluation Report (EER) over a negative statement made by her reviewing officer concerning her interpersonal skills, alleging inter alia, that she had not been counseled by that officer on the alleged deficiency, no examples were provided, the critical sentence was indirectly related to a medical condition she had earlier suffered at post, and that the statement caused her not to be promoted in 2013. She requested that her review statement be expunged from the EER and that she be granted another promotion review by a 2013 Reconstituted Promotion Board.

The Board found that grievant had been counseled by her rating officer on her problematic interpersonal skills with others (which she did not dispute), that her reviewing officer was not required to counsel her; that she had not previously asserted her medical condition may have contributed in any way to her interpersonal conflicts, and presented no medical documentation to support that assertion; and that the observations in the reviewer's statement required no further examples, within the context of the EER instructions. The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

██████████, a Diplomatic Security Officer grieves her April 16, 2011 – April 6, 2012 Employee Evaluation Report (EER) for containing statements by the Ambassador, her Reviewing Officer, which she alleges are procedurally flawed, inaccurate and falsely prejudicial. She claims the Ambassador was not at Post long enough to make such a negative comment on her interpersonal skills, that she had not been counseled on the alleged deficiency, and that the sentence at issue in her EER was indirectly related to a medical condition which she had earlier suffered at post. For relief grievant requests that her entire 2012 Review Statement be expunged from her EER, that she be granted another promotion review by a 2013 Reconstituted Board and any other relief deemed just and proper.

II. BACKGROUND

Grievant joined the U.S. State Department (Department, agency) as a Diplomatic Security (DS) Officer in 2003. In June 2010 she arrived on assignment to ██████████ ██████████, as the Embassy Regional Security Officer (RSO). In August 2010, she incurred a back injury during a training exercise at post. Over the next 18 months, grievant continued to suffer pain from the back injury and was medically evacuated (medevaced) twice. In March 2012, while on the second medevac, M/MED downgraded grievant's medical clearance to Class 2, which prevented her from returning to ██████████ for the final two months of her assignment.

Grievant contests the reviewer statement for the EER prepared for her final year at post.

III. POSITIONS OF THE PARTIES

THE GRIEVANT

██████ maintains that a statement by the Ambassador, her Reviewing Officer in her April 16, 2011 – April 6, 2012 Employee Evaluation Report (EER), “is procedurally flawed and falsely prejudicial.” Of the four months the Ambassador was present at post before her EER was due, Grievant had been on leave for one of those months, and “he traveled and literally, we met once a month for our one on ones. He cancelled on me because of different reasons so I think that out of the 4 months, we met twice.” She contends that the Ambassador had not been at post long enough, nor was he familiar enough with her performance, to make such a critical statement, that he failed to counsel her about it, and that absent the damaging statement she would have been promoted to FS-02 in that rating cycle. She “maintains that without an explanation of my medical condition . . . the reviewer’s statement is falsely prejudicial.” The statement she objects to is shown in bold in the following excerpt from the reviewer’s statement:

██████████ was away from post for a portion of the rating period, as she has noted in her statement. Of that period, I was present at post for only four months, so my experience with ████████ was somewhat limited. However, during that time, I was impressed by ████████ thorough knowledge of security procedures and by her skills, as well as by her enthusiasm for her work. ████████ **occasionally had difficulties working with others in the Embassy, but she has great potential, and I am hopeful she will continue to develop as an officer during her next assignment with the ██████████ in ████████.**

Grievant contends that Department regulations governing EER preparation require that any perceived deficiencies be discussed in advance, so that negative comments do not come as a surprise to the officer. She cites 12 State 46265 (May 8,

2012¹ as requiring that “any perceived deficiencies by the Ambassador about my performance should have been documented appropriately and properly raised through counseling.” She quotes from the cable:

Whenever possible, post management should make every effort to correct performance and/or conduct issues before they become serious problems. Managers should first determine whether they are dealing with a performance problem or a misconduct problem, or both. . . . As the leader of your mission, you are expected to ensure that employees with poor performance or misconduct problems are provided counseling, that counseling sessions inform the employee what is wrong and what improvement is needed, that counseling sessions are administered in accordance with the timeframes set forth in the FAM, that counseling sessions are documented . . . and that any continued performance problem is reflected in the employee’s evaluation report . . .

Grievant argues that the Ambassador’s failure to discuss his perceived issues with her interpersonal skills warrants expunging his comment. She disagrees with her rating officer’s observation that he did not believe her reviewing officer was not required to counsel her. She also contends that the Ambassador’s positive comments do not negate the “difficulties working with others” statement and that he provided no examples supporting his negative observation, making it vague and unsupported. She faults the Ambassador for failing to mention her medical condition, the painful back injury, which she argues “may” have affected her interpersonal relations with others.

Lack of examples and prior counseling rendered any corrective behavior on her part impossible. The Department inaccurately avers that the AFI section of the EER is the only one requiring examples. Under the Instructions for EER Preparation Review Statement section it states: “Independent observations of the employee’s performance and potential must be supported by providing additional examples of performance observed during the rating period.” She contends that since her rater did not discuss

¹ Chiefs of Missions’ Instructions Regarding Conduct, Suitability, and Discipline Abroad.

interpersonal skills in her AFI section, independent observations by her reviewer required examples.

Grievant illustrates one of her numerous run-ins with the MO, who entered her office and berated her over a parking space for the Ambassador's wife:

I had just returned from leave and was told by the [ARSO] that the Ambassador wanted his wife to drive into the compound to occasionally pick up mail. The ARSO told me that the Ambassador did not want 'special attention' and did not want a designated parking spot inside the embassy compound. The MGMT officer insisted otherwise and demanded that vehicles be moved to accommodate a parking space for the Ambassador's wife that the Ambassador allegedly did not want. I tried to explain and defend the wishes of the Ambassador only to get screamed and yelled at in my office. It was at this time that I spoke to the Ambassador after hours. This particular issue very much involved the Ambassador and the confusion over his wishes and the fact that one of his senior staff lost his temper with me over a parking spot."

Regarding the examples provided to the Grievance Staff by her reviewer and others, grievant argues they should be disregarded as they are incorrect, and many occurred outside the rating period. The Ambassador knew that grievant had investigated the Marine detachment Gunnery Sergeant for inappropriate conduct in October 2011 when she observed him zooming security cameras in on women's buttocks. He was also investigated for many unexcused absences from work and misuse of the MSG vehicle (dedicated for use by junior MSGs). She defends her interactions with the Marines and is at a loss as to which Marines did not like her. She was on good terms with "at least three of the five Marines." One compared her to another strong female – his mother, two indicated they were considering jobs in Diplomatic Security after leaving the Marine Corps, one requested a letter of recommendation for college and another asked her for a letter of recommendation upon his leaving the Marine Corps. She does not equate coaching or mentoring a Marine with any personality conflict.

In support of her position that she was unfairly criticized, grievant includes emails received from her Assistant RSO, and some LES employees and Marine Detachment guards expressing their appreciation for her assistance and/or mentoring during their assignment to the embassy. One expressed what an honor it had been to work with her and that “your professionalism sets the bar too high.”

As to difficulties with the supervising Marine unit in [REDACTED], grievant claims that he lied to the DCM about their previous interactions, and that as she explained “a situation” to him on the phone, “he raised his voice and began berating me.”

THE DEPARTMENT

The Department notes that this grievance is not about the Department of Labor’s denial of her workman’s compensation claim for the back injury, or her view of incompetent medical diagnoses and/or treatment for her injury by the Department. It is about her poor interpersonal relations with some American officers and employees, local personnel and others in [REDACTED], and the United States, spanning periods before, during and after her back injury.

The Department cites several examples of grievant’s poor relations with personnel in the Embassy and elsewhere. When interviewed by the Grievance Staff, the Ambassador stated that “on one occasion, when she walked into my office unannounced after working hours to complain about another officer [about the parking space issue], I noted to her that the issue could best be resolved through better communication and relations with that officer rather than involving me directly in her disagreement.”

In a June 3, 2014 statement to the Grievance Staff, the DCM stated:

As discussed, I do believe this statement by Ambassador [REDACTED] is completely justified – I would agree that [REDACTED] certainly does

indeed have great potential, but unfortunately she also had difficulties working with others in the embassy on a regular basis. This was a frequent topic of discussion between [REDACTED] and me (as I imagine she would agree), but I don't recall specifically whether Ambassador [REDACTED] independently discussed these issues with her – I believe he probably did on occasion, but just can't recall.

The Ambassador noted that he did his best not to be overly critical in his statement because “grievant has good RSO skills and great potential, but to develop into a truly effective RSO, she needed to improve in her interpersonal skills.” He understood from the DCM that he had counseled her on the issue of interpersonal relations. In his June 12, 2014 statement the Ambassador stated:

Yes, I did observe such difficulties and was aware of others I did not directly observe. She had a difficult relationship with the Marine Security Guard Detachment, both with the Gunny Sergeant in command and some of the Marine Guards themselves, based on complaints I received and others I was informed of by other embassy officers. The Marines complained about a rude, unpleasant attitude toward them and her lecturing style of supervision. As a result, there was poor communication between these vital links in the security structure at post. [Grievant] also had difficulties with the supervising Marine unit in [REDACTED]. . . visiting inspecting officers made it clear to me they did not respect her style of supervision of the Marines and that the Marines at post did not respect her. In addition, I personally observed that she had a poor relationship with at least one American section head, with whom she had several arguments. I was also told by my DCM that at one time or another before my arrival that she had personal disagreements with a number of other American staff and section heads.

The MO stated that the DCM told him of attempts to get grievant to “. . . change her abrupt, hostile, overbearing affect in her interactions with embassy staff. At one point an officer from DS International Programs came to post to attempt to resolve the conflicts between [grievant] and post personnel. She told me she was well aware of [grievant's] interpersonal interaction problems, that she was there to try to keep [grievant] from being curtailed . . .”

The Department noted a number of reported instances where grievant was cynical, abrupt, abusive, and combative.

V. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing by a preponderance of the evidence, that the grievance is meritorious. (22 CFR 905.1(a)) We find that the grievant has failed to carry that burden of proof for the reasons that follow.

Grievant argues that the Ambassador did not counsel her as required in 12 State 46265 (5/8/12). This cable was issued after grievant's April 15, 2012 EER rating period had passed, and addresses the duty of the Ambassador to ensure that employees with poor performance or misconduct problems receive counseling. We find that the Ambassador did ensure that she was counseled by the DCM on her poor interpersonal relations, and that the Ambassador was not required to counsel her himself, though he did so informally, by suggesting that her issue with the MO "could best be resolved through better communication and relations with that officer." The Ambassador provided a statement to the Grievance Staff as to his comment in the EER:

[...]They certainly are not false or inaccurate as she alleges. If anything, I did my best not to be overly harsh in my statement, noting that I felt she had good skills as an RSO and great potential. However, I believed and still believe that in order to develop into a truly effective RSO, she needed to improve in her interpersonal skills. She certainly was capable of that, and I hope that it will happen.

Grievant's argument that her reviewer failed to counsel her fails. She does not dispute her rating officer's statement that he frequently discussed her poor interpersonal skills with her. Her reviewing officer was not required to counsel her on that same issue.

Grievant also claims that the Ambassador's observation about her interpersonal skills in his reviewer's statement failed to comply with the Instructions for EER Preparation Review Statement.² She quotes these instructions as follows:

Independent observations of the employee's performance and potential must be supported by providing additional examples of performance observed during the rating period.

Grievant contends that the instructions she quotes required the reviewer to provide very specific examples of poor interpersonal skills since her rater did not criticize her interpersonal skills in the AFI section.

In an inquiry to the parties on April 21, 2015, the Board confirmed that grievant's 2012 EER was prepared on Form DS 5505i. The instructions from which grievant quotes are for a previously used form, DS 1829i. The actual instructions for the reviewer statement for grievant's 2012 EER are as follows:

SECTION IX. REVIEW STATEMENT
(Completed by the reviewer)

The reviewer's assessment of performance and potential adds an important second dimension to the evaluation. From the beginning of the rating cycle, reviewers must be familiar with the employee's performance. The reviewer must independently assess the rated employee's performance, and must not rely solely on the views of the rater. *In this section, the reviewer must comment on the employee's performance and potential, using examples.* The reviewer must also describe relations between the rater and the rated employee. If the reviewer disagrees with the evaluation of the employee by the rater, or if relations between the rater and employee are strained, the reviewer must make this clear.

The reviewer shares responsibility for ensuring that the employee is adequately and fairly rated and should discuss with the rater instances where a report is inadequately prepared or is not fair. The reviewer may suggest that a rater consider revising sections or statements. As appropriate, the reviewer may comment on the adequacy of preparation of

² The EER instructions are prepared by HR each year, taking into consideration feedback provided by the previous year's selection boards. Although they are negotiated with AFSA, the instructions are not incorporated into the FAM or FAH.

the report and on the candor shown by the rater. If there is no reviewer, indicate so in this section. (Emphasis added.)³

The correct instructions applicable to the reviewer statement for grievant's 2012 EER are fairly general. They require examples of potential and performance, but with no linkage of the need for such examples to a difference in opinion expressed by the rater and reviewer.

Grievant cites the first paragraph of the reviewer statement, in which the sentence to which she objects is found. However, in the following three paragraphs, the Ambassador expands upon his introduction, providing several specific examples of grievant's performance and potential:

██████ leadership skills were tested when she returned from out of town on the day of post's Marine Corps Ball and was thrust into a potentially dangerous situation due to reports that three persons appeared to have been surveilling the site of the Ball. . . . She volunteered to be one of a series of speakers to a local student group. . . . ██████ also organized a very useful Crisis Management Exercise

The instructions do not require that there be examples for every statement. The Ambassador's assessment of grievant's performance and potential included several examples sufficient to allow the Selection Boards to understand that assessment and give it credibility, and thus complied with the instructions. As the Ambassador explained during the course of the grievance investigation, he sought a balance between flagging the problem and not being overly critical of grievant or undermining his message of her great potential.

³ Although the Instructions state that they apply to Form DS-5055i used for FS-02s, FS-01s, and Senior Foreign Service, a cable sent out on May 11, 2011 extended the use of the new EER form to all tenured Foreign Service Generalist and Specialist employees beginning in the 2011-2012 rating period.

However, even statements not supported by specific examples must be accurate and not falsely prejudicial. It was clear from the record that the Ambassador did have more specific examples that supported the accuracy of his clear, but more general, statement about grievant's difficulties in working with others during the rating period.

Grievant has not denied conflicts with Embassy personnel, medical staff in the Department, the Marine Colonel in [REDACTED] etc. Her assertions now that her medical condition "may" have affected her interactions with others" and therefore "there may have been a few times when she spoke out of turn or impolitely" are speculative and unsupported by any evidence. Her rating and reviewing officers did not observe any correlation between her medical condition and work and were informed of none by grievant. Her reviewer was advised by others that her interpersonal problems were "longstanding." Grievant attempts to prove her that her medical condition caused her interpersonal problems in the 2011-2012 rating period by referencing her 2013 EER, which cited no interpersonal issues, because by then she had been "finally diagnosed and given proper treatment." We agree with the Department that this does not support her position that her medical condition caused her earlier conflicts. During the rating period at issue here, there is no contemporaneous evidence that she attributed her interpersonal issues to her medical condition when counseled by her rater, and she has presented no corroborating evidence to that effect in this appeal. There is no medical documentation reflecting a causal relationship between her medical condition and her performance issues. Her rater, who frequently discussed grievant's interpersonal issues with her, fully supports the reviewing officer's comment in the EER. Precisely because circumstances, behaviors, personality mixes and job requirements change, along with assignments,

performance evaluations are required yearly to account for changing circumstances.⁴

Grievant has not demonstrated any nexus between her medical condition and her interpersonal issues with others.

Grievant's argument that certain examples of interpersonal conflicts contained in the record occurred outside the rating period or are hearsay, must fail. One such claim relates to a statement given by the MO to the Department relating that the DCM had told him of several attempts to get grievant "to change her abrupt, hostile, and overbearing affect in her interactions with embassy staff." This, she claims is hearsay, since the MO was told this had occurred, but was not present as a witness. However, the rating officer acknowledges that he discussed grievant's problematic interpersonal relations with her on numerous occasions and did not deny discussing them in some manner with the MO. Grievant offered no evidence as to when the "interpersonal conflicts" occurred and the MO's examples are corroborative of the reviewing officer's observation.

Grievant maintains that in January 2011, a post visit by a DS International Programs Officer "to understand what was occurring at post" took place outside her rating period, and therefore should not have been considered by the Department in adjudicating her grievance. Other than grievant's assertion, there is nothing in the record to indicate when that officer came to post, and grievant does not dispute the MO's statement that the officer told him she had come to post because she was aware of [grievant's] interpersonal problems and that she was there to try to keep grievant from being curtailed from post. The Board finds that this observation corroborates grievant's rater's observation that her interpersonal problems were regular and her reviewing officer's comment that ". . . she occasionally had difficulties working with others in the

⁴ See FSGB Case No. 2007-051 (July 23, 2008)

embassy . . .” Despite grievant’s argument that her reviewer had only been at post four months, not long enough to properly evaluate her, we note that evaluations are required of those officers at post for four months or longer. Why the rater chose not to address this issue in his AFI assessment is unknown, but to us it demonstrates that the reviewer was unwilling to ignore the substantial interpersonal issues grievant generated with others. We apply the same reasoning to other examples grievant objected to as allegedly being outside the rating period – there is no evidence presented as to when these incidents occurred.

We note that in response to a December 29, 2011 email that the MO sent to employees he supervised and copied to grievant, instructing them to inform him of “all inquiries and service requests you receive from the [RSO’s office]” grievant sent an email to her rating officer and others stating:

The Mayor of Crazytown has issued the following proclamation to his staff. Note: the Health Unit is also cc’d and frankly, I don’t need the MGMT officer in my uterus. Therefore, I will no longer seek assistance from the Health Unit. Sad that his petulant behavior all year has marred what was otherwise a normal post.⁵

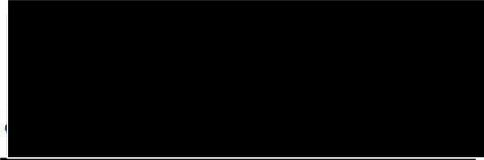
The record does not include the rater’s response, if any, but the Board finds this and several other emails to her supervisor grievant entered into in the record indicative of her strident reactions to situations with which she disagreed. As grievant has not met her burden of proof, it is unnecessary to address her argument that she would have been promoted earlier absent her reviewer’s EER statement.

V. DECISION

The grievance appeal is denied.

⁵⁵ The Board notes that grievant refused to consult with the Health Unit long before December 2011.

For the Foreign Service Grievance Board:



Warren R. King
Presiding Member



Barbara C. Cummings
Member



Jeanne L. Schulz
Member