BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

and

Department of State

Record of
Proceeding FSGB
No. 2014-051

February 18, 2015

ORDER: Interim Relief from Separation

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Susan R. Winfield
Board Members:	James Blanford Barbara C. Cummings
Special Assistant:	Joseph Pastic
Representative for the Grievant:	*Pro se*
Representative for the Department:	Laurie Younger, HR/G
Employee Exclusive Representative:	American Foreign Service Association

ORDER: INTERIM RELIEF FROM SEPARATION

I. THE ISSUES

Grievant is an untenured FS-04 career candidate Foreign Service Officer (FSO) in the political career track with the Department of State (Department, agency). She appeals a decision by the Department to terminate her limited career appointment (LCA) in the Foreign Service, as a result of her failure to obtain tenure. This Order denies grievant's request for interim relief during the pendency of this grievance appeal.

II. BACKGROUND

Grievant, [redacted], joined the Department of State in October 2009. Following six months of language training, she arrived at her first post in Embassy [redacted] on June 18, 2010, serving there until June 27, 2011 as the ambassador's staff assistant. After voluntarily curtailing from post because of medical issues, grievant's medical clearance was reduced from a Class 1 to a Class 5, thereby restricting her to positions in Washington, D.C. only. Grievant next served as the Environment, Science, Health and Technology and International Relations (ESTH/IO) officer at the [redacted] in Washington, D.C. from July 18, 2011 to July 17, 2012. At the end of this tour, grievant's medical clearance was upgraded to a Class 2, which permitted her to return to overseas posts. From August 20, 2012 to August 19, 2013, she served as the junior desk officer for [redacted] and the [redacted] in Washington, D.C. In November 2012, grievant was advised that she was accepted for an assignment to [redacted] on which she had bid, beginning in June 2014 and would be required to take additional language training before that assignment.

In March 2013, grievant was informed that she was denied tenure by the Winter 2012 Commissioning and Tenure Board (CTB) and would be reviewed again by the Winter 2013

CTB. In September 2013, she began language training for the [redacted] assignment. However, on April 17, 2014, she was informed that after a second tenure review, the Winter 2013 CTB did not recommend her for tenure and she would therefore be separated from the Service on October 25, 2014. Her training was discontinued and she was reassigned in the interim to a domestic position in the [redacted].

Grievant filed her agency-level grievance on August 1, 2014, claiming that her supervisors in the [redacted] and [redacted] assignment were biased against her, created a hostile work environment, and included inaccurate and falsely prejudicial comments in her 2012-2013 Employee Evaluation Report (EER). She complained also that the Entry-Level Division in the Office of Career Development and Assignments (HR/CDA/EL) diminished her competitiveness for tenure by not providing her an opportunity to serve a second overseas tour before she received her second CTB review. Moreover, she complained that CDA/EL had not explained the implications of not completing a consular tour on her tenure potential.

For relief, grievant requested that her August 2013 EER be expunged in its entirety and that the decision of the 2013 CTB be overturned. On December 14, 2014, the Department denied the relief sought, ordered termination of grievant's LCA and her separation from the Service. Grievant appealed to the Foreign Service Grievance Board (FSGB, Board) on December 22, 2014 seeking continued Interim Relief (IR) from separation, extension of her LCA for two years to allow for an additional overseas tour, immediate assignment to an overseas position and an additional review of her file for tenure at the end of her overseas assignment.

III. POSITIONS OF THE PARTIES

A. Grievant

Grievant argues that her August 2013 EER was procedurally and factually flawed and contains unfavorable and falsely prejudicial information. She argues that the EER contains her rating officer's exaggerated and misleading description of one drafting mistake that she made and ignores the fact she drafted many documents without errors. She contends that the 2013 EER intentionally omitted mention of several positive accomplishments and described other accomplishments only in vague terms unsupported by examples.

Grievant also claims that the "Area for Improvement" section of this EER criticized her leadership skills and focused on one incident that occurred during her first visit to a foreign embassy for which she had not been properly prepared by her supervisors. She notes that she wrote in the "Rated Officer's Statement" section of the EER that she faced a hostile work environment during the rating period and neither her rater nor reviewer provided her with support, mentoring, or appropriate feedback. She also asserts that her rater and reviewer's written responses to these accusations are untrue.

Grievant also argues that the substance of the counseling she received during the rating period was inadequate for an entry-level officer and it was not done in the manner required by regulation. She states that she, rather than her supervisor, initiated each counseling session and her supervisor was "hyper-focused on [her] mistakes," providing mostly negative feedback and failing to recognize her positive accomplishments. Grievant further claims that she did not receive work requirements until eight months into her tour, while regulations require them to be established within 45 days of the start of her assignment. She also accuses the rater and reviewer of ostracizing her and denying her opportunities to fulfill her work requirements. She contends

that her unsatisfactory relationship with her rating officer was compounded by her reviewing officer's tolerance of the rater's hostility toward her.

Grievant asserts that she should be given time to obtain additional evaluated overseas experience because a medical condition caused her to curtail from her first and only assignment abroad. She believes that her medical issues adversely affected her first (2011) EER, limited her to domestic assignments during the time when her medical clearance was downgraded and deprived her of a chance to demonstrate consular and overseas proficiencies. She contends that having only one EER covering experience abroad significantly undermined her chance for tenure.

On the issue of interim relief, grievant argues that because she is likely to prevail in this grievance appeal, the Board should grant her interim relief during the pendency of her appeal. She claims that she proffers considerable material in support of her appeal, including correspondence, laudatory EERs and Training Reports, examples of her accomplishments, and favorable statements from colleagues praising her work.

B. The Agency

The Department objects to the continuation of interim relief in this case. It argues that grievant has not met the standard for granting interim relief to untenured career candidates, that is, that she has a "reasonable likelihood of prevailing on the merits and being granted some remedial period of continued employment." In response to each of the claims, the Department argues that grievant medically curtailed from her only overseas posting at her own request. Moreover, her complaints about the statements in her 2011 EER and her experiences with the ambassador in [redacted] were not timely grieved and may not properly be considered by the Board.

The Department also contends that grievant's August 2013 EER is an accurate balanced reflection of her performance during the rating period and contains appropriate positive mention of her accomplishments. The Department insists that the 2013 EER does not display the bias and negativity that grievant claims. Moreover, grievant does not dispute the accuracy of the statements regarding her writing and fact checking. The Department argues that if grievant wanted to enlarge on particular accomplishments in her EER, she could have done so in the "Rated Officer's Statement" section of the document.

As for the critical comments in the EER, the Department argues that both the rater and reviewer indicated there were several times when grievant's fact-checking was a problem. Thus, there was a legitimate basis for the criticism in the EER that grievant needed to pay better attention to the accuracy of her written products. Further, the Department notes that even the emails that grievant submitted corroborate that she had difficulty completing all of the work that she was assigned and had difficulty setting priorities for her work. For that reason, the agency claims, her opportunities to take on additional duties were limited.

The Department also argues that the AFI section of the 2013 EER criticized grievant's judgment based on her engaging in a "heated exchange" with a foreign diplomat when she made a routine visit to an embassy. Grievant's rater stated that at first, grievant left a voicemail indicating that she was proud to have "pushed back" in her discussions about human rights violations at the foreign embassy.[1] The Department claims that it was only when she realized that her supervisors were unhappy with her behavior that she began to minimize the heated

[1] The Department has not produced or disclosed to the Board post grievance statements from the rater or the reviewer that it relies upon and cites in opposing the instant motion. Moreover, the agency does not offer evidence of the details of the "heated exchange" other than its claims about what statements were made by grievant, her supervisors and the foreign diplomat involved. We find the absence of such documentation is not critical for purposes of the instant motion for continued IR.

exchange. The agency argues that grievant should have been able to avoid an inappropriate debate with a foreign diplomat while carrying out a simple request for visa service at that embassy and should not require any special counseling. In addition, as further evidence of grievant's lack of judgment, the agency notes that after the incident at the embassy, grievant requested guidance for escorting the same foreign diplomat during his visit to her office, but failed to mention to her supervisors that she had accepted an invitation to dinner at his home. The Department claims that since this grievance was filed, the rating officer explained that the grievant's poor judgment in engaging in a heated exchange was included in the AFI section of the EER because it demonstrated a deficiency in judgment and reliability that needed improvement.

The Department also maintains that grievant's evidence does not prove a hostile work environment. Instead, she was subjected to no more than constructive criticism that is a necessary and beneficial aspect of counseling. The Department points out that when grievant complained about her work environment, her reviewer specifically asked if she wanted to elevate her claims of a hostile work environment, but she declined. In the end, the agency contends that grievant's allegations of "marginalization," unfair criticism, failure to acknowledge her accomplishments, or failure to ask how she was doing, do not constitute a hostile environment.

The Department claims that grievant received adequate counseling throughout the rating period of her 2013 EER. It notes that she was counseled on three separate documented occasions with her rater and one occasion with her reviewer. According to the Department, grievant was counseled about her judgment and reliability, specifically concerning the incident at the foreign embassy. The counseling statements also highlighted grievant's need to improve the accuracy of her written products.

The Department also challenges grievant's assertion that her work requirements were not prepared in a timely fashion. It notes that the 2013 EER that grievant signed states that her work requirements were established on September 14, 2012, well within the required 45 days of the start of her assignment in August 2012. The agency notes that the e-mail grievant provides in support of this assertion does not indicate that work requirements were not timely issued; only that she wished to discuss them. Moreover, grievant never raised any issues with her supervisors concerning the date of her work requirements.

The agency further argues that it did not withhold any assignments to which grievant was entitled. That is, she requested to curtail from her first and only overseas post. Her tours in Washington, D. C. were the result of her bids and her medical clearances. As for her claim that she was unaware of the tenure requirements and that CDA/EL should have provided her better counseling, the Department states that the considerations for tenure are clearly set forth in 3 FAM 2245.2(a).

IV. DISCUSSION AND FINDINGS

This Board has generally held that interim relief from separation, during the pendency of a grievance appeal, particularly for untenured career candidates, shall be granted only in cases where a grievant shows a reasonable likelihood of prevailing in the grievance appeal.[2] Given the early stage of the appeal at which this determination must be made, it is of necessity based on preliminary information, without the benefit of full discovery and supplemental submissions by the parties.

[2] *See* FSGB Case No. 2014-003 (April 7, 2014); FSGB No 1989-89 (February 14, 1990); FSGB No 1989-83 (February 16, 1990). *Compare* FSGB Case No. 1997-104 (February 24, 1998), wherein the Board noted that interim relief is granted to tenured officers absent extraordinary circumstances and irrespective of a showing of a reasonable likelihood of success on the merits.

Based on the information contained in the record to date, we find that grievant has failed to show that she has a reasonable prospect of prevailing in this appeal. While she presents evidence of many plaudits and accomplishments, she has failed thus far to show that she has a reasonable prospect of convincing this Board that the comments made by her supervisors in the 2013 EER about her need to improve in some areas were either biased or falsely prejudicial. We base this conclusion on the fact that grievant does not dispute the actual basis for the critical comments in her EER and that her EER contains many positive elements to balance the few criticisms.

Nor has grievant demonstrated a likelihood that she will succeed on her claims that during her 2012-2013 tour, she was a victim of a hostile work environment (HWE), as that term is defined under Title VII of the Civil Rights Act. A hostile work environment claim requires evidence that grievant does not allege.[3] Moreover, to the extent that she claims that her strained relationship with both her rater and reviewer had a negative impact on her 2013 EER, we similarly find that she does not present a reasonable likelihood of prevailing in her appeal. In FSGB Case No. 2013-007 (June 19, 2014) at page 32, this Board cited an earlier Board case, FSGB 2004-012 (June 27, 2005) in which we stated that "the mere existence of a strained relationship [between an employee and his/her rater] does not necessarily establish that the statements written by the rater are falsely prejudicial." At this early stage of the grievance

[3] In order to prove that she was the victim of a Title VII hostile work environment, grievant would have to prove that: (a)she was subjected to unwelcome harassment that was so severe and pervasive that a reasonable person would objectively perceive it as hostile or abusive; (b) the harassment was motivated either by grievant's membership in a protected class (discriminatory HWE) or her engagement in protected activities (retaliatory HWE); and (c) her employer was aware of the harassment and failed to take appropriate measures to ameliorate the situation. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001)). Proof of an HWE requires consideration of "the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. Boca Raton*, 524 U.S. 775, 787-788 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). Leaving aside the absence of proof of discrimination or retaliation, we do not find that grievant will be able to establish that her rater or reviewer subjected her to severe or pervasive harassment.

process, because the challenged EER appears to be balanced and neither biased nor inaccurate, we are unpersuaded that grievant will be able to prove that the relationship she had with her rater and reviewer rendered her EER unfair.

We further find that grievant is unlikely to establish that she was inadequately counseled during the 2012-2013 performance year. Her complaint is that she initiated the counseling sessions. However, she does not cite any authority for her assertion that her rater was required to initiate the counseling sessions. Grievant also concedes that she was counseled three times by her rater and once by her reviewer during the performance year. We note that the regulations require two counseling sessions per year. 3 FAH-1 H-2242(a).

As for grievant's claim that her rater failed to establish work requirements for the first eight months of her 2012-2013 assignment, the EER belies this claim by stating that the work requirements were established within the time required by the regulations. See 3 FAM 2821.3-6. Grievant does not offer any evidence to dispute the statement on the EER that her work requirements were established in a timely fashion.

Lastly, grievant argues that she should not have received a second tenure review until she was able to complete a second overseas assignment. She cites no authority for this position. Nor does she offer authority that would establish that a second overseas tour was critical to her being awarded tenure.[4] The record does not include a statement from the 2013 tenure board on why it chose not to grant her tenure, nor do we have before us the complete record that the tenure board reviewed. Moreover, the record shows that grievant was advised by the 2012 CTB that her next review would be the following year.[5] Thus, at this stage in the proceedings, there is no

4 Nor does grievant offer authority for her argument that she should have completed a consular tour before her second CTB review.
5 The 2012 CTB letter states: "Accordingly, the Board encourages [redacted] to continue the strong work so far documented in her file and looks forward to next year's second review.

explanation for why grievant did not bid on overseas assignments for the 2013-14 year such that when she was next reviewed she would have been overseas. Instead, in July 2012, when grievant was permitted again to travel overseas, she bid on and was assigned to a post ([redacted] that required additional extensive language training. It appears that grievant is unlikely to establish that the Department was responsible for her decision to bid on and accept the onward assignment to [redacted] that required that she be in language training in the U.S. when she was next reviewed by the 2013 CTB.

V. ORDER

Grievant's request for continued interim relief during the pendency of this grievance appeal is denied.

For the Foreign Service Grievance Board:

[redacted]

Susan R. Winfield
Presiding Member

[redacted]

James E. Blanford
Member

[redacted]

Barbara C. Cummings
Member