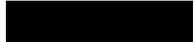


**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between



Grievant

and

Department of State

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Record of Proceeding

FSGB No. 2015-022

November 30, 2015

**DECISION**

EXCISION

For the Foreign Service Grievance  
Board:

Presiding Member:

John M. Vittone

Board Members:

Barbara C. Cummings  
Gregory D. Loose

Special Assistant:

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

*Pro se*

Representative for the Department:

Elizabeth A. Whitaker  
Grievance Analyst, HR/G

Employee Exclusive Representative:

American Foreign Service  
Association

## OVERVIEW

**HELD:** Grievant failed to establish by a preponderance of the evidence that his grievance is meritorious, that he was harmed by either his April 2013 or October 2013 Employee Evaluation Reports, or that the Department erred in designating his Reviewing Officer for the April EER or in not having anyone serve as Reviewing Officer for the October EER. The grievance was denied.

**SUMMARY:** Grievant served as an Office Director in the Bureau of Diplomatic Security (DS) and was responsible for implementing many of the organizational changes that were directed following an attack on the U.S. Consulate in Benghazi, Libya, that resulted in the death of the U.S. Ambassador. Grievant's Reviewing Officer, the Bureau's Principal Deputy Assistant Secretary (P/DAS), was placed on administrative leave and absent for the last four months of the rating period (December 21, 2012 - April 15, 2013), and grievant and other senior DS personnel were instructed not to contact her during her absence. Grievant thought that the Acting P/DAS would serve as his Reviewing Officer, but the Director General directed that the former P/DAS would write reviews for the officers for whom she had served more than 120 days as Reviewing Officer. Grievant claimed the Reviewing Officer's four-month absence and notoriety negatively affected his performance record and competitiveness for promotion and senior performance pay. Grievant then received an interim EER in October 2013 that he understood would have a Review Statement, but the DS Bureau Executive Office determined that there would be no Reviewing Officer for this EER. Grievant asserted that this lack of a Review, when combined with his previous EER Reviewing Officer's association with his performance record, damaged his competitiveness for promotion and senior performance pay. The Department countered that the April 2013 Reviewing Officer was appropriate because the officer had served more than 120 days in that capacity and had substantive knowledge of grievant's performance. The Department argued that grievant provided input in the optional section of his October 2013 EER to address his accomplishments that would have been contained in a Review Statement. Finally, the Department argued that grievant had not demonstrated that he had been harmed by either EER since each Selection Board had mid-ranked him for promotion and recommended him for senior performance pay. The Board found that although grievant demonstrated that the Department contravened the regulations regarding Reviewing Officers, grievant did not meet his burden of proof that the choice of his Reviewing Officer for his April 2013 EER in any way negatively affected his promotion potential, or that the lack of a Reviewing Officer for his October 2013 EER was a Department error that resulted in actionable harm to the grievant. The grievance was denied.

## DECISION

### I. THE GRIEVANCE

On March 13, 2015, grievant submitted a grievance claiming that the selection of his Reviewing Officer for his April 2013 EER and the lack of an appropriate Reviewing Officer for his interim October 2013 EER negatively affected his performance record and prospects for promotion and senior performance pay. The Department denied the grievance on April 14, 2015, and grievant appealed to this Board on June 16, 2015. Grievant requests extension of his Time in Class (TIC) for two years to enable him to present a more fully documented performance record. The Record of Proceedings (ROP) was initially closed on September 3, 2015, but reopened at grievant's request, and without objection by the Department, to permit grievant to add as a remedy sought a reconstituted Promotion Board to review his amended EERs. The ROP was closed again on November 10, 2015.

### II. BACKGROUND

Grievant, [REDACTED], a Senior Diplomatic Security Officer at the FE-OC grade, has been employed with the Department of State since 1985. He appealed the Department's decision to deny his grievance over his Employee Evaluation Reports (EERs) dated April 15, 2013, and October 11, 2013, covering his service as an Office Director in [REDACTED] [REDACTED] the Bureau of Diplomatic Security (DS or Bureau). The Department denied grievant's claim and concluded that grievant did not demonstrate that he was harmed by either EER.

### **III. POSITIONS OF THE PARTIES**

#### **A. THE GRIEVANT**

Grievant alleges that he was adversely affected by the Director General's decision to allow his Reviewing Officer, the former Principal Deputy Assistant Secretary (P/DAS), who had been placed on indefinite administrative leave eight months into the rating period, to draft the Review Statement on grievant's April 2013 EER. When the P/DAS was placed on leave, grievant and other senior officers in his office were specifically directed not to communicate with her, and grievant was informed that the Acting P/DAS would serve as his Reviewing Officer. Close to the date that the EER was due to be drafted, however, grievant was informed that the former P/DAS, would, in fact, be his Reviewing Officer. The P/DAS had not supervised grievant for the final four months of the rating period and, moreover, the association of grievant's performance record with the former P/DAS, who was the subject of ongoing negative media coverage, tainted grievant's file and negatively affected his chances for promotion and senior performance pay. During the four-month period when the Reviewing Officer was absent from the office, grievant was responsible for implementing many of the organizational changes mandated by the Accountability Review Board that the Reviewing Officer could have interpreted as criticism of her previous management of the office. This put grievant in the difficult position of detailing his accomplishments to the same person implicitly held responsible for the shortcomings in the office. Grievant questioned how fair and objective the Reviewing Officer could be under these circumstances.

Grievant's subsequent interim EER in October 2013 was negatively affected by the absence of any Review Statement. Grievant had been informed at the beginning of the rating period that the then Acting P/DAS for Diplomatic Security would serve as his Reviewer.

However, when the EERs were due to be drafted in October, the DS Executive Office determined that there was no one appropriate to serve as the Reviewing Officer for grievant's interim EER. Grievant worked diligently during the rating period, and his performance was not fully documented given the lack of a review. This gap in his performance record, combined with the notoriety of his Reviewing Officer for his April 2013 EER, negatively affected his overall performance record. Grievant seeks as relief an extension of his Time in Class (TIC) date so that he can have additional time to demonstrate his eligibility for promotion based on "impartial, full, and properly-documented EERs."

## **B. THE AGENCY**

The Department maintains that the Reviewing Officer for grievant's April 2013 EER was appropriate despite the fact that she had been placed on administrative leave in December 2012. The Reviewing Officer had served as grievant's Reviewer for approximately eight months of the rating period -- clearly more than the 120 days required for her to write the report. The Department found that grievant's Reviewing Officer was able to observe and comment on grievant's performance in a substantive manner. Grievant has not raised any issue concerning the substance of his EER that demonstrates that his review was anything other than a "fair and impartial assessment" of his performance. The Department also points out that grievant had an opportunity in his EER to comment on the fact that the Reviewing Officer was not present for four months of the rating period. Grievant has not provided any evidence that the association of the Reviewing Officer's name with his EER in any way "tainted" his performance record or negatively affected his competitiveness for promotion and/or senior performance pay. Rather, the Department finds that the Review Statement was "uniformly laudatory and include[d] her recommendation for performance pay and promotion." In fact, grievant was mid-ranked for

promotion by the Foreign Service Selection Board (FSSB, Selection Board) that reviewed his April 2013 EER and recommended to receive a performance pay increase.

Regarding grievant's October 2013 EER, the Department points to the instructions for the preparation of the EER that state, "Every effort should be made to ensure that employees have a reviewer. If this is not possible, the employee should be informed in writing at the beginning of the rating period that there will be no reviewer."<sup>1</sup> Grievant elected to present additional information concerning his performance in the 'Optional Section X' of his EER to expand on the area of his performance that he did not believe had been adequately addressed because of the lack of an appropriate reviewing officer. There was no limitation on the additional information that grievant could have provided. The FSSB that reviewed grievant's October 2013 interim EER mid-ranked him for promotion and recommended him for performance pay. The Department concluded that grievant has presented no evidence to support his claim that he was harmed by either his April 2013 or October 2013 interim EERs.

#### **IV. DISCUSSION AND FINDINGS**

Except in matters involving disciplinary actions, the grievant has the burden of proving by a preponderance of the evidence that the grievance is meritorious. 22 CFR Section, 905.1(a). Following a review of the evidence provided, the Board finds that grievant has not met this burden of proof.

#### **April 2013 EER:**

Grievant asserts that the fact that the Reviewing Officer was placed on indefinite administrative leave and grievant was directed not to be in contact with her for the last four months of the rating period negatively affected his performance evaluation. We note that

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<sup>1</sup> Tenured Class FS-02, FS-01 and Senior Foreign Service Employee Evaluation Report DS-5055I, Instructions for Preparation, p. 3.

grievant's Reviewing Officer had eight months to observe grievant's performance during the rating period. The Board agrees with the Department that the Reviewing Officer had sufficient direct knowledge of grievant's performance to make substantive comments in her review. The Board notes that the acting DAS – grievant's apparent preference for alternative Reviewing Officer – had only four months in which to observe grievant's performance. There is no evidence that the Reviewing Officer was officially reassigned from her position as P/DAS when she was placed on administrative leave. Therefore, she was still, in fact, grievant's assigned Reviewing Officer at the time the April 2013 EER was due to be drafted even, if she was on leave from the office. The fact that the Reviewing Officer was on administrative leave, and therefore not able to observe grievant's performance directly during the last four months of the rating period, was not optimal, however, since the final period of any rating period can be the time during which an officer can show that work requirements have been successfully achieved. Even more significant, grievant was prohibited from contacting or communicating with the P/DAS during the final four months, thereby deprived of any feedback or other interaction on performance. We recognize, however, that the Review Statement appears highly laudatory of grievant's performance and the Reviewer not only endorsed grievant's immediate promotion but also stated her strong support for awarding him performance pay. If grievant believed that certain of his significant achievements had been omitted from his EER because of the Reviewing Officer's absence for four months of the rating period, he could have used the 'Optional Section X' in the EER to address any omissions. Grievant claimed that he was put into an awkward position when preparing his input for his Reviewing Officer since much of what he had been engaged in during her absence was making operational changes that she could have interpreted as a criticism of her tenure in the office. The 'Optional Section X' was grievant's opportunity to

have the final word in his evaluation and comment on any item that he believed he could not have shared with his Reviewing Officer for her portion of his evaluation. Grievant chose not to make any additional comments.

Grievant also asserts that the notoriety surrounding his Reviewing Officer “tainted” his performance record and negatively affected his promotion and senior performance pay potential. The Board finds no evidence to support this assertion. Selection Boards receive specific instructions on promotion criteria and the review of performance files. There is no evidence that the identity of the Rater or Reviewer has any bearing at all on the FSSB review of employee performance. Grievant presented no evidence that the FSSB that reviewed his April 2013 EER received any instruction, formal or otherwise, regarding evaluations prepared by his specific Reviewing Officer. The record contains no evidence that the performance files of grievant were negatively affected or viewed differently from those of any other employees whose files were considered by the same FSSB. Grievant’s assertions amount to a suspicion on his part that is not supported by the record. Accordingly, there is no reason for this Board to conclude that the FSSB viewed grievant’s file in any manner other than consistent with routine procedures.

**October 2013 EER:**

Grievant claims that the lack of a Reviewing Officer for his interim EER in October 2013 negatively affected his performance record and his competitiveness for promotion and performance pay. The Board is not persuaded.

The Department admits that grievant should have been informed at the beginning of the rating period that there would be no appropriate Reviewing Officer, and the record does not indicate why the Department determined later in the rating period that no available Reviewing Officer was available. Instructions for completion of the EER state:

The reviewer is usually the rater's supervisor or the next highest-ranking official. Every effort should be made to ensure that employees have a reviewer. If this is not possible, the employee should be informed in writing at the beginning of the rating period that there will be no reviewer <sup>2</sup>

Although the instructions contemplate circumstances in which a reviewing officer is not available, the Department has given no explanation in this case for why no appropriate reviewing officer was available. This Board has considered a Review Statement as "an important factor in producing a balanced evaluation" that "provides a check against an unbalanced evaluation by the Rating Officer."<sup>3</sup> In grievant's case, however, the Rating he received consistently praised grievant's performance during the truncated rating period. His Rating Officer characterized grievant's performance as "exemplary" and urged the FSSB to promote grievant and award him performance pay for his "exceptional performance." Grievant made no argument that his EER suffered from a lack of balance because of the absence of a Review Statement. Rather, grievant asserts that the lack of a review omitted certain of his significant accomplishments during the rating period. As the Department pointed out, grievant commented in 'Optional Section X' of his EER on his key accomplishments that were not covered elsewhere in the EER because there was no Review Statement.

Although grievant demonstrated violations of the regulations governing the formulation of EERs, and the Department failed to meet its burden of demonstrating why no reviewing officer was available, grievant has not demonstrated that he was prejudiced by these violations. Grievant was mid-ranked for promotion by both of the FSSBs that reviewed his April 2013 and October 2013 EERs. Both FSSBs recommended grievant for senior performance pay in accordance with the recommendations made in each EER. Grievant did not present any evidence to support his claim that his performance record was negatively affected by either the selection

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<sup>2</sup> Ibid.

<sup>3</sup> [REDACTED] v. Department of State, Order for Reconsideration, FSGB 99-081, April 7, 2001.

of his Reviewing Officer for his April 2013 EER or the lack of a Reviewing Officer for his October 2013 EER. As such, the grievance must be denied.

**V: DECISION**

The grievance is denied in its entirety.

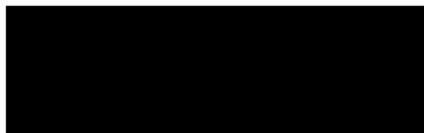
**For the Foreign Service Grievance Board:**



John M. Vittone  
Presiding Member



Barbara D. Cummings  
Member



Gregory D. Loose  
Member