

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████

Grievant

And

U.S. Agency for International Development

Record of Proceedings

FSGB Case No. 2015-038

December 12, 2016

Interim Decision

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

J. Robert Manzanares
Nancy M. Serpa

Special Assistant

Andrew D. Large

Representative for the Grievant:

Michael Macomber, Esq.

Representative for the Agency:

Sara Ryan
USAID/GC/EA

Employee Exclusive Representative:

American Foreign Service Association

Held: The Board concluded that it does not have jurisdiction over grievant's challenge to a decision by a tenure board to deny him tenure after he failed to meet the mandatory language requirement before expiration of his limited career appointment. Grievant was unable to establish that this tenure decision was the result of legal or procedural error and was therefore not grievable. The Board further concluded that because of his termination based on not meeting the language requirement, some of grievant's requests for relief must be dismissed as moot. The grievance appeal remains, pending the receipt of additional information from the agency concerning grievant's challenges to a 2013-14 performance evaluation.

Summary: Grievant filed an agency-level grievance in which he challenged a 2013-14 Annual Evaluation Form (AEF) on the basis that it contained falsely prejudicial criticisms of his work performance; that he was not properly advised of the perceived deficiencies nor given sufficient time to improve; and that the performance evaluation was the result of bias on the part of his rater. In 2014, a performance board gave grievant a "C" rating and referred his performance file to a tenure board that determined that he did not meet the skill level of his class. Grievant was therefore recommended for termination in 2014.

Grievant filed an agency-level grievance, in response to which the U.S. Agency for International Development (USAID, agency) rescinded the termination, revised grievant's challenged AEF by adding language back into the document that had been deleted and submitted the revised document to reconstituted (recon) performance and tenure boards in 2015. Both recon boards made the same decisions as were made in 2014. Grievant was given a "C" rating and he was recommended for separation based on not meeting the skill level of his class. Meanwhile, on numerous occasions, grievant took and failed to pass all sections of the required language examination in his chosen language. He received training in this language, individual tutorial services, as well as one assignment to a country in which his choice of language was spoken. While the grievance pertaining to the 2013-14 AEF was pending, grievant was denied tenure in July 2016 based upon his failure to meet the mandatory language requirement before expiration of his limited career appointment. Grievant has since been terminated from the Service.

Grievant continues to challenge the original AEF, the decisions of the original 2014 performance and tenure boards, and the 2016 decision of the tenure board that terminated him because of the failed language requirement. USAID contends that the Board is without jurisdiction to decide this grievance because the 2016 tenure decision is not reviewable. Moreover, the agency contends that the challenge to the 2016 tenure decision was not grieved at the agency level and therefore must be dismissed for failure to exhaust administrative remedies.

The Board concluded that it does not have jurisdiction over the 2016 tenure decision because grievant did not establish that there was legal or procedural error. The Board further concluded that some of grievant's requests for relief are therefore moot because of his termination. At the same time, the Board seeks clarification of what documents remain in grievant's OPF and, in light of the potential that this OPF may be shared with future employers, the Board concluded that grievant's claims concerning the 2013-14 AEF may survive his termination.

INTERIM DECISION

I. ISSUE

The Foreign Service Grievance Board (FSGB, Board) has considered the status of this case and determined that some, but not all, of the claims and requests for relief must be dismissed for lack of jurisdiction or as moot.

II. BACKGROUND

Grievant, [REDACTED], joined USAID in January 2008. He converted to a career Foreign Service appointment in July 2011 and served several tours overseas, including one tour in [REDACTED] a French-speaking country. By the conclusion of his five-year limited career appointment on July 31, 2016, grievant did not achieve the required spoken language proficiency in French and was denied tenure for this reason. By letter dated June 29, 2016, he was notified that he would be separated from the Service, effective July 30, 2016.

In April 2013, before his separation, grievant was placed on the complement as an Executive Officer (EXO) in the Management Bureau, Office of Management Services, in the Overseas Management Division (M/MS/OMD). His immediate supervisor was EXO [REDACTED]. On November 17, 2013, [REDACTED] conducted a formal mid-point progress review of grievant's performance, writing, *inter alia*, that he "was making excellent progress toward accomplishing all of his work objectives." (Emphasis added).

In April 2014, grievant received an Annual Evaluation Form (AEF) from his rater for the performance year ending March 31, 2014. In the 2013-14 AEF, grievant's rater copied most, but not all, of the language from the earlier mid-year review and removed the word "excellent." In

addition, on a Skills Feedback Worksheet (SFW), the rater made numerous critical comments about grievant's performance, stating that he needed to improve in many skill areas, including "professional and technical skills," analytical skills, budget preparation, willingness to receive critical feedback, managing change, and writing accurately to reflect all points of view.

By letter dated August 19, 2014, grievant received notice from the USAID Chief Human Capital Officer in the Office of Human Resources (CHCO/HR) that his 2013-14 AEF had been reviewed by the Foreign Service Performance Board (PB) which gave him a "C" rating and referred his file to an agency Tenure Board (TB). The TB determined that grievant's performance did not meet the standards of his class and advised him that he would soon receive notice of his separation from the Service in a letter that would follow.

Grievant then filed a "grievance action" with the agency on September 22, 2014.¹ In his grievance, ██████████ asserted that his most recent AEF and the SFW were inaccurate; the SFW should not have been reviewed by either the PB or the TB; his rater was biased against him; and he was not properly counseled about any performance deficiencies, nor given sufficient time to improve. Two days after the grievance was filed, USAID sent grievant a termination letter, dated September 24, 2014, advising that his separation date was scheduled for November 29, 2014.

¹ Grievant's counsel identified the original grievance as a document in the Record of Proceedings that bears a handwritten date of November 3, 2015 and the notation "Encl 6." Although we accept counsel's representation that this is the September 22, 2014 grievance submission, the document does not clearly express that it is a grievance or that it is based on the 2013-14 AEF and the SFW. It is instead a memorandum from grievant to the Director of Employee Labor Relations (ELR), with a subject line: "Final Analysis on Evaluation Report Challenge and Reversal of Termination Action."

USAID never issued a final written decision on the grievance. Instead, agency counsel wrote to grievant requesting “additional time” to complete her review of the grievance. On November 28, 2014, USAID counsel sent grievant another email stating:

[Y]our termination has been temporarily rescinded pending further action. Therefore, you will not be taken off the employment rolls effective November 29, 2014.

Without giving grievant any additional notice, USAID thereafter reconstituted the 2014 PB in February 2015 and the 2014 TB in June 2015, submitting to each board a copy of a “revised original” 2013-14 AEF with the deleted language and the word “excellent” restored in the mid-point progress review (Section 6) and with the same description of grievant’s Performance Plan (Section 5) as was recorded on the original mid-point progress review document. USAID states that the reconstituted (“recon”) PB received the following documents for review:²

- 2012, 2013 and “revised original” 2014 AEF
- Grievant’s Employee Data Record
- Grievant’s Language Training Scores
- Grievant’s Training Transcript

After reviewing these documents, the recon PB reached the same conclusion as the first 2014 PB – that grievant’s performance merited a “C” grade. Accordingly, his file was forwarded to a recon TB for its review.

In the interim, grievant received verbal notice from the Director of Employee and Labor Relations (ELR) on March 2, 2015, that “a [Performance] Board had convened and affirmed the decision to process the termination.” Grievant responded by sending numerous requests for more information, asking when the recon TB would meet; who would be involved in its

² See Statement of ██████████, submitted by the agency on May 27, 2016, in response to a request for documents made by the Board at the May 16, 2016 status conference. These documents were filed with the agency submission.

decision-making process; and what the results were. On March 11, 2015, he filed a second agency-level grievance, challenging in advance an anticipated separation decision by the recon TB. Grievant supplemented the second agency-level grievance on May 26, 2015.

It was not until June 17, 2015 that the recon TB met and reviewed grievant's "revised original" AEF, along with a "[r]eferral description drafted by [an HR] staff [member] to reflect the areas of concern from the 2014 Program Support Board."³ The recon TB affirmed the February 2015 decision of the recon PB and recommended grievant's separation. On August 13, 2015, the CHCO/HR issued a new letter to grievant advising him of the results of both recon boards and stating that he would soon receive a "C" rating and a newly issued termination letter.

On August 17, 2015, before he received that rating and before the agency issued the termination letter, grievant filed the instant grievance appeal with the Board in which he sought the following relief:

1. Removal of the original 2013-14 AEF;
2. "Destruction" of any Tenure Evaluation Form (TEF) and any mention of it from his OPF;
3. Rescission of the 2014 PB rating, its referral of his file to the TB, any mention of the "C" rating, and substitution of an "A" rating;
4. Rescission of the 2014 TB review, "destruction" of the TB report and the August 29, 2014 notice of impending termination and deletion of any mention of same from the OPF;
5. Rescission of the "pending" separation, "destruction" of the September 24, 2014 separation letter and deletion of any mention of same from the OPF;
6. Rescission of the 2014 Performance Board review; "destruction" of any report of the review, and deletion of any mention of same from the OPF;⁴
7. Substitution of another supervisor as a reference for grievant's bids on EXO assignments, excluding his current rater from being a reference for grievant and from discussing his performance during the bidding process;

³ We believe that this document appears in the Record of Proceedings (ROP) among those that were submitted by USAID on May 27, 2016 in response to the Board's request for additional documents.

⁴ We assume that this refers to the 2014 PB review.

8. Extension of grievant's Time-In-Service (TIS) and Time-In-Class (TIC) by one year;
9. Awarding grievant a suitable, at-grade BS-03 backstop assignment "as soon as possible;"
10. An extension of grievant's limited appointment as necessary to accommodate the above remedies and providing him with at least 30 days' notice prior to separation if he was not granted tenure;
11. Postponement of the delivery of Household Effects and other items during the pendency of the grievance;
12. Retroactive back pay, if any;
13. Attorney's fees and costs;
14. Other remedies as appropriate.

Grievant also requested Interim Relief (IR), which USAID did not oppose through the end of his limited career appointment on July 31, 2016.⁵ In an order dated March 1, 2016, the Board granted grievant's request for IR, by consent, through July 31, 2016.

Despite several requests by the FSGB for additional information and additional filings by both parties, the Board noted in early May 2016 that several of grievant's requests for relief appeared to be moot. The agency had established two recon boards, thus rendering moot grievant's challenges to the decisions of the original boards. In addition, grievant's request for relief from the "pending" termination letter did not appear to be ripe because the agency had not yet issued a new termination letter, or set a termination date. There was also confusion about precisely what was contained in the "revised original" AEF document that was reviewed by the two recon boards. The FSGB, therefore, scheduled a status conference with the parties on May 16, 2016, to determine the status of the instant appeal; whether USAID intended to issue a termination letter following the reviews by the recon boards; to obtain a copy of the revised

⁵ The agency also stated in different letters to grievant that the dates on which he would be separated were July 28 and July 30.

original AEF that was reviewed by the recon boards; and to determine precisely what were grievant's claims after the recon board decisions.

During a colloquy with counsel for the parties at the status conference, agency counsel agreed to submit additional documentary evidence of what was submitted to the recon boards, but advised that regardless of grievant's current challenges regarding his 2013-14 performance evaluation and his relationship with his rater, it was anticipated that he would be separated from the Foreign Service at the end of his limited career appointment on July 31, 2016 solely and independently based on his failure to achieve the mandatory spoken language proficiency requirement of the Service. In response, grievant contended that he had not been given a fair opportunity to pass the language requirement. USAID countered that grievant had been given every possible opportunity to pass the language test, including classes, tutoring, and an assignment to a French-speaking country (Mali) to assist him with language learning. Counsel for the agency stated that literally every option to assist grievant in preparing for the language test had been offered to him and that there was no other untried option available to him.

Following the status conference, USAID issued two termination letters. The first letter, dated May 27, 2016, stated that based on the actions of the recon boards, grievant would be terminated for not meeting the standards of his class, effective June 28, 2016.⁶ In this letter, grievant was advised that his separation would take effect "as close as possible to the date shown in the first paragraph above (June 28) ... but in no case ... earlier than that date." The second letter, dated June 29, 2016, advised grievant that because of his failure to pass the mandatory

⁶ The type-written date on this letter is June 27, 2016. This was crossed through and a hand-written date of May 27, 2016 was added.

language requirement, he would be separated from the Service effective July 30, 2016. Grievant was not terminated on June 28. It is unclear whether he was terminated on or after July 30, 2016.

Grievant subsequently filed a second amended appeal on July 18, 2016. In it, he repeated the factual basis for his initial claims as well as the events pertaining to the recon board reviews and the two termination notices. His claims included the following:

1. The original 2013-14 AEF was inaccurate and falsely prejudicial;
2. The agency did not offer him counseling or an opportunity to improve;
3. The rater was hostile and biased against him;
4. The TB improperly determined that he did not demonstrate the ability to lead or guide;
5. The recon PB and TB did not remediate the inaccurate and falsely prejudicial original AEF;
6. Grievant is unaware of what information was reviewed by the recon boards;
7. Grievant is entitled to seek discovery on these issues; and,
8. Grievant was not given an opportunity to improve on any deficiencies noted in the evaluative documents;⁷

The requests for relief in the second amended grievance appeal include:

- Rescission of the 2013-14 AEF, TEF (if any), and PB rating and review;
- Provide an “unblemished personnel file by removing and rescinding the above documents and all negative actions, letters, memoranda and references to the instant grievance;”
- Reconstitute the TB and award grievant a “B” rating or higher;
- Rescission of the termination letter and the separation letter;⁸
- Assign grievant a new impartial supervisor; ensure that he does not work with or be supervised by his 2013-14 rater;
- Assign grievant to a suitable BS-03 position;
- Extend grievant’s TIC and TIS by 2 years;
- Compensatory damages;
- Attorney’s fees;
- Interim Relief;

⁷ It is unclear from a review of the “revised original” AEF what deficiencies and/or criticisms grievant claims were noted by his rater that he was not given the opportunity to improve.

⁸ It is unclear what grievant identifies as the termination letter and what he identifies as the separation letter. The letter, dated May 27, 2016, advising grievant of the results of the recon boards only uses the term “termination,” while the letter, dated June 29, 2016, advising grievant of the denial of tenure based upon language uses both the terms “termination” and “separation.”

- Extend grievant's limited appointment to allow for the above remedies;
- Other relief as deemed appropriate.

On July 25, 2016, the FSGB, *sua sponte*, ordered grievant to show cause why his grievance appeal should not be dismissed for lack of jurisdiction, based on his anticipated failure to meet the mandatory language requirement before expiration of his limited career appointment on July 31, 2016. Grievant replied to the show cause order on July 29, 2016. USAID was invited to file a response, which it submitted on August 16, 2016, and grievant filed a reply on August 22, 2016.

III. POSITIONS OF THE PARTIES

A. Grievant

Grievant's principal arguments have consistently been that his rater issued a biased and falsely prejudicial 2013-14 AEF and failed to provide him with notice of any deficiencies in his performance or an opportunity to make timely improvements. Grievant continues to maintain that the original 2013-14 AEF is flawed and caused him to receive a "C" rating from the 2014 PB and a denial of tenure from the 2014 TB. He does not appear to directly challenge the actions of the recon boards, but merely contends that their decisions did not ameliorate the original harm.

With respect to the mandatory separation based on the language requirement, grievant argues that because of the pendency of the grievance process, "his Foreign Service assignments were placed under moratorium. The agency's failure to provide [him] with such foreign assignments denied him the opportunity to attend language trainings in an appropriate environment." In addition, he claims:

... While the Agency has averred that [grievant] was provided with language training, it cannot be denied that language immersion is the most efficient way to learn a new language. This is particularly relevant given that [grievant's] alleged failure to meet the language requirement is based solely on the verbal portion of his language exam and not his written or auditory proficiency.

Grievant further contends, without explaining, that the language criterion score of 3/3 is “subjective,” and, he argues, “it is the speaking ability requirement that [he] has marginally fallen short of by repeatedly scoring 2+.” Grievant lastly argues that the agency failed to assign him to:

... any of the Francophone countries [which] would have provided him the necessary assistance required for perfecting his language proficiency and enunciation. More importantly, the timely resolution of his grievance would have enabled him to direct his undivided attention to fulfilling the language requirement, and not fighting the Agency for their repeated and unjustifiable delays in processing his grievance.

B. USAID

USAID responds to grievant's submission by arguing that the issues raised in the initial grievance and appeal have now been overtaken by grievant's failure to meet the mandatory language requirement before expiration of his limited career appointment. The agency relies on several laws, regulations and policies that it claims required that grievant be mandatorily separated from the Foreign Service. The agency argued that it was required to deny tenure to grievant because of his inability to meet the mandatory minimum language requirement and, in the absence of tenure, grievant had to be separated at the expiration of his five-year limited career appointment. The agency cites, in relevant part, 3 FAM 4412 (a decision of a tenure board is not grievable), Section 612 of the Foreign Service Act (FSA), 22 USC § 4011 (granting authority to any agency to terminate at any time the appointment of a member of the Foreign

Service serving under a limited appointment), and ADS⁹ 450.3.5.4 (eligibility for tenure requires a minimum proficiency of S-3/R-3 if the tested language is French – “Employees who fail to meet [this requirement] are subject to termination.”).

USAID contends that grievant was never able to establish speaking proficiency at the requisite level for the language in which he elected to be tested. The agency also states that grievant received forty weeks of language training, personalized tutoring in French and an assignment to the French-speaking country of [REDACTED] to help with his language training. The agency also avers that at the time of the immersion assignment to [REDACTED] grievant acknowledged in writing that USAID had exhausted all available resources for further language training and that he would be responsible for the cost of any additional tutoring.

The agency reports that despite the support it offered, grievant took the spoken language exam for a sixth time in January 2014 and did not pass it. Although grievant blames his involvement in this grievance for being unable to focus on his language skills, the agency asserts that this grievance was not filed until September 2014, well after grievant last took the language exam. Moreover, USAID contends, grievant took and failed all six language tests before he received the challenged AEF in April 2014. According to the agency, grievant did not attempt to retake the language exam again until June 2016, one month before the end of his career assignment, at which time he was again unsuccessful.

The agency also contends that grievant’s challenge to his termination based on his failure to meet the required language skills was not first grieved at the agency level. Therefore, USAID

⁹ The ADS reference is to USAID’s Automated Directives System.

argues, this claim should be dismissed for failure of the grievant to exhaust his administrative remedies.

IV. DISCUSSION AND ANALYSIS

The Board has reviewed the parties' responses to the order to show cause and upon consideration of the arguments presented and a review of the applicable statutes, regulations and the entire Record of Proceedings (ROP) in this case, the Board concludes that the grievant has shown good cause, in part, for why the grievance appeal should not be dismissed for lack of jurisdiction because some, albeit not all, of his claims and requests for relief survive his termination. At the same time, the Board concludes that several of grievant's claims for relief must be dismissed because the Board is without jurisdiction to provide the requested remedy.

1. Grievant's Claims Pertaining to the Documents in his OPF

We note, first, that before grievant was denied tenure and ultimately terminated based on the language requirement, he initially raised grievable issues, challenging the accuracy and prejudicial impact of the original 2013-2014 AEF. Under 22 U.S.C. § 4131(a)(1)(A), (B), and (E):

... the term "grievance" means any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States ... of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including –

(A) separation of the member allegedly 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;

(B) other alleged violation, misinterpretation, or misapplication of applicable laws, regulations, or published policy affecting the terms and conditions of the employment or career status of the member; ...

(E) alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial to the member

The grievable issues included his claims that his rater improperly modified and deleted some of the language in the Mid-Point Progress Review portion of his 2013-14 AEF; she wrote a strongly critical SFW that was reportedly shared with the 2014 TB without first giving him notice of any concerns about his performance and without giving him a reasonable opportunity to correct the perceived flaws; and, lastly, the 2013-14 AEF contained falsely prejudicial comments based on his rater's alleged bias against him.

In determining whether these claims survive grievant's termination based upon his failure to achieve language proficiency, we consider regulations that require federal agencies to retain employee personnel files even after an employee is terminated and permit an employee's OPF to be shared with a subsequent U.S. Government employer. *See*, 5 CFR § 293.307(b).¹⁰ Given the OPM regulations that not only require preservation of an employee's personnel record after s/he leaves an agency, but also permit such records to be transferred to the agency that subsequently employs that employee, we conclude that to the extent that grievant had a legitimate grievance about evaluative documents in his OPF, that grievance survives his termination.

¹⁰ This regulation provides:

(a) Folders of persons separated from Federal employment must be retained by the losing agency for 30 working days after separation, and may be retained for additional 60 days (90 days where administratively necessary, e.g., where an appeal or an allegation of discrimination is made or where an employee retires or dies in service). Thereafter, the OPF must be transferred to the General Services Administration, National Personnel Records Center (Civilian Personnel Records), 111 Winnebago Street, St. Louis, Missouri 63118.

(b) When a former Federal employee is reappointed in the Federal service, the National Personnel Records Center (Civilian Personnel Records) shall, upon request, transfer the OPF to the new employing agency.

As we noted in FSGB Case No 2001-026 (December 5, 2001) at page 14, “we limit our jurisdiction to granting remedial action that is necessary and appropriate to correct some harm experienced by [or that may be experienced by] a particular grievant.” Under this principle, the Board continues to exercise jurisdiction over claims for relief after termination of an employee to the extent that there remains potential harm for which the Board can provide a remedy. Therefore, notwithstanding grievant’s termination based on failure to achieve language proficiency, we retain jurisdiction over his claims about the accuracy and propriety of documents in his OPF.

Before the Board can resolve which of grievant’s claims challenging documents in his OPF survive his termination, we first must clarify what documents are in his OPF and which of these documents grievant challenges as inaccurate or prejudicial. We note that USAID reported that it rescinded the original 2013-14 AEF before submitting a “revised original” AEF to recon PB and TB boards in 2015. Unfortunately, despite the number of months that this grievance appeal has been pending and, notwithstanding the status conference and supplementation of the ROP, the record is still unclear whether any of the original evaluative documents from 2014 remain in grievant’s OPF, including: the original 2013-14 AEF, the 2014 SFW, possibly a TEF, the 2014 original PB “C” rating document, and/or the 2014 original TB tenure denial. The Board is also unaware whether the 2014 SFW, or any other SFW, was submitted to the recon boards, whether the original separation letter of 2014 is in grievant’s file and whether, given the language proficiency tenure decision, the second termination letter of May 27, 2016 was removed from grievant’s OPF. Obviously, if some, or all, of these documents were expunged

and removed from grievant's OPF, his continued complaints about them would be moot and would have to be dismissed as such.

It is also unclear whether grievant intends to challenge the "revised original" 2013-14 AEF, any of the 2014 recon board determinations, and/or the tenure denial based on the recon board reviews. We therefore, must hold in abeyance resolution of grievant's claims about the documents in his OPF until we receive clarification from both the agency and grievant about which documents are in the OPF, which documents were reviewed by the recon boards in 2015, and which documents that remain in the OPF are currently challenged by grievant.

We therefore ask USAID to provide additional information as follows:

- Confirm whether the original 2013-14 AEF has been removed from grievant's OPF and whether the "revised original" 2013-14 AEF remains in his OPF for that performance year.
- Advise whether there are any documents from the original 2014 PB or TB that remain in grievant's OPF.
- Advise whether the original 2014 SFW or any other SFW was reviewed by the recon boards. If so, provide one copy of that SFW. Also, advise whether any SFW for the 2013-14 performance year is in grievant's OPF.
- Advise whether there was a 2014 TEF, whether it was reviewed by the 2014 recon boards, and whether it is in grievant's OPF.
- Advise whether the original termination letter, dated September 24, 2014, was placed in grievant's OPF and whether the most recent termination letters are in the file.

We likewise ask grievant to provide additional information to the Board, after the agency responds to the above inquiries have been submitted, as follows:

- Whether he intends to raise any challenge to the "revised original" 2013-14 AEF or any of the decisions/documents issued by the recon boards. If yes, grievant must submit an amended grievance appeal making clear precisely what his

contentions are about the documents or procedures that he is challenging. Grievant should not submit any documents that have previously been identified and/or submitted in previous iterations of this grievance appeal. He should simply make his arguments and identify any documents that he is challenging without resubmitting them.

- If we are advised by USAID in response to the above requests that the recon boards reviewed an SFW from either 2014 or another SFW, grievant must advise whether he intends to challenge that document, any review of the document, and why. We otherwise find that grievant's challenge to a review of the 2014 SFW by the original 2014 PB and TB should be dismissed as moot because the decisions of both original 2014 boards have been rescinded.
- Depending on the information provided by USAID, grievant shall advise the Board whether he is challenging the presence in his OPF of a TEF for the performance year ending in 2014, and should include that challenge in any amended grievance appeal.
- Grievant shall advise whether he challenges the presence in his OPF of any termination letters and if so, he should specify the basis for his challenge(s) in any amended grievance appeal.

2. Grievant's Claims About the Language Proficiency Tenure Decision

Pursuant to ADS chapters 414.3.2.1¹¹ and 450.3.5.4,¹² grievant's limited career appointment may not exceed five years unless he is granted tenure by a tenure review board. A decision of a TB is not grievable, unless it is contrary to law or regulation or results from

¹¹ ADS Chapter 414.3.2.1 provides:

Career candidate appointments are time-limited, must not exceed five years, and may not be extended or renewed except as provided in Section 309(b)(3) of the Act and Chapter 43 of Title 38, United States Code, which pertains to employee rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

¹² ADS Chapter 450.3.5.4 states:

Separation of Career Candidate Employees For Failure to Meet Language Requirements or Medical or Security Clearances for Tenure - To be eligible for tenure, employees must attain a minimum Foreign Service Institute tested language proficiency level of S-3/R-3 in a USAID Category A language (French, Spanish or Portuguese) ... for conversion to a Career Appointment in USAID....

procedural error. *See* 22 U.S.C. §4131(a)(1)(A), (B), *supra*, and 22 U.S.C. §4131(b).¹³ In the instant case, we conclude that this Board does not have jurisdiction over grievant’s challenge to the language proficiency tenure denial because it does not appear that there is any relief that the Board can provide to grievant on this claim.

Grievant argues that his last tenure denial is contrary to law and procedure because USAID did not offer him additional training and support, including immersion language training, after he filed this grievance. We conclude that this claim is not supported by any authority and is belied by the record. Grievant does not dispute that before he filed this grievance, USAID provided him with language training at the Foreign Service Institute (FSI), a one-on-one language instructor/contractor,¹⁴ and a two-year assignment to █████ a French-speaking country, where he could continue his language training. The agency argued that it was authorized to make only one such assignment to a French-speaking country. Grievant does not offer any contrary argument or any authority for his position that the agency was required to offer him more training than it did.

The ROP contains a document captioned: “Memorandum of Understanding (Language and Tenuring)” that grievant signed on April 8, 2011, which states:

I understand that the Office of Human Resources is authorizing me to proceed to my position of assignment, Supervisory Executive Officer, USAID/Mali, without having achieved the required language level for tenuring (French, S-3/R-3).

¹³ 22 U.S.C. § 4131(b) states in pertinent part:

For purposes of this chapter, the term “grievance” does not include –

... (2) ... the judgment of a tenure board ...

(3) the expiration of a limited appointment, the termination of a limited appointment ... or the denial of a limited career extension

¹⁴ USAID Mali reimbursed the Washington contractor’s company \$18,032.53 for grievant’s private tutoring.

I understand that I have exhausted the maximum weeks of language training in USAID/Washington that the Agency is responsible for providing.

I understand that it is my responsibility to pursue language study and to enroll in a language training program at USAID/W until I meet the S-3/R-3 level.

I understand that if I do not meet the S-3/R-3 level within five years of my appointment: (May 2016) that the Agency will be required to terminate my employment since I would not be eligible for tenure.

Grievant does not challenge the authenticity or legality of this document. Nor does he argue that while the grievance was pending, he ever attempted to arrange for more language training, or explain how the pendency of this case prevented him from doing so. Instead, he contends that because the agency did not give him new French-immersion assignments and because the agency “delayed” processing this grievance, he was deprived of additional language training and was so busy litigating this grievance that he was unable to acquire more training.

The Board does not find any of these arguments persuasive. First, grievant does not offer any authority for his position that he was entitled to a second assignment to a French-speaking country, or that he could properly be assigned to a French-speaking country without first passing the language proficiency test. Nor does he offer any proof that prosecuting this grievance at the agency level or before this board had anything at all to do with his inability to pass the language test, particularly since he failed the test numerous times before the grievance was first filed. Grievant also offers no authority for his position that delays in processing this grievance are a legitimate basis for the Board to retain jurisdiction of the tenure denial claim after expiration of his career appointment. Grievant cites no support for a claim that there was a legal or procedural

error when the tenure board denied him tenure after multiple opportunities were given for language training, including an overseas assignment to a French-speaking country, but grievant nonetheless failed to meet the regulatory requirements within his five-year limited career appointment. We conclude that the Board does not have jurisdiction over grievant's challenge to the tenure denial based on language proficiency because it does not appear to be grievable.

Based on these findings, the Board concludes that certain of grievant's requests for relief are irremediable and, therefore, should be dismissed for the reasons stated below:

1. Rescission of the original 2013-4 AEF and original 2014 PB rating. These have already been rescinded. Note: grievant's request for removal of these documents from his OPF must await further information from the agency as to whether the documents remain in the OPF.

2. Reconstitute the 2014 TB review. This has also already been done voluntarily by the agency. There is no reason to order another recon TB given that grievant has been otherwise terminated after a non-reviewable tenure decision for not meeting required minimum language skills.

3. Rescission of the (two) terminations based on the decisions of the TBs concerning whether grievant met the standards of his class. The request to rescind the first termination is moot because the agency voluntarily rescinded this decision. The request is otherwise moot, given the denial of tenure based on grievant's language testing deficiency.

4. Assigning grievant to another supervisor in place of grievant's rater and ensure that he does not work with or for the rater. This remedy is moot, given grievant's non-reviewable termination based on language deficiency.

5. An award of a suitable assignment. This remedy is moot, given the non-reviewable termination based on language testing.

6. Extension of grievant's TIS and TIC. This remedy is moot, given the non-reviewable termination based on language testing.

7. Compensatory damages. The Board does not have authority to award compensatory damages. *See*, 22 U.S.C. § 4137(b). The remedy is therefore unavailable.

8. Attorney's fees. This claim must await the final outcome of the case in order for the Board to determine whether grievant is a "prevailing party" on any of his claims.

9. Request for continued IR. The Board previously considered this request and decided that grievant could not prove a likelihood of success on the merits of this grievance appeal for several reasons. First, it appears that grievant continues to grieve the original 2013-14 AEF and the original 2014 PB and TB decisions, all of which have been rescinded and replaced by a revised evaluation that was submitted to recon boards. We also denied this request for continued IR under the mistaken impression that grievant had himself drafted and submitted the "revised original" AEF for review by the recon boards. We concluded that grievant could not grieve what he himself drafted. Even after the agency corrected this misimpression and explained that it had created the revised original by putting back into the 2013-14 AEF what the rater had deleted, grievant has not, to date, expressly challenged this document or the actions of either recon board. Accordingly, he has not demonstrated a likelihood of success on the merits of his claims and we dismiss as moot grievant's request for continued IR.

10. Lastly, grievant requested an extension of his career appointment while the Board is

considering and resolving this grievance appeal. Under the Foreign Service Act (FSA), grievant's appointment "may not be extended or renewed" if he is denied tenure unless there is an applicable exception as identified in Title 38 U.S.C. Chapter 43 and/or Section 309(b)(3) of the FSA. The Board concludes that grievant does not qualify for the first exception under Title 38 U.S.C. Chapter 43 that pertains to employment and reemployment rights of members of the uniformed services, nor does he argue that he does. Likewise, we conclude that grievant does not meet the second exception under Section 309(b)(3) that permits an extension of a career appointment "if continued service is determined appropriate to remedy a matter that would be cognizable as a grievance under chapter 11 [defining all grievances]."

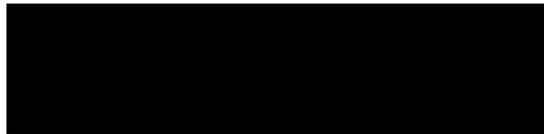
Grievant does not argue that his career appointment should be extended "to remedy a matter that [is] cognizable as a grievance" We note, moreover, that the instant grievance has two parts: a challenge to documents that may remain in grievant's OPF and a challenge to the denial of tenure based on failing the language requirement. As noted above, the Board does not have clarity at this point that there are any documents remaining in grievant's OPF that he is challenging. If there are, this Board is satisfied that it can resolve that part of the grievance that survives grievant's termination, without the need for grievant's career appointment to be extended. The Board will review any challenged document(s) and determine whether it/they should be redacted or expunged from grievant's OPF. He need not remain on the rolls of USAID as an employee for this remedy to be effectuated. Furthermore, grievant's challenge to the denial of tenure based on his language scores is not grievable and, therefore, does not offer a basis for extending grievant's career appointment. Accordingly, we find that grievant does not establish a

basis under Section 309(b) of the FSA for his limited career appointment to be extended during the pendency of the remainder of this grievance appeal. This request for relief is dismissed.

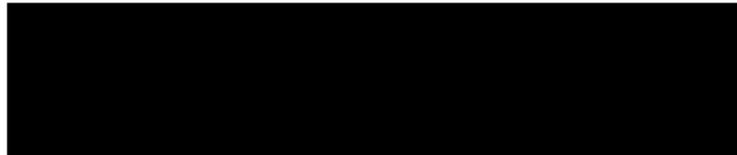
V. CONCLUSION

The grievance appeal is dismissed in part as stated above. The agency shall submit responses to the Board's requests for additional information not later than 30 days after receipt of this order. Grievant shall respond to the inquiries posed by this Board by no later than 30 days thereafter.

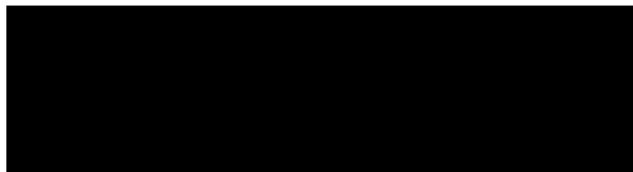
For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



J. Robert Manzanares
Member



Nancy M. Serpa
Member