

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

  
Grievant

Record of Proceedings  
FSGB Case No. 2016-005

And

November 16, 2016

Department of Agriculture

**ORDER: Motion to Dismiss**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

William Persina

Board Members:

Bernadette M. Allen

Gregory D. Loose

Special Assistant

Andrew D. Large

Representative for the Grievant:

Pro se

Representative for the Department:

Francis F. Sobolesky  
APHIS-MRPBS

Employee Exclusive Representative:

Zlatana Badrich  
American Foreign Service Association

## **ORDER: Motion to Dismiss**

### **THE ISSUE**

The grievance in this case alleges that Commissioning and Tenure Boards (CTBs) of the Foreign Agricultural Service (“FAS” or “Agency”), U.S. Department of Agriculture, made procedural errors in deciding that grievant should not be commissioned as a career Foreign Service officer; and that two performance appraisals he received were procedurally defective. The issue now before this Board is whether it is without jurisdiction to rule on the merits of the grievance under section 1101 of the Foreign Service Act, as amended (FSA), 22 U.S.C. § 4131(b)(2), and 3 FAM 4412(c),<sup>1</sup> because ruling on the complaint presented would require the Board to question the judgment of the CTBs.

### **BACKGROUND**

Grievant, after having served in a civil service position with the FAS, became a Foreign Service officer in 2009 as part of the Agency’s Foreign Service Career Candidate Program. He received a performance appraisal covering the period April 2013 to March 2014. During this time period grievant served as an FAS Assistant Attaché in [REDACTED]; in language training; and at a [REDACTED] assignment in [REDACTED]. His rating official’s comments were uniformly positive. His reviewing official, among other things, noted that transitions “from the field [REDACTED] can be difficult”; that grievant “made this transition with little effort”; that it can be difficult for a junior officer like grievant to join “a fast moving group as a team member in a cubicle setting” after having been in the field; and that grievant was a “real team player” who was “confident that he was up to the task” but “humble enough to ask for help and direction.”

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<sup>1</sup> These provisions state in relevant part that the definition of a grievance under the FSA does not include the judgment of a selection board like a CTB unless the grievance alleges “procedural violations of law, regulation or collective bargaining agreement.”

Grievant received another appraisal covering the period April 2014 to March 2015. During this time grievant was a Desk Officer posted in [REDACTED]. His rating official, who was different from the rater for his previous appraisal, again gave grievant uniformly positive comments. His reviewing official, who too was a different reviewer from that for the previous appraisal, also provided positive comments. The reviewing official further said:

[g]iven sufficient lead time and guidance from supervisors and senior managers, [grievant] is able to write useful briefing materials for senior officials. Similarly, with ample time and input that he gladly accepts, [grievant] is able to deliver effective oral presentations.

Grievant was considered for commissioning as a career Foreign Service officer by a 2013 CTB, which recommended that a decision be deferred for one year. In support of this recommendation the CTB said that grievant's work as reflected in his performance appraisals "has not shown a level of accomplishment that demonstrates the potential for success" as required under the CTB's Precepts. The CTB further said that grievant should work with his supervisor and on his own to "improve [his] skills to show sustained and results-oriented accomplishment."

A 2014 CTB considered grievant for commissioning, but again deferred a decision for another year. The CTB noted that grievant has "solid management skills and strong project management and administrative skills." However, it went on to say that, based on his performance appraisals, grievant's work had "not shown a level of accomplishment that demonstrates the potential for success" as required under the CTB's Precepts. The CTB therefore recommended that grievant work with his supervisor and on his own to "demonstrate [his] initiative and [his] ability to identify and define strategic objectives and see them to completion."

A 2015 CTB did not recommend grievant for commissioning. It said that his work as reflected in his appraisals had “not shown a level of accomplishment that demonstrates the potential for success” as required under the CTB’s Precepts. The CTB therefore informed grievant that his appointment in the Foreign Service was terminated, and that he could return to a civil service position with FAS.

Grievant filed a grievance with FAS alleging that the three CTBs failed to follow the proper procedures when reviewing his personnel file; that he was not provided with sufficient guidance as to what skills he needed to acquire to be commissioned; and that the reviewer statements in his 2014 and 2015 performance appraisals were “materially inaccurate and vague and thus prejudicial.” The Agency denied the grievance, finding that the CTB decision to terminate grievant’s Foreign Service appointment was proper. This grievance appeal followed.

Grievant alleges on appeal that the decision not to commission him as a career Foreign Service officer was based on “procedural irregularities” that violate Article 24 of the collective bargaining agreement between FAS and the American Foreign Service Association (AFSA). Article 24 of the agreement contains the Precepts governing CTB decisions on commissioning. He also claims that he was not provided with sufficient guidance, notice and opportunity to accumulate the skills necessary to be commissioned. Finally, he states that the reviewer statements in his 2014 and 2015 performance appraisals were inaccurate, vague, lacked supporting examples, and were thus prejudicial to him.

The Agency filed the motion to dismiss that is now before this Board for resolution. It argues that grievant has failed to present any evidence that the 2015 CTB violated any law, regulation or collective bargaining agreement provision. Rather, FAS argues, grievant is simply disagreeing with the 2015 CTB’s judgment that grievant should not be commissioned, a matter

that is not grievable under 3 FAM 4412. Further, it asserts that there is no indication that the CTB relied on the reviewer statements in the 2014 and 2015 appraisals. It also contends that the actions of CTB members are entitled to a “presumption of integrity,” and grievant has not rebutted that presumption.

## **DISCUSSION**

Under section 904.2(a) of this Board’s rules, 22 CFR § 904.2(a), we are empowered to make a preliminary determination of our jurisdiction if, as here, an agency questions whether a complaint constitutes a grievance. Section 1101((b)(2) of the Foreign Service Act, as amended, 22 U.S.C. § 4131(b)(2), provides that the “judgment of a selection board . . . , a tenure board . . . or any other equivalent body established by laws or regulations which similarly evaluates the performance of members of the Service on a comparative basis” may not be the subject of a grievance over which this Board has jurisdiction. This statutory mandate has been implemented in regulation. *See* 3 FAM 4412(c)(2) and section 901.18(c)(2) of this Board’s rules, 22 CFR 901.18(c)(2).<sup>2</sup> An exception from this exclusion is a complaint that alleges “procedural violations of law, regulation or collective bargaining agreement.” 22 CFR 901.18(c)(2). For the reasons that follow, we find that the grievance in this case does allege the kinds of procedural violations that bring the grievance within the scope of our jurisdiction.

Grievant first alleges that the CTB’s decision violates a provision of the FAS/AFSA collective bargaining agreement, Article 24.13. This section provides in relevant part that the “primary criterion” for a CTB recommending commissioning “is based on a candidate’s

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<sup>2</sup> The parties do not dispute that the CTB in this case is a board of the type referenced in section 4412(c)(2). We note that the Agency in its decision denying the grievance said at p. 2 that each candidate for commissioning is evaluated separately, and is not compared to other candidates. However, neither party has contended before us that this fact removes the CTB from the kinds of boards covered in in 3 FAM 4412(c)(2). In light of our holding that we have jurisdiction to consider grievant’s claims on the merits, this distinction appears in any event to be without effect in this case.

demonstrated potential, for success in the Foreign Service and adaptability to the discipline and rigors of a Foreign Service career through Class 1.” Grievant alleges that the CTB breached this agreement provision because the provision does not state that a career candidate must achieve a “level of accomplishment,” as the CTB mentioned, but rather that a candidate must “demonstrate[] potential.”

Grievant also alleges that the CTB decisions in 2013, 2014, and 2015 violate Article 24.28.b. of the FAS/AFSA agreement. This section states in relevant part that a CTB will “prepare statements, as guidance to the career candidates, identifying areas in which they should direct their efforts to improve.” Grievant says that the three CTB decisions never advised him of specific areas or provided sufficient guidance to ensure that he could address any perceived failure to reach a “heretofore unknown level of accomplishment” as required in Article 24.28.b.

Finally, grievant argues that the 2015 CTB improperly based its decision on inaccurate and vague statements, lacking examples, in his reviewers’ comments in his 2014 and 2015 appraisals. In particular, he points to the reviewer’s statement in his 2014 appraisal, which he claims did not have input from his supervisor in [REDACTED]. Grievant says this reviewer in his 2015 EER made “damning reference” to his “perceived difficulties in making presentations and writing without ample ‘lead time’ and supervision.” He asserts that he was not counseled on this area of his performance, and that there were no examples given to illustrate this supposed performance deficiency.

We find that these assertions state claims that are within the scope of a grievance that we have jurisdiction to address on the merits. Two of grievant’s claims allege breaches of the FAS/AFSA collective bargaining agreement. These are matters that are explicitly covered by the exception to the rule that the judgment of a board like the CTB is not a grievable subject under

the FSA. The third claim alleges that portions of grievant’s performance appraisals, which were contained in grievant’s personnel folder that was considered by the CTB, were materially inaccurate and vague and lacked examples to support allegedly negative appraisal comments. This type of claim is specifically identified in section 901.18(a)(5) of our rules, 22 CFR § 901.18(a)(5),<sup>3</sup> as the kind of matter that is within the scope of the definition of a grievance over which we have jurisdiction.

We find the Agency’s arguments for dismissal of the appeal to be unpersuasive. Most of these arguments are in the nature of asserting that grievant has not satisfied his burden of proof that his claims have merit. For example, FAS argues that grievant has “fail[ed] to identify what specific violation of law, regulation or collective bargaining agreement . . . took place.” It also argues that grievant has “failed to provide any evidence that the [CTB] relied on any information that was substantively defective or was prohibited by the review process.” Such arguments confuse a determination on the merits of the appeal with a determination as to whether grievant has alleged claims over which we have jurisdiction. In this regard, we stress that our determination that we have jurisdiction to consider grievant’s claims in no way signals our belief that his claims either have or do not have merit. Our decision only signifies that grievant is able to prosecute his grievance and proceed to seek to prove his case on the merits.

Having said this also addresses FAS’s other arguments—for example, that grievant has erroneously relied on Precepts that are not applicable to this case; that the actions of the CTB are entitled to a “presumption of integrity”; and that there is no indication that the 2015 CTB relied on the contested portions of the 2014 and 2015 appraisals. These are all arguments that go to

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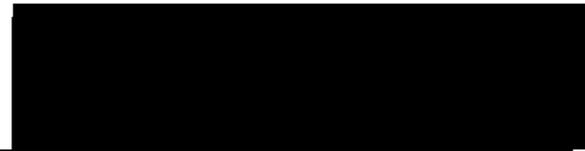
<sup>3</sup>This section defines a “grievance” as an “[a]lleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial” to the employee.

whether grievant can satisfy his burden of proof on the merits of the case. The Agency will of course be free to pursue those arguments at the merits stage.

**DECISION**

The Agency's motion to dismiss is denied.

**For the Foreign Service Grievance Board:**



William Persina  
Presiding Member



Bernadette M. Allen  
Member



Gregory D. Loose  
Member