BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]

Grievant

and

Department of State

Record of Proceedings
FSGB No. 2016-010

August 10, 2016

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Susan R. Winfield
Board Members:	Bernadette M. Allen
	Gregory D. Loose
Special Assistant	Andrew D. Large
Representative for the Grievant:	*Pro se*
Representative for the Department:	Dorian Henderson Grievance Analyst, HR/G
Employee Exclusive Representative:	American Foreign Service Association

OVERVIEW

HELD: Grievant established that the Department of State committed procedural error in not entering a group Meritorious Honor Award (MHA) nomination and the approved award into his Official Personnel File (OPF) in time for review by the 2015 G-IV Selection Board, but failed to show that this may have been a substantial factor in his being mid-ranked and not recommended for promotion. The grievance appeal was denied.

CASE SUMMARY

Grievant, a tenured FS-04 Public Diplomacy officer, received a group MHA as part of a team of employees who rendered assistance to U.S. citizens in [redacted] during the 2014 [redacted] tournament. The effective date of the award was November 24, 2014, but it was not entered into his OPF before the Selection Board (SB) ranking his class for promotion convened between July 7 and September 25, 2015. Grievant's file before the SB contained no documentation of the award, nor did his rating or reviewing officials mention it. In the end, grievant was mid-ranked.

Grievant complained that the Department violated a requirement (3 FAH-1 H-4812.2) that documentation of awards be included in the OPF for SB consideration. He contended that the Department's failure to timely include the award nomination and certificate constituted "procedural error" within the meaning of 22 CFR § 905.1(c), and that the burden of proof should shift to the Department to show that it would have taken the same action (i.e., would have mid-ranked him) had the award documentation been timely included. As relief, grievant sought a reconstituted SB. The Department disputed the applicability of 22 CFR § 905.1(c) to the instant case. First, it claimed that the delay in including the award materials in grievant's file was neither unexplained nor unreasonable, but rather arose from staffing shortages. It asserted that there was no procedural error because the Board had previously found that no regulation specifies a time limit within which the Department must insert award materials into an officer's file. The Department provided promotion statistics for grievant's class and asserted that grievant had failed to meet the requirement of the regulation to show that the omission of the award materials was "of such a nature that it may have been a substantial factor in an agency action with respect to the grievant."

The Board found that the Department's long delay in including the award materials in grievant's file constituted procedural error and rejected the excuse of a heavy workload and inadequate staffing. On the question whether the omission may have been a substantial factor in the Department's decision to mid-rank (rather than promote) grievant, we carefully weighed grievant's ranking in class, the nature of the award as a group award, rather than an individual award, the highly laudatory and detailed comments in both the rating and reviewing statements versus the more generalized whole-team narrative of the missing award narrative, and the class statistics covering the number of officers who had received three consecutive awards. The Board concluded that grievant did not prove that omission of the award materials may have been a substantial factor in his non-promotion, or that his appeal was meritorious under 22 CFR § 905.1(a). The appeal was denied.

DECISION

I. THE GRIEVANCE

[redacted] (grievant) appeals the denial of his agency-level grievance in which he complained that the Department of State (Department, agency) failed to timely include his nomination for a 2014 group Meritorious Honor Award (MHA)[1] in his Official Personnel File (OPF) before the 2015 G-IV Selection Board (SB, G-IV SB)[2] met and ranked his class. He argues that this constituted a significant procedural error within the meaning of 22 CFR § 905.1(c) that prejudiced his opportunity for promotion by the SB that mid-ranked him. As relief, he seeks a reconstituted 2015 G-IV SB.

II. BACKGROUND

Grievant is a tenured FS-04 Public Diplomacy (PD) officer. Shortly after arriving in [redacted], for his second Foreign Service posting in April 2014, he was selected to serve as one of two officers sent to [redacted] to assist Americans visiting the region in connection with the 2014 [redacted] World Cup.

On or about October 28, 2014, Embassy [redacted] Consular Chief/World Cup Country Coordinator nominated grievant and three other individuals for a group MHA as "Team [redacted] The nomination spoke exclusively in terms of team actions and accomplishments, presenting all of these as collective, rather than individual, achievements. The record shows that the Joint Country Awards Committee in [redacted] approved the award on November 15, 2014

[1] The parties refer to the award in question variously as a Group Meritorious Honor Award (GMHA) or Meritorious Honor Award (MHA). The record shows that the award was presented jointly to four employees for their collective efforts and that the award certificate was captioned, "Meritorious Honor Award." We refer to it as an "MHA" or "group MHA" herein.

[2] The 2015 G-IV SB reviewed and ranked FS-04 Foreign Service Officer Generalists competing for promotion to the rank of FS-03. The parties on occasion refer to the G-IV SB as "the Promotions Panel" or "Selection Panel."

and the Chief of Mission approved it the same day. Grievant asserts, and the Department does not dispute, that he was awarded the MHA on November 24, 2014.

On or about December 14, 2014, grievant was notified that the MHA had been approved and would be presented at an Embassy Awards Ceremony on January 16, 2015. He asserts that between December 15, 2014 and July 23, 2015, he made sixteen attempts to inquire about the status of the MHA and/or to have the nomination and the award entered into his OPF so that they would be available for review by the 2015 G-IV SB. These attempts are documented in the record and not disputed by the Department.

Meanwhile, grievant's 2015 Employee Evaluation Report (EER) for the rating period April 29, 2014 through April 28, 2015, was completed on April 17, 2015. The rating and reviewing officers were different than the person who had nominated Team [redacted] for the group MHA and neither of them mentioned in their performance evaluations either the nomination or the fact that the award had been approved. Grievant, likewise, made no mention of the nomination or award in the "Statement by Rated Employee" section of his EER. Thus, the EER was silent on the fact that grievant had been nominated for, and had received, an MHA as a member of Team [redacted] in the course of the rating period. That said, the rater and the reviewer made several laudatory comments about grievant's work assisting Americans in [redacted] for the [redacted] World Cup and cited specific examples of his individual efforts and accomplishments. The rater strongly recommended that grievant be tenured and promoted immediately, which the reviewer supported "unreservedly."

The 2015 G-IV SB convened on July 7, 2015 and completed its work on September 25, 2015. Grievant was mid-ranked by the SB. The nomination and award were entered into his

OPF approximately three weeks after the SB concluded its work[3] and approximately eleven months after grievant began his sustained efforts to have the Department timely include it in his OPF.

On October 23, 2015, grievant filed an agency-level grievance seeking a reconstituted 2015 G-IV SB to consider his OPF with the MHA nomination and award included, with retroactive benefits and interest should the reconstituted SB recommend him for promotion. On February 9, 2016, Constance M. Dierman, Deputy Assistant Secretary for Human Resources (DAS/HR), denied the grievance. While "acknowledg[ing] the Department's delay in submitting [grievant's] 2014 MHA for inclusion in [his] OPF," the Department found that grievant had not been prejudiced or harmed by the delay and that it was not a substantial factor in his not being recommended for promotion by the SB. In explaining the basis of its decision, the Department provided a set of Foreign Service Promotion Statistics for "Consular Officers," which led grievant (a PD officer) to speculate that the Department may have submitted his OPF to the wrong SB. The Department subsequently confirmed that it had provided the Consular Officer statistics in error and clarified that grievant competed for promotion class-wide, not on the basis of cone or skill code.[4] At the request of the Board, the Department submitted an expanded set of accurate statistics covering the specific cohort of officers within which grievant competed before the 2015 G-IV SB. Thus, according to the Department, grievant's OPF was properly reviewed by the correct SB.

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[3] Grievant contends that the MHA was finally entered into his OPF on October 19, 2015, whereas the Department says the date was October 16, 2015. The difference is of no consequence.

[4] The Board ultimately concluded that the original publication of statistics by the Departments was an *ex post facto* clerical error which played no role in grievant not being recommended for promotion.

Grievant next filed an appeal with the Foreign Service Grievance Board (Board, FSGB) on February 26, 2016, challenging the procedures employed in submitting his OPF to the 2015 G-IV SB. The Record of Proceedings (ROP) was closed March 29, 2016. After closing the ROP, the FSGB requested and received additional information from the Department, including the number of officers who had three consecutive awards in their OPFs, the number of these who were ranked for promotion, and how many were reached.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

1. The Department Applied the Wrong Burden of Proof

In denying the agency-level grievance, the Department applied 22 CFR § 905.1(a), that states that in all grievances other than those concerning disciplinary action, the grievant bears the burden of proving by a preponderance of the evidence that the grievance is meritorious. Grievant contends, however, that 22 CFR § 905.1(c) provides the applicable standard in the instant grievance appeal. It states:

> Where a grievant establishes that a procedural error occurred which is of such a nature that it may have been a substantial factor in an agency action with respect to the grievant, and the question is presented whether the agency would have taken the same action had the procedural error not occurred, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

Grievant argues that the Department's substantial delay in entering the MHA nomination and award into his OPF, despite his persistent efforts over a six-month period to have this accomplished, along with the fact that his incomplete OPF was reviewed by the 2015 G-IV SB, all of which the Department concedes, proves procedural error within the meaning of the regulation. Grievant also contends that 3 FAH-1 H-4812.2 imposes an obligation on the

Department to add approved awards and nomination documents to OPFs. He further maintains that the Department's guidance to employees stresses the importance of having a complete OPF for promotion review and the significance of MHAs to SBs that are considering an officer's file. Grievant argues that the Department's own regulations and guidance establish that the absence of the 2014 group MHA from his 2015 OPF "may have influenced" his ranking by the G-IV SB.

The conditions of 22 CFR § 905.1(c) arguably having been met, grievant maintains that the burden should then shift to the Department to prove by preponderant evidence that it would have taken the same action with regard to his ranking (specifically, that it would not have promoted him) if the MHA nomination and award had been timely included in his OPF. He contends that the Department erred in requiring him to bear the burden of proving the merits of his grievance.

2. <u>The Department's Finding was Conclusory and Unsupported by Evidence</u>

Grievant argues that the Department has not provided evidence to support its conclusion that he was not harmed by the omission of the MHA from his OPF. First, he notes that the Department did not provide statistics concerning the number of officers competing in his class who had three consecutive awards,[5] or evidence from notes of SB members about how they weighted awards in their ranking decisions. Second, grievant maintains that although the Department has quoted several passages from the 2015 EER with the aim of establishing that the activities and accomplishments recognized by the MHA were in fact included in his EER and therefore were reviewed by the SB, the fact that he won an award that was his third consecutive

[5] As noted earlier, the Board requested and the Department subsequently provided this information.[6] On remand from this Board, the Department chose to submit the 2008-027 officer's complete OPF to a reconstituted SB, with the result that he was promoted (whereas he had been recommended, but not reached, by the first SB that reviewed his OPF without the MHA).

MHA was not made known to the SB and might have been viewed as significant positive information that, in turn, might have impacted its ranking decision. He argues:

> Because the Department has previously made clear the significance of receiving Meritorious Honor Awards, [it] . . . is estopped . . . from asserting, without support, that informing the Selection Panel that I had received a third Meritorious Honor Award would have had only "*marginal influence*" on its deliberations.

(Emphasis in original.)

3. <u>The Department's Decision Omitted the Most Apposite FSGB Precedent and Misconstrued Other Cases</u>

Grievant notes that in its agency-level decision, the Department did not mention FSGB Case No. 2008-027 (April 29, 2009), which he claims clearly establishes the merits of the instant grievance appeal. Grievant argues that in 2008-027, the Board found that the omission of an MHA from that officer's OPF may have had a substantial impact on his ranking and remanded the case to the Department to prove that it would have ranked that officer similarly, even if the MHA were included in the OPF.[6] Grievant maintains that the facts of 2008-027 "closely mirror" his own appeal. First, even though the officer's EER in the cited case contained mention of the fact that he had received an MHA, the FSGB nevertheless found the absence of the nomination from the employee's OPF was a factor that may have had a substantial impact on his ranking. Grievant argues that the negative impact he suffered from not even having a mention of the MHA nomination or award in his EER is, by definition, even greater.

Grievant further contends that the Department misrepresented the Board's decisions in two cases which it cited in support of its agency-level decision. In both FSGB Case No. 2003-

[6] On remand from this Board, the Department chose to submit the 2008-027 officer's complete OPF to a reconstituted SB, with the result that he was promoted (whereas he had been recommended, but not reached, by the first SB that reviewed his OPF without the MHA).

040 (March 12, 2004) and FSGB Case No. 2004-006 (June 23, 2004), the respective SBs were aware that the employees had been nominated for MHAs because the nominations were in the employees' files. The Board decisions in those cases turned on the question whether the absence of other documents, such as a copy of the award certificate with a summary citation, or a nomination for a separate award for the same activities covered by the MHA nomination, would have increased those employees' prospects for promotion. Grievant contends that these cases are "wholly inapposite" to his grievance, inasmuch as neither the MHA nomination nor any other indication that he had been nominated for and had received an award were in his OPF when the SB met. Since the SBs in 2003-040 and 2004-006 reviewed sufficient documentation to be aware that those employees had been nominated for MHAs and presumably factored that information favorably into their rankings, unlike the instant case where grievant's file did not contain such information, grievant contends that the Department's reliance on these precedents is a deliberate distortion and material misrepresentation.[7]

4. The Department Has a Long History of Delaying Insertion of MHAs Into Officers' OPFs; It Lacks Impartiality to Adjudicate Complaints Arising From Its Own Procedural Errors

Grievant concludes with two related points. First, his review of this Board's past decisions in appeals arising from similar complaints leads him to conclude that the Department "has long had an inability to perform the simple ministerial function of adding [MHAs] to OPFs. … [T]he Department has flatly admitted that it lacks the ability to do its job." Thus, he maintains, the Department should not be allowed to continue to prejudice employees' prospects for promotion. Second, he argues that the Department's decision in his grievance reflects a lack

[7] Grievant makes a further factual distinction between these cases and his own based upon the erroneous promotion statistics initially cited by the Department in the agency-level decision. This argument was rendered moot by the corrected promotion statistics that the Department provided to the Board, and we therefore do not examine it.

of impartiality, inasmuch as the Department adjudicated (and exonerated itself of) his complaint, despite admitting that it delayed carrying out its obligations. Moreover, the Department's claim that the delay resulted in no harm to grievant was conclusory, unsupported by evidence, and had the effect of substituting the judgment of the Department about grievant's promotability for that of a properly constituted SB.

B. THE DEPARTMENT

The Department acknowledges the roughly eleven-month delay in entering grievant's group MHA nomination and a copy of the award certificate into his OPF. It acknowledges as well that these items were finally entered into grievant's OPF some weeks after the 2015 G-IV SB completed its ranking of grievant's class. Finally, the Department acknowledges grievant's sustained efforts between January and July 2015 to have the nomination and award added to his OPF in time for the SB to consider them when ranking him within the FS-04 generalist class. These acknowledgements notwithstanding, the Department argues that the grievance appeal should be denied for the following reasons.

The Department disagrees with grievant's argument that the burden of proof should shift to the agency because "[grievant] has not established by a preponderance of the evidence that the Department's untimely submission of his 2014 GMHA was a substantial factor in the G-IV Selection Board's decision." As support, the Department cites FSGB Case No. 1999-037 (August 26, 1999), in which the Board denied the appeal because the employee failed to show that the Department's failure to include an MHA in the OPF had been "a substantial factor" in his non-promotion.

The Department claims that its delay was neither unexplained nor unreasonable. The Department cites a statement by Bureau of Western Hemisphere Affairs human resources staff

(WHA/EX/HR) noting that they received "overwhelming amounts" of incoming nominations at that time (i.e., roughly February-March 2015), resulting in processing delays. The Department asserts that "the [Foreign Service Grievance] Board has previously taken staffing shortages into consideration as an explanation for delayed awards processing." It cites as an example FSGB Case No. 2011-061 (April 2, 2012), in which the Board "found no regulations governing the length of time within which the agency must enter an approved award into an employee's folder." The Department therefore concludes that grievant has not established in this case that the delay in entering the 2014 MHA into his OPF was "unexplained or unreasonable," or that the Department was required by any regulation to complete his OPF within a specified period of time.

Turning to the question of harm, the Department contends that grievant has failed to prove that inclusion of the 2014 MHA nomination and award would likely have resulted in a recommendation for promotion by the G-IV SB. The Department argues that grievant's 2015 EER is more laudatory than the 2014 MHA nomination, citing several statements from both his rater and reviewer to support this contention. The Department asserts that these selected quotes "[highlight] grievant's noteworthy, individual contributions to the 2014 World Cup[,] whereas the 2014 GMHA's narrative focuses on the collective efforts of the entire team." The Department cites FSGB 2003-040 (March 12, 2004), in which the Board concluded that laudatory comments in the EER covering the same work as a missing MHA made it likely that the SB would have reached the same conclusion regarding that officer's ranking, even if the MHA had been included in the OPF. The Department argues that the same conclusion is warranted in the instant grievance.

Conversely, the Department distinguishes the facts of the instant case from those of FSGB Case No. 2008-027 (November 17, 2008), cited by grievant as the most apposite case. In that case, the Department argues, the FSGB found that the EER narrative was not sufficiently comparable to a missing award nomination and thus, the omission of the nomination from the OPF might have been a substantial factor in that officer's failure to be promoted. Moreover, the officer in the cited case, unlike grievant here, had been recommended for promotion, even with the award material missing from his OPF and thus, he was arguably more likely to be higher ranked within his class and conceivably reached for promotion if a complete OPF had been reviewed by a reconstituted SB. By comparison, the Department concludes that grievant's 2015 EER in the instant appeal is significantly more laudatory regarding his World Cup contributions than the language contained in the 2014 MHA nomination.

Finally, the Department notes that the 2014 MHA was grievant's third consecutive MHA and with two prior MHA's in his OPF, the presence or absence of a third MHA "would not have had [sic] impacted the 2015 G-IV Selection Board's decision to mid-rank rather than to recommend or promote him."

IV. DISCUSSION AND FINDINGS

Because this case does not involve discipline, grievant bears the burden of proving by a preponderance of the evidence that his grievance is meritorious. 22 CFR § 905.1(a). A related provision, 22 CFR § 905.1(c), states:

> Where a grievant establishes that a procedural error occurred which is of such a nature that it may have been a substantial factor in an agency action with respect to the grievant, and the question is presented whether the agency would have taken the same action had the procedural error not occurred, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

The parties agree that the neither the group MHA nomination, nor a copy of the award itself, was in grievant's OPF when the 2015 G-IV SB reviewed his file. The record shows that neither grievant's 2015 EER, nor any other material in his OPF, gave any indication that he had been nominated for, and had received, an MHA during that rating period. In the agency-level decision, the Department acknowledged its "delay in submitting your 2014 MHA for inclusion in your OPF," although it contended that grievant was not harmed thereby.

We, therefore, find that grievant has established by preponderant evidence that the Department's delay in entering the MHA into his OPF constituted procedural error. Although the Department claims that its staffing was inadequate to process the large number of awards (and that in any event, no regulation mandates a time limit within which it must enter award materials into OPFs), we are not persuaded that this is an adequate justification for such a long delay, especially in light of grievant's many attempts over a period of several months to have the nomination and award timely entered into his OPF before the G-IV Board met.

In FSGB 2011-061 the Board, finding for the grievant, wrote:

> This Board does not deem it appropriate to demarcate a precise schedule or "drop-dead date" for inclusion of materials in employees' OPFs. We recognize the Department's prerogative regarding such matters. At the same time, we can say that a delay of six weeks in completing employees' OPFs in the spring of the year, just before selection boards are scheduled to meet, is outside the bounds of what we deem to be reasonable.[8]

In the instant case, the delay was not a matter of weeks, but nearly a year. We, therefore, also find this to be outside the bounds of what is reasonable.

The Department has provided some information regarding the large number of other awardees whose nominations and awards were similarly not entered into their OPFs in time for

[8] *See*, FSGB 2011-061 (April 2, 2012) at p. 14.

consideration by the 2015 SBs. While perhaps establishing that grievant did not suffer disparate treatment, the argument that delay was widespread and that many officers' OPFs similarly went to the SBs incomplete in no way mitigates our view that this was in fact procedural error.

The Department cites FSGB Case No. 2011-061 (April 2, 2012) at 14, footnote 3, in support of its argument that: "…the Board has previously taken staffing shortages into consideration as an explanation for delayed awards processing." The Department is correct as far as that goes, but the context of the Board's comment must be considered. In the cited passage, the Board mentioned staffing shortages as the sort of explanation that the Department *might have, but did not, offer* to explain a delay. The Board did not suggest that such an explanation, if presented, would have excused or mitigated all delays. Instead, the Board has been clear that in cases involving agency error, it does not take a blanket approach to the question whether the error constituted a significant factor in its action with respect to the grievant, but rather "carefully reviews the impact of the error on a grievant." FSGB Case No. 1999-037 (August 26, 1999) at p. 6.

What remains to be considered with respect to the applicability of 22 CFR § 905.1(c) is whether grievant has established by preponderant evidence that the Department's procedural error was of such a nature that it *may have been a substantial factor* in an action by the Department with respect to the grievant (in this case, not being ranked or recommended for promotion). FSGB Case No. 2006-035 (February 21, 2008) sheds light on the approach the Board has taken in determining whether error may have been a substantial factor in an agency action. In this case, the Board stated:

> [Grievant's revised supplemental] submission begins with what appears to be a *per se* argument – that "[i]t is undeniable that Awards and Nominations are highly laudatory and would strengthen a candidacy for

> promotion. This shifts the burden to the Department." We reject such a *per se* approach. Otherwise, as a practical matter, in grievances challenging missing awards and nominations, the burden always would shift to the Department whenever the omitted document was a nomination for an MHA. That view finds support neither in the Foreign Service Act nor the Board's regulations and is contrary to Board precedent. See, *e.g.*, FSGB Case No. 2004-006 (June 23, 2004) (holding that grievant failed to carry his initial burden of showing that an omitted MHA nomination may have been a substantial factor in non-promotion. The Board will evaluate the impact of the omission by reviewing carefully the documentation that was in the OPF and available to the SB); FSGB Case No. 91-028 (September 4, 1991).[9]

Thus, while it may seem to be common sense that the omission of any award nomination and certificate *may have had* an impact on an SB's decision, the Board has tended to take a contextual, rather than a categorical, approach, examining the facts of each appeal and particularly the impact of the agency error on the individual grievant, before reaching a conclusion. That is the approach we follow herein, with the burden remaining with the grievant, for the time being, to establish by preponderant evidence that the error may have been a substantial factor in his being mid-ranked rather than promoted by the 2015 G-IV SB. For the reasons set forth below, we find that grievant has failed to meet this burden.

First, as to the nature of the missing award, it was a group award and the record shows that the nomination did not identify any specific action or quality of grievant as an individual, separate from the team as a whole, that might have allowed the SB to assess his readiness for promotion. Further, we note the previous two of grievant's three consecutive awards were included in the OPF and were presumably considered by the 2015 G-IV SB. It stands to reason that the SB did factor in some value to these MHAs when it nonetheless decided to mid-rank

[9] FSGB Case No. 2006-035 (February 21, 2008) at p. 14.

him. It is unclear why one additional, albeit consecutive, group MHA would have made a significant difference.

Second, grievant's 2015 EER detailed in the OPF his individual achievements in [redacted] specifically highlighting and lauding his leadership and judgment with illustrative examples. It is difficult to see how the inclusion of the much more generalized narrative of the group award nomination and certificate would have provided the SB with any additional relevant information regarding grievant's individual suitability for promotion.

Finally, in considering the statistical results of the 2015 G-IV SB, which the Department provided in response to the Board's query, we find no basis for concluding that the timely inclusion of the MHA nomination and award certificate in grievant's OPF would have caused the SB to recommend him for promotion, and certainly no basis for the conclusion that this would have catapulted him so far ahead that he would likely have been reached. The record shows that grievant competed for promotion on a class-wide basis. He was mid-ranked by the SB, and as such, received no individual rank-in-class. The Department asserts that 528 officers in grievant's class were recommended for promotion. Of these, 388 were reached; thus, 140 officers were recommended, but not reached. All of these officers were ranked above grievant. Even if, for the sake of argument, one assumed that he stood at the very top of the mid-ranked contingent, he would still have had to hurdle 140 other officers in order to be promoted. This is a large number – far larger than the number of officers to be leap-frogged in other cases discussed by the parties – and it must be remembered that 140 is the minimum number, assuming that grievant stood at the very pinnacle of the mid-ranked group. The evidence in the record does not persuade us that inclusion of the MHA nomination and award would have enhanced grievant's promotability significantly, or cause the SB to propel him over 140 other competitive candidates.

Grievant has argued that the omission of the nomination, award, and any mention of the award harmed him not only *per se*, but particularly insofar as this was his third consecutive award. He speculates, without supporting evidence, that the SB would have found significant the mere fact that he had received three consecutive awards. However, the Department's statistics do not validate this contention. According to the Department, 26 officers' OPFs that were reviewed by the 2015 G-IV SB "included awards from the Department for the past three consecutive years." Of these, 15 officers were recommended for promotion and 13 were reached. Thus, 11 officers with three consecutive awards in their OPFs (almost half of the total) were mid-ranked or low-ranked. Moreover, the record does not indicate whether the three awards that these officers received were MHAs, Superior Honor Awards, group awards, or individual awards. The Department, however, did state that no other officer had three consecutive group MHAs. The Department did not elaborate, but the implication is that all other officers had at least one individual award and/or one hierarchically more significant award (such as a Superior Honor Award).

The record gives us no basis on which to conclude that the absence of the 2014 group MHA from grievant's OPF, admittedly due to agency error, may have been a substantial factor in the SB's decision to mid-rank rather than promote him. On this basis we find that grievant has not met his preliminary burden, under 22 CFR § 905.1(c), that would be required to shift the burden of proof to the Department. The conclusion follows, therefore, that grievant has failed to carry his burden of proving that his grievance appeal is meritorious.

V. DECISION

The grievance appeal is denied.

For the Foreign Service Grievance Board:

[redacted]

Susan R. Winfield
Presiding Member

[redacted]

Bernadette M. Allen
Member

[redacted]

Gregory D. Loose
Member