

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

Record of Proceedings
FSGB Case No. 2016-018

And

November 15, 2016

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

William Persina

Board Members:

Gregory D. Loose

Harlan F. Rosacker

Special Assistant

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

Pro se

Representative for the Agency:

Elizabeth A. Whitaker
Grievance Analyst, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

Held: The Board held that grievant had failed to satisfy his burden of establishing by preponderant evidence that his EER was defective because he had not been properly counseled on the fact that his supervisors believed that his yelling at colleagues and subordinates was a performance problem; that even if he was counseled on the yelling issue, there was no written confirmation of the counseling; and that comments in his EER that his yelling created a hostile environment were improper because he had not been advised prior to his receipt of the EER that his supervisors believed that to be the case. The Board therefore denied the appeal in its entirety.

Summary: Grievant is an untenured Financial Management Specialist who was posted to the U.S. Embassy to ████████ in February 2014. It is undisputed that grievant yelled at colleagues and subordinates in the office, and that his colleagues and subordinates yelled back at him. It is also undisputed that both his rater and the Ambassador had oral conversations with grievant, informing him that his yelling was inappropriate. None of these oral conversations were reduced to writing. He was involuntarily curtailed from his post at the embassy in June 2014. He was given an EER covering the four-month period he was at the embassy. The EER contained references to the yelling incidents, and said that grievant created a “hostile work environment” due to the yelling. That EER language was subsequently revised during the grievance process.

Grievant filed a grievance alleging that his EER was defective because he had not been properly counseled on the yelling issue; that even if he had been properly counseled, that counseling was not reduced to writing; and that he had not been advised prior to the EER that his rater and reviewer believed that he had created a hostile work environment by yelling at colleagues and subordinates.

The Board rejected grievant’s claims. It first found that the oral conversations he had with his rater and the Ambassador about the yelling incidents were sufficient to put grievant on notice that management found such behavior to be inappropriate, and they were thus properly considered to be counseling. The Board then held that the absence of documentation of the counseling did not render the counseling inadequate. Finally, the Board rejected grievant’s claim that both the original EER “hostile work environment” language and its revised version were unfairly prejudicial. The Board said it was inextricably related to the yelling references in the EER, and neither version of the language was unfairly prejudicial to grievant. Accordingly, the Board denied his appeal.

DECISION

I. THE GRIEVANCE

Grievant makes several procedural challenges to his Employee Evaluation Report (EER) covering a four-month period from February to June 2014. Specifically, he claims he did not receive adequate counseling, that counseling he did receive was not properly documented, and that the EER alleged that he created a work environment that “reached an unacceptable level of hostility” without providing adequate support for the comment. Grievant requests that the EER be expunged from his record; that the Board order that a specialist tenure board immediately be convened to consider his eligibility for tenure based on his record without the challenged EER; and that the Board "take proactive steps to ensure that established EER procedures are applied, adhered to and enforced."

II. BACKGROUND

At the relevant periods in this case grievant was an untenured Financial Management Specialist with the U.S. State Department (Department). On February 27, 2014, grievant arrived at the U.S. Embassy in [REDACTED], to assume duties as the Financial Management Officer for the Embassy. In that position he supervised several locally employed staff employees as well as several American officers. Grievant’s position had been filled by a series of temporary supervisors for approximately eight months leading up to his arrival. His performance rating official for his tour of duty at the embassy was the embassy’s Management Officer, and his reviewing official was the Acting Deputy Chief of Mission. He was involuntarily curtailed from his post at the embassy in June 2014.

It appears from the record of this case that, from the outset, grievant’s relationship with this staff at the embassy was marked by discord. Grievant was of the opinion that staff members

frequently did not follow his directions, were at times disrespectful to him, and “arguably insubordinate.” EER of June 24, 2014 at Part VII, Statement of Rated Employee. It is acknowledged in the record by both parties that his staff yelled at him on occasion. Grievant stipulated in his EER that he “responded in kind” to his staff; that is, he yelled at them. He discussed his yelling with staff and indicated that he would try to improve his behavior in this regard.

Grievant had discussions with his superiors on at least two occasions about his yelling at colleagues and subordinates. The first was an informal conversation with his rating officer in late March or early April 2014, wherein the rater told grievant he should not yell at his staff. This discussion was not scheduled in advance, although the rater referred to the encounter as a “counseling” session. The second was a “candid exchange” grievant had with the Ambassador, during which grievant recalls that his yelling at staff was discussed, though he denies that he viewed this as a counseling session *per se*. Neither discussion was reduced to writing.

Grievant met with his rater and other supervisory officials on other occasions to discuss work related matters. On April 16, 2014, grievant met with his reviewing officer to discuss the use of representational funds. This meeting was confirmed in writing to grievant’s rater, to the effect that grievant had been helpful in addressing the matter. On May 15, 2014, grievant met with his rater to discuss various work related matters such as the timely delivery of work products. According to grievant, the staff’s yelling at grievant was also discussed at this meeting. This meeting was followed up the next day by an e-mail confirming the work issues discussed, but did not mention the staff yelling issue. Further, on May 30, 2014, grievant’s reviewing official and rater met with grievant to discuss grievant’s “email protocol.” Grievant

never received a DS-1974 counseling certification form for any of these meetings during his tenure at the embassy.

Grievant received an EER covering his approximately four-month tenure in the Embassy in August 2014. There were a number of laudatory comments in the EER concerning various aspects of his work. However, in Part V.B. of the EER, "Evaluation of Potential," his rater discussed his "Interpersonal and Communications Skills." In this connection, the rater said that grievant "had several difficult issues" in this area. The rater said further:

As a result, his staff was very tense towards the end of the rating period. Despite my counseling and mentoring, it was widely perceived that his office had become a hostile work environment. Although during the rating period there were numerous counseling sessions where [grievant] agreed to change and adapt, unfortunately he did not modify his behavior.

The rater went on to say that grievant did not receive DS-1974 counseling forms for the May 15 and May 30, 2014 counseling sessions that were identified in the EER as having been held, although according to the rater these counseling sessions were documented in writing, because "it was early in the rating period."¹ In the "Area for Improvement" section of the EER, Part V.C., the rater said:

In April I had to counsel [grievant] on not raising his voice and not to yell at his LE [Locally Employed] staff. Despite my counseling session, this happened several additional times not only with LE staff, but also with the direct hire American staff. In May, there were similar incidents about once a week. It was concluded that there was a hostile work environment due to [grievant's] behavior and treatment of his staff and customers.

Finally, in Part VI. of the EER, grievant's reviewer said:

Despite my efforts and the Ambassador's efforts to counsel and mentor him, [grievant] continued experiencing difficulties with his interpersonal and communication skills. His communications caused numerous confrontations and raised tensions with locally employed staff, direct-hire American officers, and office management specialists.

¹ Grievant states that he does not recall there being a May 30 session, and never received anything in writing about that session.

Grievant filed the subject grievance with the Department on November 6, 2015. He raised three challenges to his EER: first, he alleged that the EER lacked the proper documentation of any counseling session; second, he asserted that there was a lack of any counseling session; and third, he claimed that the "hostile work environment" language in the EER was unsupported and unfairly prejudicial to him. He requested that the EER be expunged from his record.

The Department denied the grievance in part on February 1, 2016, but granted relief to grievant by directing a rewording of the "hostile work environment" phrase as used in the Area for Improvement section of his EER, agreeing that the language was "inappropriate in this instance." As to the lack of documentation of counseling, the Department stated the grievant was, or should have been, aware of the rater's concern regarding his performance in those areas where improvement was needed. Thus, the Department asserted that under case law of this Board, the rater's and reviewer's actions in this case satisfied the test for determining whether counseling adequately put an employee on notice of perceived performance issues. Regarding grievant's argument that he was not counseled about his performance, the Department argued that grievant's own statements in the record of the case show that he was in fact counseled concerning various aspects of his performance.

The Department determined that in Section V.B., "Interpersonal and Communications Skills," the EER would be amended to state:

It was widely perceived that the environment in his office had reached an unacceptable level of hostility.

In Section V.C, the AFI, the EER would be amended to state:

[grievant's] behavior and treatment of his staff and customers needs to become less hostile and more collegial. [sic]

In all other respects the Department denied the grievance, as it concluded that grievant had failed to establish by preponderant evidence that his grievance had merit. Grievant then filed his appeal with this Board.²

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant first argues that, while he had discussions with his reviewer about performance matters, he never had counseling sessions with him during grievant's tenure at the Embassy. As to his yelling at his colleagues and subordinates, grievant concedes that he did have a conversation with his rater about the problem, in the form of his rater "dropping by" his office in late March or early April 2014 to talk about the issue. However, he says that it did not constitute a counseling session that was planned in advance, nor did it constitute counseling on the issue "throughout the rating period" on the yelling issue. Further, he says that he had a discussion with the Ambassador about the yelling issue, although grievant says it was not counseling, nor was the Ambassador a "party" to the EER. He also argues that he was not counselled on the "hostile work environment" issue referenced in his EER. Grievant claims that at other meetings, such as the May 30, 2014, meeting with his rater and reviewer on e-mail protocol, they did not discuss the yelling and hostile work environment issues referred to in the EER, and therefore he cannot be considered to have been "counseled" at the meetings on those performance issues.

Grievant next argues that, even assuming that he did receive counseling on the yelling and "hostile work environment" issues, it was not reduced to writing on a DS-1974 form as required under Department rules. The e-mail that grievant received after the May 15 meeting with his rater did not qualify as an appropriate counseling certification. Further, grievant claims

² This Board has been advised that grievant was recommended for tenure by the 2016 Summer Specialist Tenure Board.

that in denying his grievance, the Department has improperly “waived” the requirement that counseling sessions be documented.

Grievant next argues that the “hostile work environment” references in his EER were never discussed with him before he received it, and those references are thus unfair and prejudicial to him. He also asserts that the Department’s revisions to the EER passages referencing the “hostile work environment” are mere “wordsmithing,” and do not alter the prejudicial nature of the remarks.

Finally, grievant states that, contrary to the Department’s claim, he has suffered harm as a result of the challenged EER comments. He points out that, despite subsequent strong EERs that he received, the performance issues alleged in the challenged EER were the sole basis cited for his being denied tenure by the December 2014 and December 2015 Specialist Promotion and Tenure Boards (SPTBs).

B. THE DEPARTMENT

The Department concedes that the yelling and office hostility issues may not have been on the agenda of every performance-related encounter between grievant and his supervisors. However, the Department argues, there is no requirement that meetings with rater and employee to discuss performance issues be scheduled in advance. Grievant concedes that his supervisors discussed these issues with him, so he cannot claim to be surprised when they were addressed in his EER.

The Department also asserts that although the rater may not have provided grievant with formal documentation of his performance counseling or a written performance improvement plan, grievant admits that he was instructed to stop yelling at his staff. Further, grievant should reasonably be expected to know what standards of performance were expected of him in the

workplace, and certainly refraining from yelling at colleagues and subordinates is one of the work standards grievant should be expected to know without great explication from his supervisors.

The Department next claims that by the May 15 meeting at which yelling by staff to grievant was discussed, grievant had already been orally counseled by his rater a few weeks before about grievant's yelling at staff. Accordingly, there was no need to raise the issue again with him at the May 25 meeting. Further, the Department says that "[i]t is no stretch of logic to conclude that adult professionals yelling at one another in the workplace creates an environment of hostility, even though the words 'hostile work environment' or 'unacceptable level of hostility'" may not have been specifically used in the conversation. The Department goes on to state that during grievant's May 30 meeting with his rater and reviewer, grievant received counseling concerning his effective use of e-mail. Accordingly, the Department claims, this meeting is also reasonably found to have been a counseling session on aspects of grievant's performance.

As to grievant's claim concerning the lack of documentation of counseling, the Department points to the standard established by this Board that a grievant suffers no harm, even where a formal counseling form was not prepared, provided that the grievant was counseled by his supervisor throughout the rating period. The test is whether or not the grievant was, or should have been, aware of the rater's concern regarding his performance of those areas where improvement was needed. The Department cites to FSGB Case No. 2003-048 (May 5, 2006) at 27; FSGB Case No. 2005-023 (October 7, 2005) at 028; and FSGB Case No. 2005-068 (September 11, 2006) at 15 in support of its position on counseling. The Department argues that

this standard is met here, and grievant's claim on this point should therefore be rejected. Finally, the Department asserts that grievant did not suffer any harm as a result of the disputed EER.

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing by a preponderance of the evidence that the grievance is meritorious. 22 CFR § 905.1(a). For the reasons that follow, we find that grievant has failed to satisfy his burden of proof, and we therefore deny his appeal in its entirety.

Whether Grievant Was Adequately Counseled

This Board has previously addressed what constitutes adequate counseling of an employee under the Foreign Service Act, as amended (FSA), and under Department rules and regulations. In general, we have adopted a flexible approach that stresses whether an employee's supervisors gave the employee adequate notice of a perceived performance problem. The Board has consistently upheld an employee's right to be advised of deficiencies in performance, and the employee must be given a reasonable opportunity to demonstrate acceptable performance before being separated. *E.g.*, FSGB Case No. 2002-040 (May 28, 2003). The obligation to counsel rests with the agency and is an agency requirement, not merely a requirement for the rating official. FSGB Case No. 2000-060 (May 7, 2001).

An example of the Board's approach in this kind of case is FSGB Case No. 2005-002 (June 29, 2005). In that case the grievant and the Department advanced conflicting arguments as to whether any counseling at all had taken place in connection with certain negative remarks made in his EER about grievant's communication skills. This Board noted that the evidence showed that grievant's rater had oral discussions with the grievant concerning the tone of his e-mail communications, and that the rater and reviewer had discussions on the issue. Based on

these and other facts, the Board held that the record showed that “the rater and reviewer were both involved in either counseling the grievant directly or discussing internally the importance of counseling grievant on the issue of the tone and nature of his communications.” Accordingly, the Board rejected the grievant’s argument, finding that he had not satisfied his burden of proof on this issue.

Similarly, we find in this case that grievant has failed to establish by preponderant evidence that he received no counseling at all on his yelling at his subordinates. Grievant stipulates that his rater came to his office in late March or early April 2014 to discuss grievant’s yelling at his colleagues and subordinates. Moreover, grievant also concedes that the Ambassador at some unspecified point spoke with him about this same issue. Finally, grievant himself says that the issue of his colleagues and subordinates yelling at him was discussed orally at his May 15 meeting with this rater.³ We believe these facts establish that management in a timely fashion made it abundantly clear to grievant that it regarded his behavior as unacceptable and that grievant had to stop behaving in this way. The fact that grievant’s rater did not schedule these meetings in advance, provide an agenda, or issue a performance improvement plan, does not establish that counseling did not occur, nor did he demonstrate such procedures were required by law or regulation. We conclude that grievant’s argument this point is without merit.

The Lack of Counseling Documentation

It is undisputed that grievant never received a DS-1974 Counseling Certification Form concerning his yelling at staff and the “hostile work environment” observations that later appeared in his EER. Indeed, it does not appear from the record that there is a writing of any

³ Grievant stresses at several points in his appeal that his colleagues and subordinates yelled at him. The record does not reveal who yelled at whom first. However, we do not view that question to be relevant to our decision. Even assuming his colleagues and subordinates began the yelling, it would not justify grievant’s yelling back at them, and his EER would still fairly reflect the fact that grievant engaged in conduct inappropriate for a supervisor.

kind memorializing management's dissatisfaction with grievant's behavior towards his staff. This is not a desirable state of affairs.

The importance of some form of writing confirming counseling on performance issues is evident. For one thing, it would eliminate the kinds of disputes as to whether counseling occurred, such as we have in this case. Further, it would provide a clear statement as to what management had told the employee as to what the performance problem was and what the employee must do to address the problem. These are important features of a smoothly functioning performance management program.

Indeed, the Department has shown it is well aware of the importance of confirming counseling sessions in writing. In Department Announcement No. 2015_03_090 (March 17, 2015) the Department's Human Resources (HR) Bureau emphasized the importance of the rule that employees must receive two counseling sessions each year, at least one of which must be documented using the DS-1974 form. In fact, as a "best practice," HR recommended that all counseling sessions be documented using the DS-1974.

Again, however, our case law establishes that we have not applied a rigid *per se* rule in cases where there is no documentation of a counseling session. In FSGB Case No. 2005-073 (October 11, 2006), the Board said as follows:

We have found that [a grievant] has a procedural right to be notified of where his performance has been deficient and a substantive right to an opportunity to improve [emphasis in original]. Because it is a procedural right, the notice or counseling need not be rigid. It may take forms other than in writing. To be sure, the employee must be fairly informed, and we have commented that the supervisor should be aware of risks involved in not memorializing the counseling in writing.

Our case law thus indicates that grievant's argument as to the lack of written counseling on the yelling and "hostile work environment" EER references is without merit and should be rejected.

Our conclusion on this point is further buttressed by two facts. First, grievant was only at post for four months. This abbreviated tenure excuses to some extent the absence of written confirmation of counseling on the facts of this case. A lack of written documentation of counseling of an employee for a full performance year may warrant a different conclusion.

Second, we agree with the Department's view that the nature of the performance issue in question, *i.e.*, yelling at colleagues and subordinates, is such that grievant should not have been under any misapprehension about the concerns of his supervisors, whether the counseling was confirmed in writing or not. Written documentation of counseling can be more important in cases involving, for example, technical performance issues, where an employee may need to refer back to the counseling document to make sure he or she is responding appropriately to the rater's expectations. However, when the performance issue is yelling at colleagues and subordinates, there should be no doubt about how an employee needs to respond to the counseling as the performance period progresses.⁴

The "Hostile Work Environment" EER Comment

We also reject grievant's claim that he was not properly advised of the criticism in his EER that he had caused a "hostile work environment" in his office. In our view, this comment is inextricably connected to the yelling issue. As the Department notes, "a reasonable person would view a workplace with adult employees yelling at one another hostile [sic]." In other words, being put on notice of the office problems his yelling created was effectively notice of the fact that the environment in the office was hostile.

⁴ We note that grievant does not allege that the contested EER passages are unfairly prejudicial because he timely responded to the oral counseling he received by ceasing the inappropriate conduct. He did say in his EER that he "made efforts, which [he] thought to be successful" to improve his behavior. However, the record does not specify when the yelling incidents occurred. Accordingly, we have no basis on which to conclude that grievant timely acted to correct his performance.

Grievant also argues that the Department's revisions to the EER during the agency grievance process were mere "wordsmithing" and did not eliminate the "taint" created by the EER. We reject this claim as well. In order to prevail on this point, grievant would have to establish that the EER's revised references to "hostility" in the work place were inaccurate or falsely prejudicial. *See* 22 CFR § 901.18(a)(5). For the reasons set out above, we find that grievant has not satisfied his burden of proof on this issue. Rather, the comments seem to us to be fair and reasonable under the circumstances.

We disagree with the dissent's insistence on assessing grievant's claims against the original EER's references to a "hostile work environment," as opposed to the revised EER language which did away with use of the phrase "hostile work environment." The Department apparently agreed with grievant's (and the dissent's) notion that "hostile work environment" is a phrase of art in employment discrimination law and is not appropriately used in the circumstances of this case. In its decision on the grievance, the Department's Deputy Assistant Secretary for Human Resources directed that the EER be changed to eliminate the use of the "hostile work environment" language. We therefore conclude that grievant received from the Department as much relief as he is entitled to on this point.

The dissent goes on to conclude that the Department's substituted phrase, that "it was widely perceived that the environment in his office had reached an unacceptable level of hostility," remains falsely prejudicial and should be expunged because "it leaves little doubt that what is being described is a 'hostile work environment.'" We disagree with this conclusion as well. The fact that the phrase "hostile work environment" has a specific meaning in employment discrimination law does not in our view bar using the word "hostile" or "hostility" in other employment settings. We find no basis to conclude that use of the word in the circumstances of

this case clearly and directly transmutes into “hostile work environment” as used in the discrimination setting. Nor do we find any basis in the record on which to conclude that grievant was adversely affected by the original “hostile work environment” phrase as used in the EER. In this connection, we note that the 2014 and 2015 Specialist Tenure Boards (STBs) both deferred a decision on granting grievant tenure. However, both STBs made clear that their decision was based on the understanding that the “hostile work environment” reference in the EER was to grievant’s yelling at staff, and not to some other workplace issue such as employment discrimination. That is, we find that the STBs would have reached the same result if they had the revised EER language before them as they did with the original EER language. Accordingly, we find no basis to conclude that the 2014 and 2015 STBs mistakenly understood the “hostile work environment” reference in the EER to describe conduct that is any different from the conduct later described in the revised EER language as a result of the agency grievance decision.

Finally, the dissent opines that grievant was not given adequate notice that his conduct was believed to have created hostility in his office. We disagree with this point as well. It simply strains credulity to hold that an employee who is counseled that his yelling at colleagues and subordinates in the workplace is inappropriate could be surprised by the idea that his supervisors believe that this behavior is causing an environment of hostility in the office. Grievant’s supervisors’ failure to specifically use the words “hostile” or “hostility” in their counseling is therefore not prejudicial to grievant.

V. DECISION

Grievant’s appeal is denied in its entirety.

For the Foreign Service Grievance Board:



William Persina
Presiding Member



Gregory D. Loose
Member

DISSENT

I respectfully dissent from my colleagues' finding that certain statements in grievant's EER for the period February 28 to June 24, 2014 (as revised by the Department in response to his agency-level grievance) are not falsely prejudicial. I also do not share all of their views on the adequacy of counseling.

In considering the 2014 EER it is important to keep in mind that when grievant left post after an assignment of less than 120 days, neither he nor his rater and reviewer anticipated that his performance at the post would be documented in an EER. Drafting of the EER did not begin until several weeks later – in response to an order by the Department. The contemporary documentation of counseling is minimal. Most of the limited evidence which the Department offers to meet its burden of showing that there was adequate counseling was gathered by grievance investigators eighteen months later when the rater explained that he had been reassigned to another post and had no records.

In his original grievance on November 6, 2015, grievant challenged two statements by the rater in the 2014 EER that indicated he had created a “hostile work environment” in his office. He explained:

As I understand it, alleging such behavior (a ‘technical term’) carries a heavy burden of proof and must be alleged in a formal case in connection with which an investigation should be held, counseling sessions should occur, and reprimands should be established. The first I was advised of the allegation was in reading the EER in July 2014. It was never discussed with me before or after that time. Rather, the inflammatory – arguably defamatory – allegation was asserted solely in the EER in vague, unsubstantiated statements.

In the Department's February 1, 2016 decision on the grievance, it found that “the use of the term ‘hostile work environment’ is inappropriate in this instance.” The Department offered no explanation for this finding, but it changed statement “a” above to: “it was widely perceived

that the environment in his office had reached an unacceptable level of hostility;” and statement “b” to “ [REDACTED] behavior and treatment of his staff and customers needs to become less hostile and more collegial.” I concur in the majority’s speculation that “the Department apparently agreed with grievant’s (and the dissent’s) notion that ‘hostile work environment’ is a phrase of art in employment discrimination law and is not appropriately used in the circumstances of this case.”

In considering whether the words “hostile work environment” – in those exact words or the words in a similar formulation – are falsely prejudicial, I contend that one must keep in mind the source of this terminology in employment discrimination law and how a reasonable person serving on a Foreign Service Selection Board panel might perceive these words.

The term “hostile work environment” is described in in 3 FAM 1520 regulations on Non-Discrimination on the Basis of Race, Color, National Origin, Sex or Religion. These regulations were issued under the authority of:

- a. Title VII of the Civil Rights Act of 1964, as amended (Title VII) (42 U.S.C. 2000e et seq.); and
- b. The Foreign Service Act of 1980, as amended (22 U.S.C. 3901, et seq.); and
- c. Equal Employment Opportunity Commission (EEOC) regulations contained in 29 CFR 1614.

3 FAM 1525.1a (2) states that one of the requirements in determining what constitutes sexual harassment is that “[t]he unwelcome conduct unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or abusive work environment.” 3 FAM 1526.1a similarly points out that one of the conditions for determining what constitutes

discriminatory harassment is “when it creates an intimidating, hostile, or offensive working environment.”

These are not arcane regulatory provisions. The Department regularly publishes announcements on its policies on sexual harassment and discriminatory harassment, and it provides extensive training to employees. It is reasonable to assume that the highly experienced Foreign Service officers who serve on Commissioning and Tenure Boards (CTB) would recognize the various formulations of “hostile work environment” and sense their connotation. Since the terminology is based on laws and regulations that have force throughout the federal government, it would also be familiar to employees from other agencies who serve on CTBs.

As grievant has pointed out, a working environment may be found to be hostile – and thus a violation of these laws and regulations – only by following the procedures detailed in these regulations. Allegations of discriminatory harassment or sexual harassment in the Department of State are to be made to the Office of Civil Rights (S/OCR), which then conducts or oversees an investigation and decides what steps might be taken based on its findings. There is no evidence in the record that any embassy employee forwarded allegations of either sexual or discriminatory harassment by grievant to S/OCR, nor is there any evidence of an S/OCR investigation. It is important to note that these agency regulations provide elaborate due process protections for both the complainant and the employee accused of discrimination. It seems clear to me that they do not permit such findings to be made by individual raters, reviewers, visiting management experts, or even ambassadors.

I would find that the rater’s and reviewer’s uses of “hostile” and “hostility” in the challenged EER are clearly prejudicial and are also falsely prejudicial. I would also find that one of the revisions ordered by the Department remains falsely prejudicial.

It is quite appropriate for raters or reviewers to describe behavior that they have observed – *e.g.*, that rated employee yelled at his staff and colleagues or displayed hostility toward his staff and colleagues. However, in some instances this rater and reviewer did not describe what they had observed. Rather they resorted to the passive voice and asserted what had been “concluded” or “perceived” to be a hostile work environment. They did not identify by whom or through what sort of process this conclusion or perception had been reached. I find these statements falsely prejudicial since a reasonable person reading them would infer that they were based on a finding of sexual or discriminatory harassment after an S/OCR investigation.

I find that the revised statement – “it was widely perceived that the environment in his office had reached an unacceptable level of hostility” – remains falsely prejudicial and should also be expunged. The Department’s rephrasing is facile and unpersuasive – it leaves little doubt that what is being described is a “hostile work environment.”

That said, I find that the revised statement “[Grievant’s] behavior and treatment of his staff and customers needs to become less hostile and more collegial” is based on a permissible description of observable hostility. Grievant has not demonstrated that it is falsely prejudicial.

Grievant admits that he was counseled not to yell at his employees and colleagues, and he acknowledges having made an effort not to yell. However, he argues that he was not presented with the words “hostile work environment” until he received the EER that was drafted a few weeks after he departed post.

The Department has not shown that the words “hostile” or “hostile work environment” were ever used by the rater, the reviewer or the Ambassador in any of their written or face-to-face exchanges with grievant while he was at post. Given the requirements in law and regulations for proving a “hostile work environment” and the seriousness of such a finding, I do

not find sufficient the majority's argument that "it strains credulity to hold that an employee who is counseled that his yelling at subordinates in the work place is inappropriate could be surprised by the idea that his supervisors believe that this behavior is causing an environment of hostility in the office." If a hostile work environment was indeed what the rater had in mind while discussing the matter with grievant while he was still at the post, he should have addressed it bluntly. There is nothing in the record indicating that the rater said anything remotely approaching "Your yelling at staff and colleagues is hostile and is creating a hostile work environment." The Department has not presented any evidence that this damaging conclusion crossed the rater's mind until the Department ordered him to prepare an EER – several weeks after grievant had left the post and. I would find that grievant was not sufficiently counseled about "a hostile work environment." Even as revised, the following statement remains falsely prejudicial: "It was widely perceived that the environment in his office had reached an unacceptable level of hostility." In my view, simply rearranging the words is insufficient. The implication of "hostile work environment" – essential to a finding of sexual or discriminatory harassment – is too strong to be dismissed as "not prejudicial."

In response to a request from the Board, grievant provided the low ranking statements prepared by the December 2014 and December 2015 Specialist Tenure Boards. Since grievant did not file his agency-level grievance until November 6, 2015, and the Department did not order revisions until February 1, 2016, it is obvious that the low ranking statements issued by both the December 2014 and December 2015 Specialist Tenure Boards were based on the original, unrevised 2014 EER. In discussing grievant's problem areas, the December 2014 tenure board quoted the rater's statement in the unrevised 2014 EER that "Despite my counseling and mentoring, it was widely perceived that his office had become a hostile work environment." The

December 2015 tenure board cited the rater's statement that "it was concluded that there was a hostile work environment due to [grievant's] behavior and treatment of his staff and customers." (emphasis added)

The majority disagrees with my "insistence" on assessing grievant's claims based on the original EER's reference to a "hostile work environment." I would point out that both the 2014 and 2015 CTBs cited this language from the original, unrevised EER in their recommendations to postpone a decision on grievant's tenuring. It is clear to me that grievant was harmed by that highly prejudicial language. Accordingly I would order that the statements on grievant by those two CTBs be stricken from the Department's records.

Absent confirmation that the Department has effected grievant's tenure as recommended by a recent CTB,⁵ I would also order that a revised 2014 EER – with the Department's changes and the additional change I have suggested – be reviewed by one more Commissioning and Tenure Board. Even without the additional change that I have suggested, the significant changes already made by the Department to the original language in the 2014 EER dictate that the revised 2014 EER be reviewed by another CTB.



Harlan F. Rosacker
Member

⁵ See footnote on page 6.