BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between	Record of Proceeding
[redacted]	FSGB Nos. 2014-041
	November 9, 2015
Grievant	**DECISION**
and	
Department of State	EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:	John M. Vittone
Board Members:	William B. Nance Harlan F. Rosacker
Special Assistant:	Katherine D. Kaetzer-Hodson
Representative for the Grievant:	*Pro Se*
Representative for the Department:	Holly Colburn HR/G
Employee Exclusive Representative:	American Foreign Service Association

OVERVIEW

HELD: DENIED IN PART AND GRANTED IN PART: The Board finds that the Department has not proved seven of eight specifications, included in two charges that were the bases for its decision to suspend Grievant for three days. With respect to the penalty, the Board finds that it has inappropriately applied the charge of Discriminatory Harassment as an aggravating factor with respect to the sole specification that has been sustained. The Department is directed to reduce the penalty to no more than a Letter of Reprimand, and to advise the Board of its actions within 30 days of receipt of this Decision.

SUMMARY: Grievant, an FS-02 Foreign Service Officer with the Department of State, appeals the agency-level grievance decision upholding her three-day suspension without pay for improper personal conduct and poor judgment.

While grievant was serving as Public Affairs Officer (PAO) at a U.S. Embassy, the Assistant Public Affairs Officer (APAO) filed an Equal Employment Opportunity (EEO) complaint alleging that grievant made numerous inappropriate and insensitive comments (many of which she overheard) – including several references to the national origin of some local and American employees; that she used harsh and profane language that made others uncomfortable in the workplace; and that she exhibited behavior that lacked professionalism, cultural sensitivity and good judgment. The EEO complaint triggered an Office of Civil Rights (S/OCR) investigation during which about a dozen local and American employees of the embassy were interviewed and signed affidavits. The S/OCR report was forwarded to the Office of Human Resources (HR/ER). The Department proposed to suspend grievant for five days without pay based on charges of improper personal conduct (seven specifications) and poor judgment (four specifications). The Deciding Official did not sustain three of the four poor judgment specifications and mitigated the penalty to three days. Grievant filed an agency-level appeal, which was denied.

Grievant's appeal to this Board requested that the three-day penalty be significantly reduced or rescinded, and any other relief to which she might be entitled.

I. THE GRIEVANCE

[redacted] (grievant), an FS-02 Foreign Service Officer, appeals the denial by the Department of State (Department, agency) of her grievance of its decision to suspend her for three days for improper personal conduct and poor judgment. The charges are based on a Report of Investigation by the Department's Office of Civil Rights that was forwarded to the Office of Human Resources on October 15, 2013. The investigation stemmed from allegations by grievant's American subordinate (complainant) that she had engaged in harassment based on national origin, while serving as Public Affairs Officer at Embassy [redacted] Grievant is also accused of making several insensitive comments that created an uncomfortable work environment for American and [redacted] agency employees.

Grievant has requested that the three-day suspension be rescinded, or in the alternative, significantly mitigated; and any and all other appropriate relief.

II. BACKGROUND

Grievant served as the Public Affairs Officer in [redacted] from January to October 2013. Her relationship with her Assistant Public Affairs Officer (APAO) was difficult from the beginning of her assignment, and deteriorated over time. Each claimed that the other retaliated and/or frustrated her ability to perform her job.

The Ambassador and DCM, aware of tensions within the Public Affairs Office, met with grievant to discuss performance and supervision issues. The DCM was grievant's direct supervisor and rating officer, and also held counseling sessions with her, during which Public Affairs Office dynamics were discussed. At her supervisor's suggestion grievant met with the APAO and the Human Resources Officer (HRO). During this meeting the APAO leveled several allegations against grievant, claiming harassment based on national origin. She also

claimed that grievant had made several inappropriate and offensive comments in her presence about other persons. During the meeting with the HRO, grievant apologized to the APAO for having made comments or used language that might have offended her – and subsequently extended a written apology.

A short time later, the APAO filed a formal Equal Employment Opportunity (EEO) complaint,[1] alleging that grievant made a number of inappropriate comments and references to national origin in comments about others, and that grievant's behavior lacked professionalism, cultural sensitivity and good judgment. While none of grievant's references to national origin were claimed to have been directed at individuals in one-on-one conversations, the APAO said that she was offended by grievant's comments, since she herself is a naturalized U.S. citizen. The filing of her EEO complaint led to an S/OCR investigation and to obtaining the series of affidavits[2] that constitute the S/OCR report. The allegations that constitute the Department's formal charges against grievant stem from the affidavits in the S/OCR report and a letter from an English Language Fellow (ELF) assigned to [redacted]

Based on these allegations, the Department began disciplinary proceedings against grievant under the authority of 3 FAM 4300, bringing two charges against her: Charge 1 – Improper Personal Conduct (seven specifications), and Charge 2 – Poor Judgment (four specifications); and proposed a five-day suspension without pay. In setting the penalty the

[1] 3 FAM 1526.3 reads in part: "All U.S. citizen employees or U.S. citizen applicants for employment may file an Equal Employment Opportunity (EEO) complaint with the Department. Individuals who wish to file an EEO complaint **must** consult a Department of State EEO counselor within 45 days of the most recent harassing incident. A list of EEO counselors is available on S/OCR's Web site at socr.state.gov. It is recommended, but it is **not** necessary, for an employee to complain to his *or* her supervisor or other responsible official before approaching an EEO counselor."

[2] It is unclear from the record how S/OCR selected candidates to interview, and it is noteworthy that neither the DCM nor the Ambassador was interviewed.

Department concluded that grievant had violated its Discriminatory Harassment Policy, found in 3 FAM 1526.

After considering grievant's responses, the deciding official did not sustain three of the Poor Judgment specifications and reduced the penalty to a three-day suspension. The grievant filed an agency-level grievance, and on August 12, 2014, the Department issued its decision on the grievance, sustaining the three-day suspension and declining to grant any relief.

On October 10 grievant appealed the agency-level decision to this Board. She forwarded her Supplemental Submission on January 12, 2015, and the Department responded on February 9. Grievant filed a Rebuttal on March 9. In response to the Board's requests the Department provided a copy of the S/OCR Investigative Report on March 16 and a copy of a July 15, 2013, letter from the English Language Fellow to the Department on March 27. On April 9 the Board accepted clarifications to her rebuttal as requested by grievant. The record of proceedings was closed on June 8, 2015.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

The Department accuses grievant of improper conduct for using inappropriate language and making multiple statements suggesting bias or discrimination based on national origin, and asserts that these actions were inconsistent with grievant's position as a Foreign Service Officer and as PAO. The Department claims that grievant's pattern of behavior reflected poor judgment. The charges are listed below, indicating the Department's position on each specification.

Charge 1 – Improper Personal Conduct

Specification 1 – Grievant asked the APAO: "What's the name of the Chinese guy who came to borrow a recorder, who speaks bad English?"

The Department points out that grievant acknowledges having made the statement but avers that she seems not to understand that her comments were insensitive. Despite her desire for efficiency she could have asked the question without disparaging a colleague's manner of speaking and done so in a manner "more appropriate to the workplace."

Specification 2 – After a telephone conference with State Department staff in Washington, grievant said to the APAO: "What the hell is that woman doing in that position! She's not even a real American!" On the following day, grievant allegedly said again: "but this woman is not a real American!"

The Department points out that grievant admits to making "unflattering comments" about the woman in question but contends that her words are being twisted. It argues that grievant's description of the event on appeal is significantly different from her colleagues' recollections, and finds the colleagues' recollections are more credible.

Specification 3 – In describing to the APAO an event at a previous post involving a naturalized U.S. citizen, grievant stated: ". . . she has a U.S. passport, but she is not a true American. She was Asian. In fact, I think she was Vietnamese."

The Department argues that grievant seems to be claiming that she only stated the woman was a foreign-born spouse of an American, and that she did not comment on the woman's specific nationality. Even if true, this does not lessen the offensiveness of her comments or intimidating behavior, which are both inappropriate and derogatory.

Specification 4 – The APAO overheard grievant say – in responding to a question from an [redacted] employee of the Embassy about the children born to immigrants to the U.S.: "[T]hose immigrants are coming to the U.S. and having babies. Even though they grow up in the

States, they are not culturally American." Her comment in the workplace where she could be overheard was inappropriate.

In response to grievant's claim that she did not discuss her views "amongst" a group of colleagues, the Department points out that the APAO, who reported directly to grievant, declared in an affidavit that this comment was one of several comments by grievant that were "very offensive" to her as a foreign-born, naturalized U.S. citizen.

Specification 5 – In the presence of an American colleague, the APAO, and other local embassy employees grievant shouted into her cell phone, "You f---ing c--t! You already ate?! You didn't wait for me!" Her use of profanity was inappropriate.

The agency asserts that it has taken into account both the complainant's and grievant's recollections. It points out, however, that grievant did not deny using the "f" word in the presence of three local embassy employees while being transported together in an embassy vehicle following an event at the embassy.

Specification 6 – An American colleague stated that at a social event hosted by a senior Embassy official he had asked what the hostess meant in saying that as a college student she had been a "little sister" in a fraternity. Grievant explained to him – in earshot of several expatriates -- that "it means you don't have a gag reflex." The American colleague interpreted this to mean that the "little sister" was obliged to perform oral sex on members of the fraternity. In this situation grievant's comment was inappropriate.

The agency claims that grievant admitted making the comment in response to a colleague's inquiry. It argues that as an Embassy Foreign Service Officer attending a "get-together for new arrivals" at the official's residence, grievant should have been modeling professional behavior.

Specification 7 – An English Language Fellow (ELF) reported that in a conversation with the ELF in an embassy vehicle driven by an [redacted] employee of the embassy, grievant referred to [redacted] as "stupid" and "slow."

The agency notes that grievant acknowledges using the word "slow," but claims she was referring to "pace" and not to the people of [redacted] However, given grievant's acknowledgement that her comments at times may be viewed as inappropriate, coupled with instances of embassy employees receiving her comments differently from the way she intended them, the Department finds the ELF's version of these comments to be more credible than grievant's.

Charge 2 – Poor Judgment

Specification 2 – Grievant demonstrated poor judgment in observing to the recently arrived ELF how terrible it was that she had been granted check-cashing privileges at Embassy [redacted] and that the embassy was unprofessional in breaking rules to permit it. Grievant opined further that she would not be blamed when the embassy received a reprimand for bending the rules.

The Department argues that "personal opinions can often be both in contrast with those of the Department and inappropriate to express in relation to its work." It argues further that if grievant had a legitimate concern with the way the Department was applying banking options to the ELF, she should have raised those concerns through appropriate channels within the embassy.

Penalty Considerations

In determining the severity of the penalty the deciding official found that grievant's offenses were particularly egregious in that her comments were racially or ethnically insensitive,

had violated the Department's discriminatory harassment policy in 3 FAM 1520, and, as a result, had undermined the agency's efforts to foster a tolerant and respectful work environment. Further aggravating the severity of her misconduct are the expectations inherent in grievant's role as the PAO and the fact that she had spent more than 10 years in the Foreign Service and had received EEO training. The Department argues that the penalty was properly considered, is within the zone of reasonableness, is not unduly punitive, and should be sustained by the Board.

B. THE GRIEVANT

Grievant disputes making several of the comments she is reported to have made, and avers that in any case she never intended for anything she said to offend anyone. She is convinced that the relationship she had with her APAO is at the heart of the problem. She stated that she and the APAO had a tense relationship, based in large part on grievant's general displeasure with her subordinate's work – both in terms of quality of work and timeliness of task completion. The DCM asked that grievant, the APAO, and the HRO meet to try to identify the source of the tension. During a key meeting that followed, the APAO described several events during which she claimed grievant discriminated against her because of her national origin; she accused grievant of making "borderline illegal statements" in that regard,[3] and pointed out that grievant often used profanity and harsh language that made her uncomfortable. Grievant claimed this was the first time she was made aware of these accusations. She apologized to the APAO during the meeting and vowed to curtail usage of profanity and harsh language generally, and in her presence particularly.

Grievant admits that she referred to one local employee (Charge 1, Specification 1) by his national origin and also referred to his poor English skills, but claims she did so, not to be

[3] Grievant's deputy is a naturalized U.S. citizen, born in [redacted] a fact that grievant claims not to have known until the meeting with HRO.

disparaging. After a question to the APAO drew a blank, she described him in a way that would permit the APAO to quickly identify the person she wanted her to contact in order to get something she needed urgently for the Ambassador. Grievant had only recently arrived in [redacted] and she could not recall the employee's name. Grievant claims that in hindsight she can see that her description may have come across as insensitive, but it was the first thing that came to mind as she was focused on speed and efficiency. She claims that her description of the employee is being misrepresented as culturally insensitive and as a slight against his national origin and English language abilities, when in fact, she intended neither.

Grievant claims that her words are being twisted with respect to her comments (Charge 1, Specifications 2 and 3) about naturalized U.S. citizens not being "real Americans." In the first incident (Specification 2), grievant, the APAO, and three Department colleagues in Washington were on a conference call that became contentious. Grievant was supporting the Ambassador's choice for speaker at an Embassy Fourth of July event, but one of the Washington participants – a naturalized U.S. citizen born in South Africa – was promoting another speaker. Following the conference call, grievant made the comment in response to the proposal made by the Washington representative: "What the hell is that woman doing in that position! She's not even a real American!" Grievant admits that she was frustrated by the call and by the prospect of having to tell the Ambassador that Washington was not supporting his choice for speaker, but avers that her comment was not an attack on the woman's national origin, but rather an expression of her belief that neither the woman's knowledge of [redacted] civil war history nor the fact that she was born in South Africa gave her the necessary insight to counter the Ambassador's wishes.

Grievant denies that she made the second comment (also cited in Specification 2), i.e., "but this woman is not a real American," or that she went to the APAO to explain her action after making the initial comment. Grievant claims this second event is wholly fabricated.

Regarding the alleged "true Americans" remark (Specification 3), grievant disputed the facts as cited by the APAO. Grievant claims that she and others – including the APAO – were discussing the music for the Fourth of July event, specifically, the national anthems for the U.S. and [redacted] She claims to have told the APAO that she hoped not to repeat the problems that occurred at a previous post when she, as the PAO, was preparing for a similar event. In that situation, a woman rehearsing the U.S. national anthem was publicly taunted by another individual. Grievant claims to have shared the story with the APAO and others only to reinforce her desire to avoid issues like the one she had witnessed earlier.

Grievant confirmed that she had a conversation in her office in response to a question from her [redacted] Cultural Assistant concerning a TV news story about the Dream Act. She expressed her personal opinion about the need for immigration reform (Charge 1, Specification 4). Grievant stated that illegal immigrants do a disservice to the children they bring to the U.S., as opposed to the ones born there. She told the Cultural Assistant that a consular officer at one of her prior posts used to get upset about the ambiguities in U.S. law concerning the granting of U.S. citizenship. She said she expressed her personal opinion that U.S. laws should clarify exactly what the Fourteenth Amendment entails so that the system could be fairer about who is or is not granted citizenship. She emphasized that the record does not show that the employee was offended or that the interchange impeded their work.

Regarding her alleged use of the "f" word and the "c" word (Charge 1, Specification 5), grievant acknowledged that she sometimes uses the "f" word and that she may well have used it

in an embassy vehicle following an official reception as she was talking on her cell phone to a male friend, while riding with the APAO, an [redacted] driver, and two other local [redacted] employees. She is adamant, however, that she is personally uncomfortable with the "c" word, and did not and does not use it.

Grievant explained the circumstances surrounding her explanation of "little sister" (Charge 1, Specification 6) by asserting that she did not intend to offend anyone, and that she was unaware that anyone was offended by the comment, which she attributed to her "bawdy sense of humor." She also contends that the comment followed the general tenor of the conversation taking place at the time, which occurred at an after-hours event. Grievant claims that other attendees made remarks of a "sexual nature" so she did not believe her comment was inappropriate for the setting.

Grievant denies the ELF's claim that she referred to [redacted] as "stupid" and "slow" (Charge 1, Specification 7) during a car ride with the ELF, while sitting next to a local [redacted] driver. Grievant contends that in the process of trying to help the ELF manage her expectations, she advised her not to expect the same customer service standards as one would find in the U.S., and that it takes longer to get things done in [redacted] She also claims to have advised the ELF of the importance of establishing relationships and saving face in [redacted] but she denies that she denigrated [redacted] in any way.

Grievant also contends that the ELF's description is not accurate when she claims that grievant expressed how terrible it was that the ELF had been granted check-cashing privileges (Charge 2, Specification 2). Grievant denies that she made any such statement. On the contrary, grievant claims to have told the ELF that she was glad she had been afforded this privilege, and that she thought it was "unfair that the Embassy put us both [the ELF and grievant] in this

uncertain situation, based on their rules and restrictions." Grievant claims to have stated her view that the inconsistent manner in which the embassy handled the ELF's support was unprofessional. She also expressed her concern that she not be blamed for all the rules that she believed were being broken, noting that she had served in posts where other officers had been disciplined for actions they took at the insistence of upper management when those actions were not in complete compliance with the letter of the law or with agency regulations.

Grievant objects to the agency's assertion – in setting the penalty it imposed – that her conduct constituted "discriminatory harassment" or "discrimination" as laid out in the Department's policies. She asserts that:

> 3 FAM 1526 is clear in its language that it refers to 'discriminatory' words or actions ***directed at someone***, i.e., "Discriminatory harassment is verbal or physical conduct that denigrates or shows hostility ***toward an individual*** . . . . ," "employees must not harass ***anyone*** . . . . ," or "Employees also must not harass ***someone***. . . ." [Emphasis added by grievant.] This implies that the statements are made to the individuals. Even if the board were to take the allegations raised in the specifications as wholly accurate, which I maintain they are not, the statements were not made to the specific individuals and therefore do not fall under the policy the Department cites as an aggravating factor.

Grievant asserts that the Department has not taken into account, as mitigating factors, the hostile environment she endured, inadequate support from senior management, or the embassy's inexperienced staff.

IV. DISCUSSION AND FINDINGS

As this is a disciplinary case, the Department has the burden to demonstrate by a preponderance of the evidence that the disciplinary action is meritorious, in accordance with Section 905.2 of Volume 22 of the CFR. The Department also must establish that grievant engaged in the charged misconduct, that a nexus exists between the case and the efficiency of the

Service, and that the penalty chosen was not arbitrary. We will examine each specification with respect to these points in the discussion that follows.

As a whole, we find that the record does not support the charges of improper personal conduct and poor judgment by a preponderance of evidence. For the reasons set forth below, we sustain one of the specifications and overturn the others. We hold further that in considering the severity of the penalty the Department, in utilizing the discriminatory harassment policy as stated in 3 FAM 1526 as an "aggravating factor" as opposed to a formal charge, inappropriately applied the policy. (See discussion below).

Grievant used frank, descriptive, and sometimes profane language in talking to American staff, and in the presence of [redacted] local staff – within the confines of Embassy [redacted] offices or within embassy vehicles. Her language was often perceived as inappropriate and/or insensitive. She acknowledges most of the allegations, but claims that in several instances her words were either twisted or misinterpreted. There is no record, however, of grievant using these methods of expression in other venues and no claim by the Department or any of her colleagues that she did so publicly, or in the presence of any government official or non-government representative ([redacted] or foreign). It has not been alleged or proven that her conduct compromised the position of PAO or otherwise harmed the posture of the United States. The APAO claimed that actions or conduct by grievant affected her work performance. No other employee, American or [redacted] made any claim that grievant's actions affected work performance at the embassy. Nonetheless, there is no question that her use of "salty" language made some staff (both American and [redacted] uncomfortable on more than one occasion.

Our findings on each of the specifications for the two charges are as follows:

Charge 1 – Improper Personal Conduct

Specification 1 – Grievant asked complainant, "What's the name of the Chinese guy who came to borrow a recorder, who speaks bad English?"

Grievant admits that she used this language and acknowledges in hindsight that it could be perceived as insensitive. We find persuasive her claim that she used this description for speed and efficiency because she could not remember the name of the employee, whom she needed to contact quickly. She did not intend her reference to the employee to be disparaging or offensive – only descriptive. The Department found that regardless of her intent, the comment was unprofessional and demeaning.

We do not find that the comments were disparaging or denigrating in the context of the situation. The comment was made during a private discussion between grievant and her assistant. It did not affect office operations. The subject of the comment was not present, and when told about it, he said he was not offended. While grievant might have found a better way to describe the local employee, we do not find that the statement rises to the level of improper personal conduct that warrants disciplinary action. We do not sustain this specification.

Specification 2 – Grievant (referring to the Cultural and Educational Exchanges Coordinator (CEEC) in Washington) said to complainant following a phone call that did not go well: "What the hell is that woman doing in that position! She's not even a real American." The next morning, grievant again said, "but the woman is not a real American!"

Grievant claims that she was frustrated by the Washington representative's implication that her personal familiarity with U.S./[redacted]/[redacted] history made her better qualified than the Ambassador in [redacted] to choose the best speaker for an upcoming program.

We accept grievant's argument that she was defending the Ambassador's choice of speaker – that is what an Ambassador's staff is expected to do. However, based on the record we

find that – contrary to grievant's explanation – her disparaging comments were based on the Washington representative having been born in [redacted], rather than her lack of professional expertise.

With respect to the second comment that the APAO attributes to grievant, grievant denies that such a conversation took place. We find that the Department has not shown by a preponderance of evidence that the second comment was made. Nonetheless, since we have found that grievant did make the first comment, we sustain this specification to the extent that it cites to the first comment.

Specification 3 – Referring to a woman at another post, grievant said to complainant, ". . . she has a U.S. passport, but she is not a true American. She was Asian. In fact, I think she was Vietnamese."

Grievant disputes the APAO's version of events during which this comment was made. She and the APAO were discussing the music for the Fourth of July event, and she shared an experience from another post when similar preparations had not gone well. Specifically, the spouse of one American officer had mocked another woman, who was rehearsing the U.S. national anthem. Grievant avows that she herself had not mocked the woman as the APAO had reported, but had simply related a story about her in order to avoid a similar problem in [redacted] She claims not to remember anything about the woman's passport, and contends that she only became aware of the woman's nationality after the incident occurred.

We have two versions of the conversation – the APAO's and grievant's. There were no other witnesses. Neither version provides clear insight on the manner in which grievant related the story or what led the APAO to interpret her actions as "mocking" and disrespectful. More

importantly, the comment was not directed at an individual whose national origins were described. We find that the preponderance of evidence does not sustain the specification.

Specification 4 – Grievant said to an [redacted] LES (in a conversation overheard by complainant), "[T]hose immigrants are coming to the U.S. and having babies. Even though they grow up in the States, they are not culturally American."

The local employee's own account in the S/OCR report makes it clear that grievant was responding to the employee's specific inquiry on behalf of an [redacted] woman, selected to participate in the International Visitor program, who wanted to take her baby with her to the U.S. Grievant responded that "the U.S. does not go after illegal people until they do something bad, and that even the babies born on American soil have passports, but are not culturally Americans."

Grievant confirms that this interchange was part of a lengthy one-on-one conversation in her office with the LES member of her staff. Grievant recalled that they had been discussing a news program they had watched on TV about the Dream Act, which highlighted inconsistencies in U.S. immigration policy. Grievant claims to have expressed her opinion that illegal immigrants do a disservice to the children they bring into the U.S. at an early age, as opposed to children of illegal immigrants who are born in the U.S. The former have no U.S. citizenship claims; the latter have full U.S. citizenship. She also mentioned that U.S. consular officers at a previous post were upset that pregnant nationals from that country would travel to the U.S., have their children there, and then return to live in their home country. Their children, having been born in the U.S., held U.S. citizenship, but spent their lives in the country of their mother's birth.

The Department found it inappropriate that grievant discussed her "personal views in the workplace amongst a diverse group of colleagues, especially in [her] supervisory PAO position."

The record does not support the Department's conclusion that grievant made this comment in the presence of a "diverse group of colleagues." Rather, it appears that she expressed her personal views, in the privacy of her own office, to an [redacted] member of her staff at that person's request for clarification of certain issues. Although the complainant evidently overheard parts of the conversation from outside the grievant's office, her account of what was said appears to be incomplete and inaccurate, missing the complexity of the actual conversation.

While there are public and even internal official situations in which an employee is not free to express personal opinions, the record does not support the conclusion that grievant's behavior in this instance was inappropriate. We do not sustain this specification.

Specification 5 – Grievant speaking on her cell phone, overheard by complainant and driver – both in an embassy car with grievant – "You f---ing c--t! You already ate?! You didn't wait for me!"

Grievant confirmed the conversation and acknowledged that she "likely" used the "f" word, but contends that she is personally uncomfortable with the "c" word, and denies that she ever uses it. We find that the evidence in the record does not prove that she used the "c" word. We find that it was inappropriate for her to use the "f" word in the presence of American and [redacted] staff in an embassy vehicle. However, while we find its use particularly offensive in certain circumstances, we recognize that the "f" word is used quite frequently in common discourse today. We note, however, that the Department did not charge grievant with only the "f" word, but rather charged her with using it in conjunction with the other word which together constitute a more offensive phrase. Since the Department did not prove the full specification as stated, we do not sustain this specification.

Specification 6 – Grievant said to another embassy officer, perhaps overheard by others, "[I]t means you don't have a gag reflex."

Grievant admits making the statement, although she claims that it was a side comment, rather than a loud response directed to a larger group of people. She made the comment after one of her American colleagues asked what the host of an informal get-together meant when she explained that she was a "little sister" to a Greek fraternity in college. Grievant's comment led the colleague to understand that a "little sister" is someone who performs oral sex on fraternity members. Although the Department characterizes the setting as "official" because it took place at the USAID Mission Director's house during a gathering to welcome newcomers, including grievant, we find that characterization to be overstated. The record shows that the comment was made during a gathering at a small, informal after-hours social event that included no [redacted] The comment was indeed crude, and in poor taste. While the Department has every right to expect its officers to model appropriate behavior at all times, it has failed to prove that grievant's comment rises to the level of misconduct, or that in this informal social setting where no [redacted] were present there was a nexus to grievant's duties as PAO. We do not sustain this specification.

Specification 7 – Grievant said in an embassy car to an ELF, presumably overheard by an [redacted] driver, that [redacted] are "stupid" and "slow."

This allegation is made in the ELF's July 15, 2013, letter to the Bureau of Educational and Cultural Affairs.[4] Grievant denies that she used the word "stupid" in this conversation, and disputes the implication of the ELF that her use of the word "slow" was meant in a disparaging way; rather, she contends that she was describing inefficiencies in [redacted] Given the ELF's

[4] The letter is referenced in the ELF's affidavit, but details of the allegation are contained only in the text of the letter.

extreme frustration that her English language program never really got started, and that she blamed grievant for the early termination of her grant, we find that her views of grievant lack credibility for being objective. We also note that in the same letter, the ELF seems to mirror the sentiment that she accuses grievant of harboring, when she states that: "I knew that it would take time because nothing happens with American-style efficiency in [redacted] The personal sentiment expressed by the ELF is nearly the same that grievant used in the conversation she reported: i.e., that she should not expect the same customer service standards as in the U.S., and that it takes longer for things to get done. While much of grievant's language described throughout the S/OCR report is certainly unvarnished, we find the evidence supports grievant's interpretation that the statement was not intended to disparage or stereotype the [redacted] The record does not include any statement from the driver. We do not sustain this stipulation.

Charge 2 – Poor Judgment

Specification 2 – Grievant expressed to an ELF how terrible it was that the ELF was granted check-cashing privileges through the embassy.

This specification is based on a conversation that took place in a grocery store in [redacted] as claimed in the affidavit that the ELF submitted to S/OCR. Grievant denies claims that she told the ELF how terrible it was that she had been granted check-cashing privileges. In fact, grievant claims that she expressed just the opposite sentiment, and also expressed her hope that she not be blamed for any fallout that resulted from this extension of privilege. However, the decision to grant it did not rest on her authority.

Grievant asserts that she is being punished for "implying" to the ELF that the embassy broke rules on her behalf. While grievant's comments may have been injudicious, the Department has not cited any specific rule or regulation that prohibits an employee's private

criticism of the Department's actions. Accordingly we find no basis on which to sustain this specification.

Penalty

The S/OCR report stated only that grievant "may have violated 3 FAM 1526 or other Department policies," leaving the decision to the Department to take any management action it deemed appropriate. While the Department based its charges on the S/OCR report, it did not charge grievant with violation of the regulations on Discriminatory Harassment in 3 FAM 1526, but rather elected to charge her with the violations of Improper Personal Conduct and Poor Judgment, as provided in 3 FAM 4300.

Nonetheless, in considering the penalty, the Department utilizes discriminatory harassment – as an aggravating factor to presumably enhance the degree of penalty. We find this is an inappropriate and highly questionable use of what is clearly a separate charge within the Department's list of offenses. Its use as an aggravating element results in a complete dearth of examination or analysis of the criteria that defines discriminatory harassment that the Department would need to prove in order to sustain such a charge. It also deprives the grievant from understanding and responding to the evidence necessary for her defense, a fundamental tenet of fairness in any grievance procedure. We note that the regulation governing discriminatory harassment as promulgated in 3 FAM 1520 contains several elements, each of which would need to be analyzed. The FAM provision reads as follows:

> Discriminatory harassment is verbal or physical conduct that denigrates or shows hostility toward an individual because of his or her race, color, gender, national origin, religion, age (40 or over), physical or mental disability, sexual orientation, or because of his or her opposition to discrimination or his or her participation in the discrimination complaint process. In general, harassment is against the law when it creates an intimidating, hostile, or offensive working environment, or when it interferes with an individual's work performance.

Since the Board sustains only Specification 2 of Charge 1, we analyze the penalty in terms of the Department's decisions regarding that Specification. Regardless of the Department's use of the Discriminatory Harassment policy as an aggravating factor which we find inappropriate, the question is whether the Department has presented the requisite evidence supporting its assertion that grievant violated the Department's Discriminatory Harassment policy. Specification 2 of Charge 1 alleged that in statements to her APAO after a frustrating phone call, grievant twice referred to the Cultural and Educational Exchanges Coordinator (CEEC) in Washington as "not a real American." The person in question was a naturalized American citizen of [redacted] origin.

Given the circumstances of the sustained specification, the Department must show that grievant's verbal or physical conduct denigrated or showed hostility toward an individual because of or based on his or her national origin. Since the CEEC did not even know of the remarks, they could not have constituted discriminatory harassment of her. The question is, therefore, whether the remarks could have constituted discriminatory harassment of the APAO, the only other person involved.

It is clear from the record that most of the complainant's sensitivity in reacting to grievant's comments that someone is not a "real American" or "culturally American" stems from her own status as a naturalized American citizen. While several of grievant's comments are in poor taste, we do not find that they could reasonably be interpreted as hostile or disrespectful of the race or national origin of the person to whom she was speaking.

A key element in determining whether an act or words constitute discriminatory harassment is whether the conduct or behavior of the charged individual interferes with an individual's work performance. The APAO states several times in her affidavit that she is

concerned that grievant will retaliate against her for having filed the EEO complaint. She also claims that grievant – as her supervisor – increased scrutiny of her work, placing obstacles to progress on her projects and nit-picking her written work product – to the extent that grievant's behavior did affect her work performance. Contrarily, grievant contends that the APAO's real concern is her unhappiness with being told that her work is substandard. In grievant's affidavit she states that she does not believe the APAO's work performance had been affected by the tension between them. A subordinate employee of the APAO stated that she did not believe that the tension between grievant and the APAO had affected the latter's work performance.

This Board has considered issues of harassment and hostile work environment on several occasions. In FSGB Case No. 2014-051 (Order dated February 18, 2015), we found, quoting *Faragher v. Boca Raton*, 524 U.S. 775, 787-788 (1998), that proof of a hostile work environment "requires consideration of 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"

In FSGB Case No. 2007-035 (August 6, 2008), the Board found that a mere showing that a grievant experienced "a work environment that was difficult, and possibly even unpleasant" is not sufficient in and of itself to establish that the employee was subjected to a hostile work environment. In the instant case, while we find grievant's statements about the CEEC may have been insensitive considering the APAO's own status as a naturalized citizen and may have made the APAO uncomfortable, we do not find that two statements, in the context in which they were made, rise to the level of harassment of the APAO as defined by 3 FAM 1526.

It is clear that the APAO is offended by grievant's language, demeanor, the way she perceives that grievant treats [redacted] and the lack of respect she seems to display toward

[redacted] culture. There seem to be some important differences between them on program issues, with decisions that the APAO champions sometimes being overturned by the PAO on her own, or in consultation with the Ambassador and DCM. A lot of the office tensions appear to stem from differences between the way things were done in the past and the supervisory style and preferences of a new PAO. The APAO may have found the new environment unpleasant, but we are not persuaded that it was hostile.

Based on the record evidence available to the Board, we find no support for the APAO's claim that the conduct and behavior for which grievant is criticized have affected her work performance. The APAO has not cited any work objective that has been stymied or significantly slowed as a result of grievant's behavior, nor has the Department presented evidence that the two statements had any effect on the operations of the office as a whole. Based on the evidence we also find that the PAO's dissatisfaction with the complainant's performance began before she made her EEO complaint and that it thus was not retaliatory. The Board finds that the Department failed to prove by the preponderance of the evidence that grievant had engaged in discriminatory harassment with respect to the remaining specification.

Conclusion

The three-day suspension is based on a Department decision to sustain eight specifications under two charges, seven of which this Board is not sustaining. In addition, we find that the Department inappropriately treated as an aggravating factor its claim that grievant violated 3 FAM 1520 and discriminatory harassment as defined in 3 FAM 1526.1, but failed to prove that she violated these regulations with respect to the single specification upheld.

In view of our findings on both the facts and the applicable regulations, we find that a Letter of Reprimand would be the maximum reasonable penalty in this case.

V. DECISION

Grievant's appeal is denied in part and granted in part. The Department is directed to reduce the penalty to no more than a Letter of Reprimand, and is further instructed to inform this Board of its actions taken in view of our finding within 30 days of receipt of this Decision.

For the Foreign Service Grievance Board:

John M. Vittone
Presiding Member

William B. Nance
Member

Harlan F. Rosacker
Member