BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between	Record of Proceeding
[redacted] Grievant	FSGB No. 2014-043
and	September 21, 2015
Department of State	**DECISION**

For the Foreign Service Grievance Board:

Presiding Member:	William E. Persina
Board Members:	Gregory D. Loose Jeanne L. Schulz
Special Assistant:	Katherine D. Kaetzer-Hodson
Representative for the Grievant:	*Pro se*
Representative for the Department:	Elizabeth A. Whitaker Grievance Analyst, HR/G
Employee Exclusive Representative:	Sharon Papp American Foreign Service Association

OVERVIEW

HELD: The Department has met its burden of proving that the charged misconduct (Failure to Report for Duty) occurred, that a nexus exists between grievant's misconduct and the efficiency of the Service, and that the proposed punishment is proportionate to the offense. Grievant has failed to meet his burden of proof with respect to the affirmative defense he asserted. The grievance appeal is denied.

SUMMARY: Grievant, an untenured Special Agent in the Bureau of Diplomatic Security, grieved the Department's Decision to suspend him for 14 days without pay and place a discipline letter in his Official Personnel Folder for Failure to Report for Duty. The Department charged him with failure to report for a morning meeting and missing a flight from [redacted] to [redacted] on June 2, 2012, while a member of Secretary Clinton's Security Detail. As aggravating factors, the Department cited the fact that grievant consumed nine alcoholic beverages the night before the meeting and the flight, left his hotel alone at 2:30 a.m. the morning of the meeting and flight, and remembers nothing after that until he allegedly awoke at 10:15 a.m. in a car with three strangers in a wooded area 25 km. from his hotel. Grievant was removed from the Security Detail and sent home from [redacted], with other members of the Detail picking up his assignments in [redacted]. Grievant asserted the affirmative defense that he was drugged, kidnapped, and robbed, making it impossible for him to report for scheduled duty. He further complained that the Department's investigation of the incident was biased and procedurally flawed, that he has been improperly harmed by the Report of Investigation, that the Department mischarged him, that his "off-duty" conduct should not constitute an aggravating factor, and that the penalty was unreasonably harsh and inconsistent with penalties meted out for similar or lesser offenses in recent years.

The Board found that the Department had met its burden of proof. The existence of the charged misconduct (i.e., that grievant had failed to report to the morning meeting and had missed the flight to [redacted] was not in dispute. The Board found it reasonable for the Department to conclude that grievant's consumption of nine alcoholic drinks in five and a half hours, followed by his departure from the hotel alone at 2:30 a.m., contributed to his failure to report for duty at 9:00 a.m. The Department established nexus by detailing the hardships, disruptions, and potential compromise to security caused by grievant's sudden, unexpected absence from the Secretary's Security Detail. The Board found the proposed penalty to fall within the zone of reasonableness given the gravity of the offense (particularly the high importance of his assignment, the clear negative impact of his absence on the Department's mission, and his status a Special Agent). Grievant presented no objective evidence (neither witness statements nor physical evidence) to support his theory that he must have been drugged, kidnapped, and robbed.

DECISION

I. THE GRIEVANCE

Grievant, an untenured FS-04 Diplomatic Security Special Agent (SA), appeals the imposition of a 14-day suspension without pay and the inclusion of a discipline letter in his Official Performance Folder (OPF) resulting from his failure to report for duty while a member of the Secretary of State's protective detail in [redacted]. Grievant alleges that the Department committed numerous violations of the Foreign Affairs Manual (FAM) in conducting its investigation and compiling the Report of Investigation (ROI); that it mischarged him; that the Department does not meet its burden of proof because it failed to consider his affirmative defenses; and that the Department has assessed an excessively harsh and unreasonable penalty. He seeks to overturn the charge and penalty, have the decision letter and any unsupported allegations removed from his OPF, recover attorney's fees, and obtain all other appropriate relief.

II. BACKGROUND

Grievant joined the Department in 2011. The instant grievance arises from events on the evening of June 1 and morning of June 2, 2012, in and around [redacted], while grievant was assigned to temporary duty (TDY) as a member of then-Secretary of State Hillary Clinton's Security Detail (SD) during the Secretary's official visits to [redacted] and [redacted].

Following Secretary Clinton's departure from [redacted] on June 1, grievant completed his responsibilities for the day, and, at approximately 9:00 p.m., he and other members of the SD went to a concert in [redacted] where he consumed two beers. At about 10:00 p.m., they went to a restaurant, where he had a hamburger and another beer. At about 11:15 p.m., grievant and

another agent went to a bar, where he had a mixed drink. Grievant then went to another bar at about 11:45 p.m., where he consumed three beers. Grievant states he does not recall leaving this last bar, but wound up at another venue, where he remembers having two beers. Thus, between 9:00 p.m. on June 1 and 2:30 a.m. on June 2, grievant consumed nine alcoholic beverages.

Grievant and another SA returned to their hotel at about 2:30 a.m. on June 2. The other agent retired to his room, but grievant spoke with a hotel employee in the lobby and then left the hotel on foot, alone. Grievant states that he was hungry and left the hotel to get food, though he does not recall what his specific destination was. He has no further recollection of what happened during roughly eight hours following his departure from the hotel, and no witness has been identified who can establish his whereabouts or activities during that period.

Grievant was scheduled to attend a meeting of the SD at 9:00 a.m. on June 2, after which he was to depart immediately for the airport to catch a flight to [redacted] and continue his duties on the protective detail. When he did not show up for the 9:00 a.m. meeting, an SA attempted to locate him in the hotel and notified SD management that he was missing and not responding to messages. The Assistant Special Agent in Charge (ASAIC) of the SD contacted hotel staff and requested access to the room key logs and CCTV footage. The key logs showed that the last time grievant's door was opened was 9:00 p.m. on June 1. The SD team accessed grievant's room and secured his law enforcement credentials, diplomatic passport, and other sensitive items. CCTV tapes showed grievant entering the hotel lobby with another SA about 2:30 a.m., talking with hotel staff, then exiting the hotel alone and turning left (which, according to the record, was the opposite direction from the 7-11 store where the SD team normally bought food and water). The rest of the team departed for [redacted] on a 12:35 p.m. flight as scheduled, while the shift supervisor and ASAIC remained at the hotel to concentrate on locating grievant.

Grievant states that at approximately 10:15 a.m. on June 2, he awoke in the rear passenger seat of a car parked in a wooded area with three other sleeping men whom he could not identify but who looked "vaguely familiar." He exited without waking the others and followed a path to a road. At approximately 11:00 a.m., grievant contacted an SD team member and was instructed to flag down a public bus and proceed to the nearest railway station. After being picked up by the ASAIC, the Assistant Regional Security Officer, and a local national, grievant stated that he felt very groggy, "more than just hung over." They took him to a local medical center for evaluation, and then to a police station, where grievant filed a report of the incident, noting that $80 and a credit card were missing from his wallet (though other credit cards and grievant's BlackBerry were still in his possession).[1]

As the circumstances of grievant's disappearance were unclear, and his report of feeling groggy raised questions about his neurocognitive condition, the Department removed him from the SD and ordered him to return to the U.S. Blood and urine tests from the medical center came back negative for the substances screened (so-called "date-rape drugs" Oxazepam, Benzodiazepine, and Creatine), and the [redacted] police ultimately dismissed grievant's complaint that he had been robbed "by unknown perpetrator" for lack of evidence.[2]

Following grievant's return to the U.S., the DS Office of Investigations and Counterintelligence Special Investigations Division (SID) opened an investigation into his failure to report for duty in [redacted] On November 9, 2012, the ROI found, in part:

> Allegation that SUBJECT consumed an excessive amount of alcohol resulting in unauthorized/unexcused absence from duty is **SUBSTANTIATED**. However, the SUBJECT's whereabouts during the approximately eight hour 'black-out'

[1] Grievant and the Department subsequently verified that no attempt was made to use the missing credit card fraudulently.

[2] The official [redacted] police report does not appear in the record, and these cited documents reflect informal communications between the RSO's office at Embassy [redacted] and their local police contacts.

period could not be determined and HIS explanation that HE may have been drugged, kidnapped, and robbed could not be corroborated.

The ROI concludes that grievant committed the following "Administrative Violations":

- 3 FAM 4377.13: Unexcused or unauthorized absence from the job during working hours or any scheduled day of work (AWOL).

- 3 FAM 4377.42: Conduct demonstrating untrustworthiness, unreliability, or use of poor judgment.

- 3 FAM 4111.1:[3] The ROI states in part that achievement of U.S. foreign policy objectives requires ". . . maintenance of the highest standards of conduct by employees of the Foreign Service. . . . Given the representational nature of employment in the Service and the diplomatic privileges and immunities granted employees of the Service abroad, it is necessary that employees observe such standards during and after working hours or when the employee is on leave or in travel status."

- 3 FAM 4130:[4] The ROI states in part, "Because of the uniqueness of the Foreign Service, employees are considered to be on duty 24 hours a day and must observe especially high standards of conduct during and after working hours and when on leave or in travel status. Accordingly, the commission after work hours of many of the offenses listed here under 'Conduct on the Job' would still be punishable if it affects the ability of the individual or agency to carry out its responsibility or mission."

On July 23, 2013, the Department proposed a 14-day suspension without pay for a single specification of Failure to Report for Duty. The Department cited the following as aggravating factors:

1. Grievant's admitted consumption of nine alcoholic beverages on the evening of June 1-2, 2012, and departure from the hotel alone at 2:30 a.m.;

2. "[T]he nature and seriousness of your actions in relation to your duties, position and responsibilities, as well as your job level and the nature of your specific assignment," including the fact that as a result of grievant's being removed from the SD and returned to the United States, "the Secretary's protective detail in [redacted] was short one agent";

[3] We note that the cited language appears to be at 3 FAM 4114, not 3 FAM 4111.1. We do not judge this discrepancy to be material.

[4] We do not rule on whether the ROI correctly describes the breach of 3 FAM 4130 (which occurs in the FAM section on Standards for Appointment and Continued Employment) as an "Administrative Violation."

3. The burden which fell on the rest of the security team inasmuch as some had to assume grievant's duties on the SD while others were diverted from other responsibilities to locate and retrieve grievant;

4. Notoriety arising from grievant's actions; and

5. Grievant's past work record, specifically the fact that the incident in [redacted] occurred during his first year of employment with the Department as an SA.

Attached to the proposal letter was a case comparator worksheet (CCW) citing a single case, but the Department later stated that "the case mentioned in the CCW should not have been included because it was settled with the understanding by the parties that it would not be used in the future as a precedent." The Department has not set forth any other comparator cases.

Grievant submitted a written reply to the proposal for discipline, and later presented an oral argument to the Department's Deciding Official on November 13, 2013. The essence of grievant's reply to the charge was that he had been the victim of a crime, which made it impossible for him to report for duty. Grievant complained of several aspects of the investigation and ROI, and asserted that SID had failed to prove its allegation that alcohol contributed to his failure to report for duty and that the evidence presented in the ROI was "largely exculpatory."

A decision letter was issued on May 22, 2014, sustaining the proposed 14-day suspension. On June 11, 2014, grievant filed a grievance with the Department, and then a supplemental grievance on July 18, 2014. On October 21, the Deputy Assistant Secretary (DAS) for Human Resources signed a decision letter denying the grievance and sustaining the charge and penalty.

Grievant appealed to this Board on November 4, 2014. On April 15, 2015, following completion of discovery between the parties, grievant filed a Supplemental Submission, to which

the Department responded on May 15, 2015. Grievant filed a Rebuttal on June 8, 2015, and the Record of Proceedings was closed on June 19, 2015.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

First, the Department argues that grievant's complaints that the investigation and ROI were biased and improperly conducted are without merit and should be dismissed. It asserts that comments made by an agent to one witness regarding widely-publicized misconduct of Secret Service agents in Colombia and the consequent need to investigate the instant case were not evidence of bias, but rather "a realistic and professional understanding of the elements of this case and the greater context." In response to grievant's claim that on-the-ground investigation in [redacted] was "sorely lacking," the Department lists several inquiries and interviews conducted in [redacted] or remotely with parties in [redacted]

In response to grievant's complaints that "exculpatory" evidence was excluded from the ROI, the Department points out that some items, while not mentioned in the ROI narrative, were documented in attachments, while other instances (e.g., one SA's statement that grievant "walked and talked normal" on the evening of June 1-2) were substantially identical to other witness statements that were included. Regarding grievant's complaint that bruising around his eye mentioned in agents' notes was not included in the ROI, the Department shows that it is in fact mentioned even if specific comments in the agents' notes were omitted. Similarly, grievant complains that a Supervisory SA told him that the Department's Office of Medical Services (MED) had stated it is impossible to black out for eight hours from drinking, but this information was omitted from the ROI. The Department sought clarification from the SA, who stated that he does not recall MED making the statement to which grievant refers. More generally, the

Department asserts that even if all omitted items cited by grievant were included in the record, the fact would remain that he did not report for duty, which is the offense charged.

Second, the Department defends its decision to charge grievant with Failure to Report for Duty rather than other offenses enumerated in 3 FAM 4314 and 3 FAM 4377. It distinguishes Failure to Report for Duty in that it is not a routine attendance-related charge (such as Absence Without Official Leave) and punishment is not required to be determined as a function of the length and frequency of absence. It cites 3 FAM 4373 giving it discretion to determine what to charge in accordance with the facts and circumstances of a given case, noting that a charge is not a penalty, and thus not subject to the precept of similar penalties for like offenses. Therefore, grievant errs in asserting that "mischarging" him constituted a violation of the referenced precept.

Third, the Department maintains that it has met its burden of proof, whereas grievant has failed to meet his burden to establish the facts upon which his affirmative defense rests. To begin with, grievant admits that he failed to report for the scheduled meeting at 9:00 a.m. on June 2, 2011, that he missed his scheduled flight to [redacted] later that day, and that he was unable to serve on Secretary Clinton's SD in [redacted] as assigned. The Department has also proved nexus to the efficiency of the Service. In support of its contention that grievant's failure to report for duty compromised the security of Secretary Clinton's visit, the Department cites the response of an SA involved in the investigation to a Request for Admission filed by grievant:

> I strongly disagree with the assertion the Secretary's Detail was not compromised as a result of S/A [redacted] [sic] actions. Supervisory Agents and others agents assigned to support the Secretary's Detail had to locate a missing agent with the facts surrounding the agent's disappearance unknown. This had the potential to be a catastrophic incident and multiple individuals around the world were working to locate a missing agent and determine the facts surrounding the agent's failure to report for duty. . . . Further several

> agents in leadership positions (*the assistant special agent in charge and the shift leader*) had to work on resolving issues with agent [redacted] taking their attention away from preparations for the Secretary's arrival at their next work location and from providing supervision to the other members of the detail who travelled independently to a country where there have been past incidents of terrorism and harassment against U.S. government employees.

Regarding the potential security impact of grievant's absence from the SD in [redacted] the Department notes that, "According to the Security Environment Threat List (SETL), [redacted] is rated high for terrorism and political violence. The Department asserts that it was not possible to deploy a replacement for grievant on such short notice, so the Secretary's SD had to operate with one less SA than planned in [redacted]

Likewise, the Department argues that the "notoriety" of grievant's actions impacted the efficiency of the Service, noting that the hotel management, the [redacted] police, and members of the U.S. Armed Forces on the SD all were notified that grievant was missing as the SD attempted to locate him. Citing FSGB Case No. 2006-049 (October 24, 2007), the Department asserts that it is only necessary to prove the potential for embarrassment, not actual widespread publicity, to demonstrate an impact on the efficiency of the Service.

On the other hand, the Department asserts that grievant has produced no evidence in support of his affirmative defense (i.e., that he was "likely" the victim of a crime that prevented him from reporting for duty). There is no witness testimony establishing that he was kidnapped, drugged, and robbed. The tests performed at the medical center produced no evidence that grievant was drugged, and grievant's complaint that the screening was not comprehensive for all common "date rape" drugs, even if true, in no way establishes that he was in fact drugged. The [redacted] police dismissed grievant's case for lack of evidence. Although their reply to an inquiry from Embassy [redacted] contained the phrase "by unknown perpetrator," this cannot be taken

to mean that the [redacted] police established the existence of a crime – "lack of evidence" is the more telling phrase.

Finally, the Department contends the proposed 14-day suspension is reasonable, proportionate to the offense, and was determined after consideration of the *Douglas* factors. "Mr. [redacted] conduct was, indeed, sufficiently 'damaging, costly, and disruptive to operations and to the reputation of the Department' so as to merit a 14-day suspension." The Department's demonstration of the negative impact of grievant's conduct on the efficiency of the Service has been discussed above. The Department rejects grievant's assertion that the DAS failed to properly consider the *Douglas* factors, including what he considers to be possibly mitigating circumstances. The Department points out that both the ROI and its various communications with grievant contained reference to possible mitigating factors raised by grievant, demonstrating that they were considered. Moreover, the Deciding Official signed the *Douglas* Factor worksheet, affirming that she did in fact consider all potentially mitigating factors. The Department cites 3 FAM 4111.1 to refute the suggestion that off-duty conduct abroad is subject to a more lenient standard than conduct during business hours, and notes that status as a DS agent is an aggravating factor for determination of penalty.

As a further aggravating factor, the Department expresses doubt regarding grievant's potential for rehabilitation. His reliance on a defense without objective proof, and denial that his absence from the SD compromised security, are evidence that he has neither comprehended nor taken responsibility for his misconduct. The Department denies questioning his rehabilitative potential solely because he is attempting to defend himself against the charge; rather, it is grievant's reliance on a defense for which he cannot provide evidence, and his minimization of the consequences of his actions, that cast doubt on his capacity for rehabilitation.

The Department rejects grievant's contention that the ROI and proposal for discipline have improperly harmed his career. First, grievant himself asserts that he has been given "critically important duties and assignments" subsequent to the [redacted] incident. Regarding the denial of assignment to DS/ICI/CI, the Department acknowledges that the SA involved decided not to accept grievant's bid based on the contents of the ROI and proposed discipline. It was not improper for the SA, as head of DS/ICI/CI, to be aware of this information. The SA made his decision based on consideration of the fact that mention of lack of candor in the ROI could lead to grievant's impeachment as a witness in cases he would handle at DS/ICI/CI (so-called "Giglio impairment").[5] This was a rational basis for denying the assignment, and was not vindictive. Moreover, "Whether or not [grievant] is or will be Giglio impaired is a decision for the Department of Justice to make – not the Department of State. . . ."

As noted above, the Department originally cited just one comparator case in its CCW but later stated that the case was provided in error and should be disregarded. The Department addresses 15 cases that grievant asserts illustrate instances in which similar (or more serious) offenses occasioned lesser penalties than are proposed for him. Ten of the cases do not involve DS agents and thus are not truly comparable inasmuch as DS agents are held to higher standards of conduct, and DS agent status is considered aggravating for purposes of penalty. The five remaining cases that do involve DS agents are likewise incomparable because they involve different charges and/or misconduct in the United States rather than overseas (where employees are held to the highest standards of conduct).

[5] The SA made a judgment call on potential concerns based on the 14-day suspension. He believed assigning grievant to counterintelligence investigations might negatively influence an espionage investigation, based on the misconduct allegation in grievant's ROI. He believed that DOJ, after review of the DAS statement "I do not accept your claim that you were the victim of a crime" and her finding that his failure to carry out his duties was evidence of "lack of candor," could negatively influence the outcome of a prosecution.

Regarding the lack of a comparator case, the Department asserts, "[T]here are discipline cases where the CCW identifies no comparable case, even for context. . . . [T]he absence of a comparator case does not harm [grievant] in any way." The Department cites the so-called "principle of practicality" as governing application of the precept of like penalty for similar offense.[6]

B. THE GRIEVANT

Grievant asserts that it is illogical and contrary to evidence to charge him with Failure to Report to Duty and cite his consumption of alcohol and other "off duty" behavior as aggravating factors. Rather, grievant argues it is most probable that he was drugged, kidnapped, and robbed. Thus, he should not be charged with misconduct, as the crime perpetrated against him rendered him incapable of reporting for duty as scheduled.

As proof that he was not drunk, he cites statements from SD team members that he did not appear intoxicated[7] and a text message he sent just before departing the hotel that was coherent and free of mistakes. He asserts that he has never experienced such an episode after drinking the same amount of alcohol and alleges that MED informed an SA discussing his case that it is impossible to black out for eight hours from consuming alcohol. When he awoke, he felt different than simply hung over ("groggy," "nervous," "light headed," "my reactions felt delayed," etc.), making it likely that alcohol was not the cause of his "black out," but rather that

[6] FSGB Case No. 2011-009 (January 17, 2012) (*quoting* FSGB Case No. 2002-034 (February 24, 2004)): "There is no precedent that holds the principle of 'similar penalties for like offenses' requires mathematical rigidity or perfect consistency regardless of variations in circumstances or change in prevailing regulations, standards, or mores. That principle should be applied with practical realism. In the final analysis, it is hornbook law that the selection of an appropriate penalty by an agency involves a reasonable balancing of the relevant facts in the individual case."

[7] These statements all concern observations made before 2:30 a.m. As noted, no witnesses to grievant's whereabouts or activities between 2:30 a.m. and approximately noon have been identified.

he had been drugged. Although tests at the medical center detected no drugs in his system, the tests did not screen for common "date rape" drugs GHB, Ketamine, and Rohypnol and thus do not disprove that he was drugged. He argues that dismissal of his case "with unknown perpetrator" by the [redacted] police establishes that a crime was committed.

Moving beyond these facts, grievant advances four general lines of argument:

- "the Department committed violations of the FAM that resulted in harmful error to my rights to a fair, impartial, objective, accurate, and complete investigation";
- "the Department committed a misapplication of FAM in the charging of my alleged misconduct and applicable affirmative defenses";
- "the Department failed to meet its burden of proof by a preponderance of evidence standard"; and
- "the Department committed an abuse of discretion in the reasonableness of its discipline."

Grievant focuses on 12 FAM 221.7-1, which calls for investigations to be conducted in "a fair, impartial, objective, and business-like manner. . . ." and 12 FAM 221.7-2, which provides that ROIs "must be complete and accurate." Grievant references a 2013 State Department Office of the Inspector General (OIG) report[8] that broadly criticized the conduct of investigations by DS (and specifically SID). Grievant complains about several aspects of the investigation and ROI that he asserts demonstrate bias and a lack of objectivity:

- The ROI refers to him as the "SUBJECT" of the investigation, a term he finds loaded with presumption of wrongdoing.
- He finds evidence of bias in a statement made by the RA that the reason the Department was pursuing grievant's case was the recent scandal surrounding misconduct by Secret Service Agents in Colombia. Grievant finds the reference to the Secret Service in Colombia an extraneous factor that proves that the

[8] United States Department of State and the Broadcasting Board of Governors, Office of Inspector General, ISP-I-13-18, *Inspection of the Bureau of Diplomatic Security, Office of Investigations and Counterintelligence, Divisions of Special Investigations, Criminal Investigations, and Computer Investigations and Forensics* (February 2013).

investigation of his case was improperly driven by management's political concerns.

- Grievant asserts that the ROI is inaccurate and incomplete because it presents only evidence pointing to his guilt while omitting "exculpatory" evidence, such as witness statements that he did not appear intoxicated and grievant's own assertion to SID that he did not believe he drank enough alcohol that evening to black out;

- Grievant asserts that SID did not conduct a sufficient investigation in [redacted] – in fact, that "no investigative action was undertaken by SID in [redacted] – such as questioning the hotel employee and the convenience store clerk.

- Grievant complains that the Department should not cite statements he made in his EER as evidence that he acknowledged that his off-duty conduct had been improper. The cited EER language included, ". . . I left myself vulnerable while off duty and disappointed my colleagues, supervisors, and most of all, myself. I sincerely regret my mistakes, and can ensure it will never be repeated."

- Grievant refutes the assertion that he has not been harmed by the ROI. He points out that he was denied an assignment to DS/ICI/CI on the basis that contents of the ROI could lead the Department of Justice to conclude that he had displayed lack of candor during the investigation, a situation that could leave him "Giglio impaired" as a law enforcement agent. He argues that the SA misinterpreted the ROI inasmuch as he was not formally charged with lack of candor.

Grievant's second broad complaint is that the Department erred in charging him with Failure to Report for Duty, and that the appropriate charge should be Absence Without Official Leave (AWOL). "By mischarging me, the Department imposed a more pejorative charge against me than other employees who committed 'an unexcused or unauthorized absence from the job during working hours or on any scheduled day of work,' deprived me of normally entitled affirmative defenses to my alleged misconduct, and deprived me of the right to a 'like penalty for similar offense.'" AWOL is explicitly mentioned as attendance-related misconduct in 3 FAM 4314 (whereas Failure to Report for Duty is not a listed offense), and 3 FAM 4377.13 defines it as "unexcused or unauthorized absence from the job during working hours or on any scheduled day of work." He contends that by charging him with Failure to Report for Duty, the Department deprived him of affirmative defenses that would have been available had he been

charged with AWOL – specifically provisions of 3 FAM 3523 that permit a supervisor to allow an employee to charge time missed to annual leave, etc., if the employee can "provide an explanation acceptable to management and/or acceptable documentation (e.g., medical certification or court documentation) to justify the absence." Moreover, 3 FAM 4377.13-15 provides that the penalty for attendance-related offenses is dependent on the length and frequency of the absences. In the instant case, grievant was absent only once, for a few hours. Grievant contends, "The Department has committed an abuse of discretion in the reasonableness of the proposed penalty, improperly considered aggravating factors, ignored the precept of 'like penalty for similar offense,' and failed to properly consider mitigating factors in determining the severity of the proposed discipline." He considers a 14-day suspension "exceedingly harsh," and claims that "it is almost a guarantee that I will never be tenured. . . ." Grievant refers to charges and penalties in a number of other disciplinary cases between 2011 and 2014 that he asserts involved misconduct similar to or more serious than his own, all of which received lesser penalties than 14 days' suspension. He specifically cites 15 such cases as proper comparators for the instant case.

Grievant asserts it was improper to consider off-duty conduct an aggravating factor, since he engaged in no prohibited conduct: there was no curfew in [redacted] no prohibition of consuming alcohol, and no official warnings regarding crime. The Department has produced no evidence that he was under the influence of alcohol or that drinking and staying out late contributed to his failure to report for duty. Grievant disputes that his conduct compromised the security of the Secretary's visit: ". . . [A]s a trained DS agent, I know a little more about protective operations than the Department supposes it does. My failure to report did not decrease the net number of

agents protecting Secretary at any point in time. . . . [T]he Department is treating the potential for harm caused by my 'Failure to Report for Duty' as equivalent to causing actual harm."

He also denies that his failure to report for duty was "inherently notorious." It was not widely known, and it was DS personnel (not grievant himself) who caused the notoriety to which the Department refers by the manner in which they searched for him and conducted the subsequent investigation.

Grievant contends that the Department failed to adequately consider mitigating factors, including the fact that the misconduct was an isolated instance that has not been repeated; that his subsequent service record demonstrates not merely his capacity for rehabilitation but the fact of his rehabilitation; and whether an alternative (lighter) sanction would be adequate.

IV. DISCUSSION AND FINDINGS

As the instant case involves discipline, pursuant to 22 CFR 905.1(a) the Department bears the burden of establishing by a preponderance of the evidence that the proposed disciplinary action is justified. Specifically, the Department must prove that: a) the charged misconduct occurred; b) there is a nexus between the charged misconduct and the efficiency of the Service; and c) the penalty imposed is proportionate to the offense and consistent with penalties imposed for similar offenses.

The charged misconduct is Failure to Report for Duty. The parties agree that grievant failed to report for the scheduled meeting at 9:00 on June 2, 2012, that he missed his scheduled flight to Istanbul at 12:35 p.m. that day, and that he did not arrive in [redacted] to complete his duties. Accordingly we hold that the Department has met its burden of proving that the charged misconduct occurred.

Regarding the question of nexus between the misconduct and the efficiency of the Service, the Department has demonstrated that grievant's sudden absence from the SD did negatively impact security arrangements for the Secretary's visit to [redacted] and [redacted] DS staff on the SD and at Embassy [redacted] had to be pulled from other tasks related to the Secretary's trip to seek grievant's whereabouts, retrieve him from the train station, and take him to a medical center and a police station. When the Department concluded he could not continue on the SD in [redacted] but should return to his field office, the Department incurred $1,251.49 in travel charges to rebook his ticket. Given the extremely short notice, the Department states it was impossible to replace grievant, so his assigned duties in [redacted] had to be shouldered by other members of the SD team. Against this, grievant's arguments that his failure to report for duty did not negatively impact operations of the SD are unpersuasive. We therefore hold that the Department has established that a nexus exists between the charged misconduct and the efficiency of the Service.

We reject grievant's contention that the Department has failed to show that his off-duty consumption of alcohol has a nexus to the efficiency of the Service. Grievant appears to misapprehend the basis for the Department's discipline. The merits of the misconduct charge do not focus solely on grievant's off-duty alcohol consumption. Rather, they focus on the fact that grievant failed to appear for work on the morning of June 2, a fact about which, as we have indicated, there is no dispute. The Department refers to grievant's alcohol consumption only as a factor contributing to grievant's failure to report for duty, and an aggravating factor in determining the length of the suspension.

Regarding the reasonableness and consistency of the penalty, this Board has found that "deference is to be given to the agency's judgment unless the penalty is so harsh and

unconscionably disproportionate to the offense that it amounts to an abuse of discretion."[9] We find the proposed penalty to be within the zone of reasonableness for the offense, and not so unconscionably disproportionate as to constitute abuse of discretion. Grievant complains that he should have been charged with AWOL rather than Failure to Report for Duty, but he has not demonstrated from law, regulation, or precedent that the Department is barred from charging him with Failure to Report for Duty. We agree with the Department that the listing of infractions in 3 FAM 4314 and 3 FAM 4377 does not constrain the Department's ability to bring a charge of Failure to Report for Duty (i.e., the listing is not exhaustive), nor is the penalty for the latter charge required to be determined according to length and frequency of absence. It is important to note that (consistent with 3 FAM 4374(1)), we have focused on similarities and differences of underlying conduct, rather than simply on how the respective charges were worded, in determining whether various cases involved like offenses. Neither party has identified a close comparator,[10] but the Department has carefully distinguished grievant's offense from those in the several other cases that he advanced as comparators, and has shown that the circumstances and

[9] FSGB Case No. 2002-034 (February 24, 2004)

[10] As noted above, the Department contends that any potential comparator for the instant case should concern conduct by DS agents (as their status is aggravating for purposes of penalty), a position with which we agree. By our count, grievant has advanced 17 cases as comparators. These are primarily agency-level cases (few, if any, appear to have been brought before this Board, and none is identified in the record by FSGB case numbers). It is difficult to determine from the record how many of these cases involve DS agents, but based on the filings of the parties, we have considered the following. Case No. 2010-0837 involves a DS agent charged with intoxication and physical altercations off duty. It is not a comparator for the instant case as it does not concern Failure to Report for Duty. Likewise, Cases 2010-119, 12651, and 12972 appear to involve alcohol and off-duty misconduct or poor judgment as charges, not Failure to Report for Duty. They are not demonstrated to be comparators. The charges in Case No. 12947 are failure to follow instructions, misuse of government funds, and off-duty misconduct, so the case fails as a comparator. Finally, grievant cites two unnumbered cases on p. 309 in which DS agents failed to report for duty on protective details for foreign dignitaries in the U.S. While these are more similar to the instant case in circumstance, we find the distinction between failure of a DS agent to report for duty in the U.S. versus overseas to be important (though both, of course, are quite grave infractions). First, the conduct of all Foreign Service Officers overseas is held to the highest standard. But more specifically, the impact of an SA's failing to report for a domestic protective assignment is generally less than overseas, since the Department has the resources, and the ability to deploy them, to enable it to move more quickly and effectively to cover gaps. Thus, we are not persuaded that these two domestic cases are true comparators for determining penalty. From the record, we find none of the cited cases to involve a charge, a body of consequences, and a fact pattern similar enough to those of the instant case to be taken as a true comparator.

consequences of grievant's failure to report for duty on the Secretary's SD overseas were significantly more serious than routine attendance-related infractions such as AWOL. Accordingly we hold that the Department has met its burden of proving that the penalty is proportionate to the offense within the zone of reasonableness.

Grievant asserts that he was the victim of a crime sometime after 2:30 a.m. on June 2, 2012, which made it impossible for him to report to duty as scheduled at 9:00 a.m. In a disciplinary case, grievant carries the burden of establishing an affirmative defense by a preponderance of evidence.[11] Here, grievant offers no evidence regarding when, how, or by whom he was drugged. Neither does he identify any witnesses who can shed light on his whereabouts or activities between 2:30 a.m. and approximately noon of the following day. No evidence in the record bears on these questions, with the exception of a mention of a possible bruise above grievant's right eye, grievant's report that $80 and only one of several credit cards were missing from his wallet (with no subsequent attempt to use the missing card fraudulently), and the negative results of drug tests carried out by the medical center. In the end, grievant's evidence for the theory that he was drugged, kidnapped, and robbed at best seems to come down to his surmise and suspicions when he awoke on June 2, 2012. He offers no possible explanation as to why no charges were ever made on the one card he claims was taken or why all of his credit cards were not taken and charged. It is more than difficult to conclude that, having no recollection of events hours earlier, he knew how much money he had in his wallet and what credit cards might be missing. Informal observations by other members of the SD team to the effect that he did not seem intoxicated earlier, and his reports of subjective feelings upon awaking (when he was by his own admission groggy and disoriented), taken together, are

[11] FSGB Case No. 2012-069 (September 16, 2013)

insufficient to establish that grievant was kidnapped, drugged, and robbed. He does not suggest who robbed him. He does not say how the bruise above his eye may be related to the crime. Although cash and a credit card were missing from his wallet, he presents no evidence that they were stolen from him. The drug tests done by the medical center were negative. Grievant asserts that the tests were not sufficiently comprehensive in that they did not screen for many commonly-used "date-rape drugs," but even if this is granted, there exists no objective evidence that he was drugged. We therefore hold that grievant's affirmative defense fails.

We find that the Department has established that it considered aggravating and mitigating factors (including the *Douglas* factors) in determining penalty. It is not unreasonable for the Department to conclude that grievant's off-duty conduct (specifically consuming nine drinks after 9:00 p.m. and leaving the hotel alone at 2:30 a.m.) contributed to his failure to report for duty the following morning.[12] Even if he engaged in no specific prohibited conduct, his conduct as a whole that evening resulted in his not reporting for scheduled duty, and the argument that it is improper for the Department to consider grievant's actions on the evening of June 1-2, 2011, because they occurred "off-duty" is unavailing. Grievant was an SA with important security-related duties on an overseas TDY assignment. Grievant has cited no law or regulation requiring his "off-duty" conduct (which, though what happened may never be known, undeniably set the stage for his failure to report for duty) to be excluded from official consideration. Conversely, the Department cites the 3 FAM 4111.1[13] requirement that employees abroad maintain "an especially high degree of integrity, reliability, and prudence. . . during and after working hours or

[12] We wish to emphasize, as grievant's filings on occasion appear to misapprehend this point, that the Department does not charge grievant with misconduct while off duty. The sole charge is that he did not report for duty. The Department considered his off-duty conduct purely as a possible aggravating factor in the context of determining appropriate penalty, and our discussion here remains within those bounds.

[13] Please refer to footnote 3, page 6.

when the employee is on leave or in travel status." At a minimum, grievant's off-duty conduct evinced less than a high degree of prudence inasmuch as his actions on the night of June 1 and the morning of June 2 put at risk his ability to report for duty, make his flight to [redacted], and carry out his duties effectively. The Department has demonstrated the importance of grievant's assignment and the ways in which his absence from the SD compromised arrangements for the Secretary's security. Grievant's arguments that his absence was inconsequential and/or that the Department's response to his failure to report for duty was inappropriate are unpersuasive. We find it reasonable for the Department to cite as an aggravating factor the fact that grievant was in his first year with the Department and was only beginning to establish his record of performance when the incident occurred.

Grievant argues that the Department erroneously found that he lacked rehabilitation potential in declining to mitigate his suspension because he maintained his defense that he was the victim of a crime. He further asserts, among other things, that he has not for several years repeated the kind of behavior at issue in this case, and that he has professed remorse for his behavior in this case. Even assuming that grievant has made a good case for his rehabilitation potential, however, we do not conclude that it warrants a reversal of the Department's 14-day suspension determination. As the MSPB made clear in its *Douglas* decision, 5 MSPR 280, 306, not all mitigation factors need be accorded equal weight. Rather, the Board must determine whether the Department responsibly balanced all relevant factors. The most important factor is the nature and seriousness of the misconduct and its relationship to the employee's duties. *Luciano v. Dep't of the Treasury*, 88 MSPR 335. 343 (2001). Given the nature of grievant's job responsibilities and the conduct at issue here, we cannot say that a 14-day suspension is an unreasonable penalty, even if grievant has shown rehabilitation potential. In sum, to the extent

that the Department erred by citing grievant's reliance on his defense of having been the victim of a crime, we do not find that the Department's error was prejudicial to grievant.

Grievant complains that the Department unfairly cited his EER statement as an acknowledgment that his off-duty conduct in [redacted] was improper, but fails to show that any law or regulation bars the Department from doing so. Even if the Department were barred from relying on his EER statement, the effect would be minimal: the basis of the Department's charge is the facts in the record (not grievant's EER statements), and the Department's contention that grievant acknowledged wrongdoing has in no way constrained his assertion of an affirmative defense against the charge.

Grievant raises numerous complaints about the conduct of the investigation and the ROI. We do not find that any of these complaints, even if proven, would affect the fact that he did not report for duty on the morning of June 2, 2012. Grievant cites the OIG report finding that there was an insufficient firewall between SID and HR, but grievant has not demonstrated that HR or others in the Department exerted undue influence on the instant investigation. In this connection, grievant points to an RA comment regarding Colombia, but he presents no evidence that the RA or anyone else tried to skew facts to come up with a result that was not based on the record. Even without Colombia as a spur to due diligence in possibly similar cases, the facts of grievant's disappearance, failure to report for duty, inability to account for his whereabouts, strange feelings on awakening in a car full of strangers far from his hotel, allegation of crime, and removal from the Secretary's SD all would certainly seem to justify an investigation on the scale undertaken. The ROI referring to him as SUBJECT does not prove bias: he was undeniably the subject of a misconduct investigation, and the term "subject" does not presuppose guilt. Regarding grievant's complaint that much "exculpatory" evidence was excluded from the

ROI, we find that the Department has persuasively responded. Specifically, the Department showed that items grievant claims were omitted are in fact included in listed attachments to the ROI or (even if not included) were essentially similar to items that were included in the ROI.

We are not persuaded that the investigation in [redacted] was insufficient. The investigation encompassed hotel security camera tapes and key logs, interviews with other members of the SD who were with grievant on the evening of June 1-2 and/or who helped locate and retrieve him on June 2, an interview with and written statement from grievant himself, toxicology reports from the medical center, and contact with [redacted] police. Grievant complains that the SID did not interview the hotel clerk with whom he spoke before leaving the hotel or a clerk at a nearby convenience store (although the record does not establish that grievant went to that convenience store), but even if SID had authority to interview these [redacted] residents, grievant does not state what he believes they might establish. The Department's investigation was sufficient to detail grievant's whereabouts and activities for the several hours before he left his hotel and his state after he was collected at the train station. We note that the [redacted] police, who had greater resources and authority to conduct an investigation on the ground, dismissed the case for lack of evidence.

Consistent with its obligation to promote the efficiency of the Service, the Department must have latitude to determine how best to conduct an investigation and frame an ROI. We are not persuaded by the evidence or arguments submitted by grievant that the Department abused its discretion or violated applicable law or regulation in carrying out its investigation of grievant's failure to report for duty or in formulating its conclusions in the ROI.

V. DECISION

The grievance is denied.

For the Foreign Service Grievance Board:

William E. Persina
Presiding Member

Gregory D. Loose
Member

Jeanne L. Schulz
Member