

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[Grievant]

Record of Proceedings
FSGB No. 2009-012

And

November 23, 2009

Department

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Lois E. Hartman
Jeanne L. Schulz

Special Assistant

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Joanne M. Lishman
Director, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Department of State demonstrated that a two-day disciplinary suspension imposed for grievant's loss of control of his Government-issued weapon was reasonable and not an abuse of the agency's discretion.

OVERVIEW

After a personal weekend in [Named U.S. City], grievant, a Diplomatic Security Agent (DS), inadvertently left his loaded Government-issued weapon on a forward seat of a commercial aircraft at [Named U.S. International Airport]. He realized his weapon was missing while riding a "people mover" to the main terminal. The weapon was out of his control for at least half an hour and was found by an aircraft cleaning crew member. As discipline, the Department decided to suspend him for two days without pay.

Grievant appealed the suspension, claiming that the penalty was too harsh in light of the precept of like penalties for similar offenses. He cited the case of an agent serving overseas who permanently lost control of his weapon when it was stolen from his locked vehicle, and received only a two-day suspension. He also cited the admonishment received by a female agent for having left her weapon in the ladies' lavatory of an airport VIP lounge and months later for leaving her credentials and files in her locked vehicle from which they were stolen.

The Board found the fact that grievant's loss of weapon was only temporary was a matter outside his control and deserved no mitigation for its fortunate recovery. Leaving a loaded weapon on an airline where any of the passengers deplaning after him could have taken possession of it was also different from the case of the agent who left her weapon at the conclusion of a 16-hour protection detail in the ladies' lavatory. The VIP lounge was locked immediately after the departure of the VIP and at her request the New York Port Authority recovered it from the secured lounge. The public could not have gained access to the agent's weapon.

The Board held that a two-day suspension was reasonable under the circumstances. The grievance appeal was denied.

DECISION

I. THE GRIEVANCE

[Grievant], a Foreign Service Diplomatic Security (DS) Agent with the Department of State (Department, agency) appeals the agency's denial of his grievance. He alleges that a two-day suspension without pay for unintentionally leaving his Government-issued loaded Sig Sauer 229 weapon on the seat of a commercial aircraft after a flight from [Named U.S. City] to [Named U.S. International Airport] is too harsh, considering his mitigating factors and the precept of like penalties for similar offenses. For relief grievant requests that the penalty be overturned or mitigated to an admonishment, that tenure and promotion boards be reconvened, and that back pay plus interest be ordered if he is tenured and promoted.

II. BACKGROUND

After two weeks of training in Washington D.C., grievant spent the weekend in [Named U.S. City] on personal business and was returning to Washington on October 22, [Year #1] to take [a language exam] later that day, prior to returning to his duty station in [Named Post]. As he describes it:

I was carrying my SPE [the weapon] in our agency issued waist carrying pouch. The flight attendant handed me my sport coat, at which time I placed the pouch in the seat in order to put my jacket on. I then put my backpack on and exited the plane. I was approximately 3 gates from the "people movers" at [Named U.S. International Airport] that I needed to take to pick up my baggage at the main terminal. [sic] I took a restroom break, and then I entered the "people mover" and rode in it across the tarmac to the main terminal. As I was riding, I realized I did not have my carrying pouch with my SPE with me. Once I arrived at the main terminal, I asked the driver if it were possible to go back to the previous terminal immediately. The driver replied that he had to wait the standard five minutes before returning. I asked a supervisor if there was a phone number for airport security; he instructed there was an office around the corner. I went to the office requesting assistance, and was told the

security could not contact [Named Airline] or the gate that I had arrived at. In addition, they advised there was no way for them to contact someone from their department in the other terminal.

I waited for the “people mover” to take me back to the other terminal, and got on the next vehicle. On the vehicle, I opened my cell phone, and had a missed call. I attempted to call the number back (apparently [Named Airline] had tried to call me). Only to be entered into a voicemail cue [sic] asking for a voice mailbox number. I then attempted to call [Named Airline] directly, in hopes that they would be able to connect me to the gate agent – this attempt was unsuccessful as well. Apparently, [Named Airline] does not have the ability to connect to particular gates. Upon arriving back at the original terminal, I checked the bathroom quickly, and then went directly to the gate. I was advised that [Named Airline] security as well as the police had been contacted, and were currently dealing with the situation. I waited approximately 5 minutes before being summoned down the gangway. I spoke with [Named Airline] management, who expressed their understanding of the situation, and explained a cleaner had passed the pouch to a flight attendant who contacted management, per their protocol. The pilot was informed, and had attempted to contact me (through the previously mentioned missed call). The pilot was satisfied it was merely a mistake.

I spoke with police and helped them fill out their report. In addition, there were two Federal Air Marshal’s [sic] on the outgoing flight who asked a few questions for their report as well. I then contacted my immediate supervisor . . . explaining the situation. RAC . . . [Resident Agent in Charge] filled out the appropriate paperwork, and forwarded the incident on to his superiors. The timeline for this incident was approximately 10-15 minutes, as I was one of the first people to exit the plane, and the “people mover” left almost immediately after I got onboard.

Diplomatic Security conducted an investigation and referred the resulting ROI to the Director of Employee Relations, who by letter dated May 16, [Year #1], proposed to suspend him for 10 calendar days without pay as discipline for “Temporary Loss of Control of Government Issued Firearm.” The proposing official listed no mitigating factors.

After receipt of grievant’s written response to the proposal letter, the deciding official found essentially the same aggravating factors as the proposing official:

- Law enforcement officers authorized to carry weapons are held to the highest standard demanding utmost caution and particular attention to detail;
- Agents are expected to remember at all times the serious responsibility and potential dangers attendant to their authority to carry firearms and conduct themselves accordingly;
- Carelessness in leaving the weapon on the aircraft could have resulted in public alarm and the potential harm to others could have been considerable; such actions, if made public, could undermine public confidence in law enforcement officials and prove embarrassing to the DS Bureau and the State Department. Grievant's misconduct was known by [Named Airline] personnel, which could adversely affect their regard for the professionalism of DS Special Agents.

The Deciding Official found that there were certain mitigating factors, including: grievant's acceptance of responsibility; his expression of remorse; his satisfactory or better work history; his lack of any prior discipline; and his adherence to established protocol as soon as he realized that his weapon was missing. She stated that having considered "the Douglas factors, all of the materials relating to this action, and similar cases and penalties imposed, it is my decision to mitigate the proposed penalty to a suspension for two (2) calendar days. I believe this discipline is consistent with, and appropriate to, the circumstances of this case."

[Grievant]'s agency-level grievance was denied. He appealed to this Board on

May 14, [Year #3]. After completion of discovery and the filing of supplemental submissions and rebuttal, the Record of Proceedings was closed on October 23, [Year #3].

III. POSITIONS OF THE PARTIES

The Grievant

[Grievant] argues the Department has failed to establish that a two-day suspension is reasonable in view of the proposing official's violation of 3 FAM 4324.3(a), requiring review of prior similar cases before proposing disciplinary action in order to foster equity and consistency in the imposition of discipline. He cites two cases he considers similar to his own that were not considered by the proposing official. In the first, an experienced agent who permanently lost control of his firearm and temporarily lost control of his credentials and badge at a high threat - high crime overseas post in 2003 was proposed for a three-day suspension, which the deciding official reduced to two days, for leaving those items in his locked car in a parking lot while participating in a softball game. Grievant contends that it is unfair to receive the same two-day penalty when his weapon was recovered and he was much less experienced.

In the other case of which the proposing official was unaware, an untenured agent temporarily lost control of her weapon in June 2000 and, in September 2001, in a separate incident, her badge and credentials were stolen from her car. She received only an admonishment for these actions. Grievant argues that the above case is virtually indistinguishable from his, and that if the proposing official had been aware of the admonishment imposed in that case and followed the applicable regulation to treat similar cases in a like manner, grievant might not have had to present his dispute to a deciding

official. However, even if the proposing official had recommended some form of discipline, it should have been no more than the proposed three-day suspension of the more experienced agent who permanently lost his weapon. By inexplicably proposing a 10-day suspension in this case, it is likely the deciding official believed that she was substantially mitigating the penalty to two days, when in fact even a two-day suspension would have been exceedingly harsh under the circumstances.

Grievant further argues that there is no legitimate reason for the difference in penalty imposed upon him as compared with the admonishment of the female agent. Both of them lost control of their weapons, neither had been engaged in inappropriate behavior, both promptly reported the incident, and both were untenured. While acknowledging that his action of leaving his weapon on the plane could have resulted in substantial harm and could have been deeply embarrassing to the Department, those possibilities never materialized and as with the female agent, there was no notoriety. The female agent left her weapon in the ladies' lavatory of an airport VIP lounge, which was locked after the VIP she was escorting departed the area. He claims there is no record of when the agent used the lavatory prior to returning to work on the detail in the terminal; it could have been several hours during which civilians could have used the bathroom before it was locked. The incident report and Report of Investigation (ROI) do not disclose the time when the agent left her weapon in the bathroom nor do they mention whether members of the public had access to the restroom before it was locked. The female agent received only an admonishment for two separate lapses of attention months apart.

Grievant emphasizes repeatedly that his weapon was only out of his control for “10-15 minutes.” He claims that the Department’s decision to suspend him for two days is arbitrary and capricious. He contends it is common knowledge that there are numerous cases like his where the agent has received no penalty, just an admonishment from the chain of command. He refers to a “well-known” example of an agent who left his weapon at a baseball stadium in New York.

The only case presented to the proposing official on the Case Comparison Worksheet was not similar to grievant’s: an agent was proposed for a three-day suspension for consuming alcohol while armed and flying in official duty status, which became known to others. The deciding official reduced that penalty to two days.

The Department

The Department maintains that a two-day suspension was properly imposed after due consideration by the deciding official and is “consistent within the zone of reasonableness, there being no similar cases.” It concedes that the proposing official was unaware of the two cases cited by grievant as similar to his: the first case was not considered similar enough to be brought to his attention and the other was almost 10 years old, well outside the five year window used by the Department in analyzing comparable cases. The female agent’s credentials and files were taken from a locked vehicle, and she had been on duty for 16 hours prior to leaving her weapon in a secured location. The weapon was retrieved by police and was never exposed to the public. The agent’s September 19, 2000 “Incident Report of lost SPE” states that she left her weapon in the toilet at the conclusion of the protection detail, and that: “It should be noted that the VIP lounge had been secured immediately after our protectee’s departure . . . the New

York Port Authority Police . . . recovered the weapon from the secured lounge.” The female agent left her weapon in a restricted area with no public exposure and it was recovered by the police at her request. The similarities in these cases to grievant’s own are outweighed by the differences – grievant’s having left a loaded weapon unattended on an airliner in a post – 9/11 environment which was later found by a cleaning crew member.

The deciding official was aware of the case of the agent whose weapon was stolen from his locked vehicle. She considered [Grievant]’s mitigating factors: he followed protocol as soon as he discovered his loss of weapon; expressed remorse and accepted responsibility; was not the subject of prior disciplinary action; and had a satisfactory or better work record. Accordingly, she reduced grievant’s penalty from ten to two days, despite the existence of the following aggravating factors: that agents are expected to remember at all times the serious responsibility and potential dangers present in their authority to carry firearms; carelessly leaving the weapon on the plane could have resulted in public alarm; the potential of harm to others as a result of grievant’s negligence could have been considerable; grievant’s actions, if made public, could undermine public confidence in law enforcement, embarrassing the DS Bureau and Department, and may have adversely affected the regard for professionalism held by [Named Airline] personnel for the agency’s special agents.

The Department maintains that the deciding official reduced the penalty to two days based on grievant’s written submissions, facts of the case, and *Douglas* factors. It is pure speculation to think that the decision would have been reduced further still if the proposing official had recommended a lesser penalty. The agent who permanently lost

his weapon had mitigating factors not present in grievant's case: his weapon was stolen from a locked vehicle; he received six honor awards in 12 years of service; and had never lost a weapon before in a law enforcement career spanning 23 years. The agency additionally differentiates grievant's case from the female agent by noting that her weapon was not discovered by another person and was not left on a commercial aircraft.

The Department disputes grievant's claim that an agent left his weapon at a baseball stadium with no punishment. Rather, the incident which took place 17 years ago resulted in the agent's having received a 45-day suspension, based on aggravating factors not present in grievant's case. The agency maintains that the two-day suspension imposed in this case should prevail, as any "lesser penalty would tend to suggest that the Department is tolerant of an offense that potentially might have caused grave harm and embarrassment in a way that the other offenses, while serious, did not."

IV. DISCUSSION AND FINDINGS

Grievant concedes that a nexus exists between his misconduct and the efficiency of the Service. 22 CFR § 905.2 provides that the agency has the burden of establishing, by a preponderance of the evidence, that the disciplinary action imposed is warranted and that the proposing and deciding officials were mindful of the constructive purpose of discipline and the importance of like penalties for similar offenses pursuant to 3 FAM 4373 and 4374. After review of the record and applicable regulations, the Board finds that the Department has demonstrated that the two-day penalty imposed for grievant's loss of control of his Government-issued weapon is reasonable and not an abuse of the agency's discretion.

Neither party has identified a prior disciplinary case with an offense identical to that of the grievant, and they disagree on whether the cases cited in the record are similar. Both parties agree that the Case Comparison Worksheet did not cite a similar case – the armed agent consumed alcohol while flying in official duty status, which became known to others. That agent received a two-day suspension.

The first case cited by grievant, that of a tenured, experienced agent who left his weapon, badge and credentials in his locked vehicle, is similar only to the extent that the agent lost control of his weapon. Having locked it in his vehicle in the embassy parking lot from which it was stolen and never recovered is different from the circumstances of this case.

The other case that grievant finds “indistinguishable from his” is the female agent who left her weapon in the lavatory of the VIP lounge at an airport, and received only an admonishment for that act of carelessness and for leaving her credentials and badge in her locked vehicle months later. Grievant sees no difference between leaving a loaded weapon on a commercial airliner where all passengers deplaning after him could have taken possession of it and leaving the same in a bathroom in the VIP lounge of an airport. The difference, as we see it, is that, as the agent stated in her September 19, 2000 Incident Report, “she left the weapon in the toilet at the conclusion of the [16-hour] protection detail, . . . the VIP lounge had been secured immediately after [the] protectee’s departure, . . . [and] the New York Port Authority . . . recovered the weapon from the secured lounge” (Emphasis added.) Thus, in the latter situation, the public could not have gained access to the female agent’s weapon at any time after she inadvertently left it in the VIP lounge’s lavatory late at night. We are satisfied that the

agent left her weapon in a restricted, non-public area, and that it was recovered by the police at her request.

Accordingly, both of the cases discussed above upon which grievant relies are distinguishable from the circumstances involved here, and thus do not compel a conclusion that the two-day suspension imposed upon grievant for leaving his loaded weapon aboard a commercial airplane while passengers were deplaning must be reduced.

Douglas Factors Issues

Nature and seriousness of the offense:

The Department views loss of control of a loaded weapon as serious. “There could have been great potential for harm had the weapon been discovered by a dishonest individual.” Grievant concedes the incident was serious, but fortunately a member of the cleaning crew found the weapon: “No one was harmed and there was no adverse publicity.”

Grievant seems to view this as a mitigating factor. If so, he is incorrect. He states that he was among the first to exit the aircraft and that he inadvertently left his weapon on his seat when the flight attendant handed him his sport coat. This implies that there was a planeload of passengers behind him waiting to exit. Any one of them could have picked up his pouch on the way out: an opportunist or adult criminal, a child, or an adolescent filled with curiosity. Grievant might never have recovered his weapon. It could have surfaced later with tragic consequences. Likewise, adverse publicity is not a prerequisite to the imposition of discipline. 3 FAM 4139.14 provides that notoriously disgraceful conduct is that which, were it to become widely known, would embarrass or discredit the Foreign Service. It is a cause for discipline when the potential for contempt, should the

conduct become public knowledge, could reasonably be expected to affect the agency's ability to carry out its responsibilities. As it was, grievant's misconduct was known by numerous persons: those in the airport's security office and police; air marshals; the driver of a people mover; the gate and flight crew of the aircraft; the maintenance crew; and the DS and Human Resources chains of command.

Grievant seeks to minimize the seriousness of his misplaced weapon incident by asserting that it was out of his control for only 10-15 minutes and no harm was done. In view of the various activities and movements that grievant indicates he performed immediately after he deplaned without his weapon, it is more likely that a minimum of half an hour elapsed during which the weapon was out of his control. However, in our view, even 15 minutes would not serve as a mitigating factor. It was pure happenstance that his weapon was recovered by a member of the airline's cleaning crew rather than taken by another passenger who deplaned after him during the critical 15 minutes.

On another matter, we agree with the Department that grievant's argument -- that the deciding official would have reduced his discipline still further had the proposing official seen the cases grievant cited and proposed fewer than 10 days' suspension -- is speculative. That is, if the proposing official had recommended a two-day suspension at the outset, it does not follow that the deciding official or the Deputy Assistant Secretary would have reduced the penalty to less than that. Moreover, the only issue before us is whether the two-day suspension ultimately imposed was reasonable in the circumstances of this case, not whether the proposing official's recommendation was reasonable. On that issue, we note that the two-day suspension imposed by the deciding official was

upheld as reasonable by the DAS who denied the grievance at the agency level after having considered both of the cases relied upon by grievant in this appeal.

Grievant correctly points out that Senior Foreign Service Officers and Foreign Service supervisors are generally held to a higher standard than less experienced employees, as they are charged with setting proper examples for subordinates. The Board has no information on the grade or supervisory status of the officer whose weapon was never recovered. However, in our view, grievant's relative lack of seniority is outweighed by the fact that all DS agents, as law enforcement officers, are held to the highest standards of conduct. All are expected to remember the serious responsibility and potential dangers inherent in their authority to carry firearms, and therefore must conduct themselves accordingly. That grievant's loss of weapon was only temporary is a fact that was outside his control – he deserves no mitigation for the weapon's fortunate recovery by an airline employee. The loss of a loaded weapon, particularly one issued by the Department, inside secured areas of an airport in a location where it was readily accessible by members of the public and could have been improperly been used or passed on to others for their use was a very serious offense even if it was fortunately recovered shortly thereafter.

Grievant also appears to have misconstrued the Department's position on harsher penalties for misconduct occurring abroad. That standard is articulated in 3 FAM 4139.8, Criminal Conduct, which imposes an additional obligation on employees serving abroad to scrupulously refrain from activities that, but for diplomatic immunity, would subject the employee to criminal sanctions. In this case, it makes no difference to the Board

whether the offense occurred in the U.S. or abroad. Grievant's loss of control of his government-issued weapon would not constitute criminal conduct in either event.

In FSGB Case No. 2002-034 (February 24, 2004), the Board found that: “[I]t is hornbook law that the selection of an appropriate penalty by an agency involves a responsible balancing of the relevant facts in the individual case.” We find that the Department gave a full and persuasive rationale for its decision to impose a two-day suspension, that the discipline is consistent with applicable regulations, and that it is within the zone of reasonableness.

V. DECISION

The grievance appeal is denied.