

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

  
Grievant

Record of Proceedings  
FSGB No. 2009-027

And

January 10, 2013

U.S. Department of State

**DECISION**  
EXCISION

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For the Foreign Service Grievance Board:

Presiding Member:

Elliot H. Shaller

Board Members:

Jeanne L. Schulz  
Nancy M. Serpa

Special Assistant:

Carol L. Gullion

Representative for the Grievant:

*Pro se*

Representative for the Department:

Thomas M. Lipovski  
Attorney Advisor, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** In the discipline grievance portion of this appeal, the Department carried its burden in showing that the misconduct grievant was charged with occurred and that there was a nexus between the misconduct and the efficiency of the service; but, given the relatively minor nature of the misconduct, failed to show that the penalty was reasonable. In the EER portion, the grievant met her burden of showing that some inadmissible comments were contained in her 2007 EER from [REDACTED] but not that large sections of the Reviewing Officer's Statement should be expunged.

## OVERVIEW

Grievant [REDACTED] then a first-tour junior officer in the consular section at Embassy [REDACTED] appeals her five-day suspension based on the charges of Misuse of Position and Poor Judgment. The Misuse of Position charge included two specifications, i.e., that she: 1) inappropriately accessed non-immigrant visa databases to check the visa application records of a merengue band for which her [REDACTED] national boyfriend was the road manager; and 2) inappropriately accessed the database to find the phone number of a local music promoter. The Poor Judgment charge included one specification, i.e., that grievant facilitated and attended a dinner between her boyfriend and an FSN fraud investigator. When the RSO discovered her use of the database when he checked the system's use, she was interviewed at post for almost five hours without the benefit of any warnings or assurances, and without having been informed of her right to have a representative attend the interviews with her.

The Board found that, while the improper conduct concerning database access occurred, these events took place before 2008 when the Department invigorated its training and warnings with respect to accessing databases for non-official purposes. Moreover, grievant showed that database access at the request of third parties was not uncommon at her post while she served there. The Board agreed with the grievant that charging her with Misuse of Position for looking up a publicly available telephone number was "overreaching and severe." While the Board agreed with the Department that grievant exhibited Poor Judgment in facilitating and attending the dinner with her boyfriend and the FSN, no unlawful requests were made at that dinner, and there is no evidence and it is not alleged that any harm resulted from it, thus rendering it, too, a relatively minor transgression.

The Board found that a five-day suspension was overly severe, especially in light of the fact that employees who accessed the Privacy Act-protected PIERS database were almost universally given admonishments resulting from agency level actions. Given that grievant's access of an NIV database was less serious than accessing PIERS, and that her other improper conduct was minimal, the Board mitigated her penalty to a Letter of Reprimand.

On the EER grievance, the Board sustained parts of the appeal based on certain inadmissible comments. Accordingly, the Board ordered amendment of the 2007 Reviewing Officer's statement consistent with that ruling.

## DECISION

### I. THE GRIEVANCE

Grievant, [REDACTED] an FS-04 Foreign Service Officer with the U.S. Department of State (agency, Department), appeals the Department's decision to suspend her for five working days for Misuse of Position and Poor Judgment, based on conduct that took place during her first tour as a consular officer in [REDACTED] [REDACTED] [REDACTED] from 2005 to 2007. She also appeals inclusion of reference to those actions in her 2007 Employee Evaluation Report (EER). For relief she seeks: reversal or mitigation of the penalty imposed; reimbursement for the five-day suspension she served; deletion from all files of all references to charges and specifications which are not sustained by the Board; permission to revise her 2007 and 2009 EERs' rated officer statements; placement of her corrected files before tenure<sup>1</sup> and promotion boards; TSP adjustments; back pay with interest; and any other relief deemed appropriate.

### II. BACKGROUND

Grievant joined the Foreign Service in 2004 and, after training, was assigned as a consular officer to the U.S. Embassy in [REDACTED], [REDACTED] from January 2005 to February 2007. In November 2005 grievant began dating a [REDACTED] national who was the road manager of a local band. In 2006, when the band was planning travel to the United States to perform, her boyfriend, who already had a valid 10-year multiple entry tourist visa to the U.S., asked grievant to find out if there would be any problems with his band members obtaining visas. In response and, she claimed, to

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<sup>1</sup>Grievant's original appeal sought a new review by the Commissioning and Tenure Board; she has since been tenured.

satisfy her own curiosity, grievant checked NIV (Non Immigrant Visa) databases and learned of possible issues in an earlier visa application for at least one member of the band. Grievant later admitted to checking the database “3 or 4 times,” and believes she looked up a total of 20-23 names. The Department cites the statement of an RSO who found that, on May 30, 2006, she ran a total of 18 names.

On another occasion, when a Foreign Service National (FSN) working in the consular section who kept on her cell phone the business phone number of a music promoter was absent from the office, grievant checked the consular database to obtain that phone number for her boyfriend.

Finally, at the request of her boyfriend, grievant facilitated, and attended, a dinner with him and an FSN fraud investigator working in the embassy’s visa section, at which grievant’s boyfriend questioned the investigator about the screening process and whether he would be doing the screening of the band members’ applications. That dinner took place on December 12, 2006, at a [REDACTED] restaurant. The Department alleges that, following that dinner, grievant repeatedly telephoned the FSN Investigator to ensure he would be the one screening her boyfriend’s band; grievant vigorously denies that she did so.

In late January 2007, the post’s Fraud Prevention Manager checked the usage of the [REDACTED] NIV database from January 1, 2006 to January 27, 2007 and found that grievant had accessed the system without authorization during that time period. The names she accessed matched those of members of her boyfriend’s band. During the period in question, grievant was assigned to the Immigrant Visa (IV) Section, and thus would have had no work-related need to access the NIV database.

On February 13, 2007, the Regional Security Officer (RSO) and the Assistant Regional Security Officer (ARSO) interviewed the grievant at the embassy. She met again with the ARSO the following day, February 14, 2007. The parties disagree about what the ARSO accused her of in these meetings, and what admissions she made, during those approximately five hours of interviews,<sup>2</sup> but it is undisputed that she was not given the standard warnings (that the information she revealed could be used against her in a criminal proceeding) and assurances (that her responses were voluntary, not required) about the nature of the interview or informed of her right to have a representative of her choosing present before and/or during the interviews. Grievant admitted during these interviews that she looked up names in the NIV database at her boyfriend's request, looked up the telephone number of a music promoter in a consular database and provided it to her boyfriend, and facilitated and attended a dinner between her boyfriend and the FSN fraud investigator. After the RSO discussed these allegations with post management, grievant's access to Department computer systems was restricted for the last seven workdays of her tour in [REDACTED]. Grievant departed post for [REDACTED] on regular transfer orders on February 23, 2007.

Sometime between the February 13<sup>th</sup>/14<sup>th</sup> interviews and grievant's departure from post on February 23, the RSO apparently told the grievant's Reviewing Officer about the charges discussed in those interviews. This resulted in the Reviewing Officer referring to the conduct underlying the charges in his review statement in grievant's 2007

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<sup>2</sup> For example, the Department claims that grievant admitted during the interview to "running the names of the band members in May 2006 to see if they would be good candidates" for visas. Grievant claims she admitted to "running the names" but did not state she had done so "to see if they would be good candidates." She also alleges that DS accused her of having looked up the music promoter's telephone number in the database for some wrongful purpose, which she denies.

EER (for the rating period that ended February 23, 2007). In the statement he addressed the events as follows:

█'s record of fine performance made it all the more difficult for me to understand the serious errors in judgment that she made in this evaluation period, missteps that were brought to my attention in its concluding weeks by the Regional Security Office. In a counseling session with █ I discussed these lapses, which occurred over a prolonged time period and were not isolated instances. █ ran the data of possible non-immigrant visa candidates through the consular name-check system to determine visa eligibility before the individuals had submitted visa applications. █ confirmed that she ran these name-checks at the request of a local musician with whom she had a continuing personal relationship. █'s lapse of judgment included as well a direct approach to the chief local investigator of the consular section's Fraud Prevention Unit to coordinate a meeting between that investigator and the local musician in question, at the musician's request. I told █ that this behavior raised serious concerns about her good judgment, something that is integral to her success in this career.

This portion of the review statement was later cited by the Selection Board as the primary factor leading to grievant's low ranking.

On March 20, 2007, the Office of Diplomatic Security (DS) in Washington, DC interviewed grievant about her conduct in accessing the databases and facilitating the meeting between her boyfriend and the investigator. Prior to this interview she was provided, and she signed, a warning and assurances notice, and an AFSA attorney accompanied her at the interview. The agent who conducted this interview had previously communicated with the ARSO at post, and had a copy of a memorandum prepared by a DS agent in Washington, about the February interviews, although that agent (the memo's author) was not present at them. (This memorandum will hereafter be referred to as "the █ memo.") In response to the interview questions, grievant provided a written statement. In pertinent part, it stated as follows:

To the best of my recollection, on a few occasions (possibly 3-4) between May/June and December 2006, I ran a total of approximately 20-23 names of members of a [REDACTED] orchestra through the INK/CLASS and NIV systems, and I informed [my boyfriend] that three or four members had been previously denied non-immigrant visas. . . .

I retrieved the business telephone number of . . . a well-known music promoter and petitioner of bands from the NIV system when the FSN that had his number in her personal cell phone, as I recalled, was not at work to give me the number. I provided the phone number to [my boyfriend]. To the best of my knowledge . . . [the] phone number is publicly available.

To the best of my knowledge [my boyfriend] met [the Fraud Prevention Investigator] at [a] party ... in early-to mid-August 2006. . . . At work one day, I told [the Investigator] that [my boyfriend] wanted to ask him a couple of questions. [The Investigator] said, OK and to call him. I believe it was the following Sunday evening that [my boyfriend] asked me to dial [the FSN's] number while [we] were in the car and [my boyfriend] was driving. I remember that I dialed [the Investigator] on my cell phone, greeted him, said that I was with [my boyfriend] and that [he] wanted to meet, then, after they talked for a few minutes, they decided to coordinate through me, and they hung up. As I recall, on that Tuesday (December 12, 2006) [the Investigator]. . . said to call him after work. That evening – again, while [my boyfriend] was driving – I remember that I dialed [the Investigator] and we decided to go to a restaurant. . . .

It is my understanding that [my boyfriend] wanted to ask [the Investigator] about whether [his] having little time . . . as the road manager would affect him or the group . . . ..

DS referred grievant's case and its Report of Investigation (ROI) to the Department's Human Resources (HR) Bureau for possible administrative action on July 6, 2007. A discipline proposal for a seven-day suspension was sent to grievant on August 22, 2007, to which she responded on September 10, 2007. The charges in this proposal that were ultimately sustained in the final decision were as follows:

### Charge 1, Misuse of Position, Specification 1

In your March 28, 2007 statement to investigators, you acknowledged your misuse of position by inappropriately accessing the consular database stating, "To the best of my recollection, on a few occasions (possibly 3-4 between May/June and December 2006, I ran a total of approximately 20-23 names of members of a [REDACTED] orchestra through the INK/CLASS and NIV systems, and informed [my boyfriend] that three or four members had been previously denied non-immigrant visas. I recall that I told him that one of those denied had a wife in the U.S. and that another worked in a bank.

In light of the foregoing, it is beyond dispute that [REDACTED] engaged in the misconduct that forms the essence of the misuse of position charge, i.e., that [REDACTED] used her position to access the INK/CLASS and NIV systems on multiple occasions to obtain information for the benefit of her [REDACTED] national boyfriend, and passed certain information that she obtained from those systems along to her boyfriend.

### Charge 1 - Misuse of Position, Specification 2

In your March 28, 2007, statement to investigators, you acknowledged your misuse of your position by inappropriately accessing the consular database stating that "I retrieved the business telephone number of [name omitted] (a well known music promoter and petitioner of bands) from the NIV system when the FSN that had his number in her personal cell phone, as I recalled, was not at work to give me the number. I provided the cell phone number to [my boyfriend]. To the best of my knowledge, Mr. [name omitted]'s phone number is publicly available.

### Charge 2 – Poor Judgment

In November/December 2006 you approached Fraud Prevention Unit FSN [name] on several occasions as to whether or not he would be conducting the pre-screening for musical groups, which is Post's SOP. You then invited [name] out to dinner with your boyfriend, Mr. [name], so they could discuss the visa application process for [your boyfriend's] [REDACTED] band that wanted to travel to the US to perform. Mr. [FSN name] went to dinner with the two of you with permission and coordination of the ARSO. [Your boyfriend] asked many questions about the process but made no overt requests for assistance, although [FSN name] thought this was an attempt to "soften him up" and establish a personal relationship so he

would go easy on [your boyfriend's] group during the pre-screening process.

In the week or so leading up to the interview of December 21, 2006, you called [FSN name] frequently during business hours at his desk to ensure that he would be screening the group, not one of the other fraud investigators. Prior to this, your relationship was cordial "saying hello in the hallway" so your sudden interest and friendly attitude to [FSN name] was noticeable to the RSO and to FSN [Name].

You admitted to meeting with [FSN] so that he could explain the visa process to your boyfriend. You had recently completed a year on the NIV line and adjudicated thousands of visas, to include handling the musician portfolio, so if anyone was fully aware and well versed in the visa process, it was you and there was no need for an FSN to explain the visa process.

For these two charges (including a total of three specifications), the Department proposed a seven-day suspension.

About a year passed before grievant received any communication from the Department about the matter; as a result, as of September 2008, she stated that she assumed that her case had been closed. It was apparently only when informed that her name had been removed from a tenure list that she realized it had not been closed. After learning the discipline case was still active, grievant asked that she be allowed to present an oral response (which she had previously waived) to the proposed discipline to the deciding official. She presented her oral response to an HR Deputy Assistant Secretary (DAS) on February 5, 2009, and the Department decided on her discipline on March 4, 2009. The final agency decision on the proposed discipline did not sustain two specifications contained in the original discipline proposal, and it reduced her suspension from seven to five days.

On April 2, 2009, grievant filed two agency-level grievances, one pertaining to the discipline and one pertaining to her 2007 EER. (She supplemented the EER grievance on April 21, 2009.) Shortly thereafter, the Department asked that both cases be stayed pending the outcome of the 2009 Selection Boards; grievant agreed. The Selection Boards completed their work in September 2009; and the Department rendered its agency-level decision on the discipline grievance on April 29, 2010 and, on April 30, 2010, on her EER grievance. The Department denied both grievances.

Before agreeing to the staying of the grievance process, grievant had filed her appeal in the discipline case with this Board on July 17, 2009. She filed the appeal of her EER case on May 5, 2010. After a lengthy discovery period the Board notified the parties that it was consolidating the two (discipline and EER) cases. Grievant filed her supplemental submission on May 23, 2011, to which the Department responded on October 3, 2011.<sup>3</sup> Grievant's reply to the Department's response, the final filing in this case, was received on November 3, 2011, and the Record of Proceedings was closed on November 14, 2011.

### **III. POSITIONS OF THE PARTIES**

#### **A. THE DISCIPLINE GRIEVANCE**

##### **Merits of the Charge**

##### **The Department**

The Department argues that the charges against grievant, Misuse of Position and Poor Judgment, have been proven; that grievant's argument that discipline was not timely fails; and that the discipline imposed is reasonable. Because grievant has admitted to,

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<sup>3</sup> The Department's October 3 response was received in two parts: one response on the Discipline Case, and a second on the EER Case.

and apologized for, all the actions for which she is charged, the facts supporting these charges have been established beyond dispute.

On February 2, 2007, an ARSO, in conducting a check of the consular databases, found that, on May 30, 2006 grievant checked on the INK/CLASS and NIV systems the names of 18 members of the group that subsequently applied for visas on December 21, 2006. This information has been corroborated by grievant's admissions. In her March 2007 statement to DS, she states:

To the best of my recollection, on a few occasions (possibly 3-4) between May/June and December 2006, I ran a total of approximately 20-23 members of [the band] through the INK/CLASS and NIV systems, and I informed [my boyfriend] that three or four members had been previously denied non-immigrant visas.

Similarly, in her September 2007 written response to the proposed discipline, grievant states:

I am truly sorry that I accessed the consular database to run the names of members of a [band] for which my boyfriend . . . was the road manager; that I told [my boyfriend] unclassified information about visa denials from the NIV local database.

Also, in correspondence related to this appeal, the grievant has apologized for her actions, and promised never to repeat them.

Grievant argues that the Department may not rely on her alleged admissions, because they were the product of the information she gave when she was interviewed in February by the ARSO without the benefit of being given the standard warnings and assurances and having an AFSA attorney (or anyone else) accompany her. The Department claims this argument is irrelevant because the admissions relied on by the Department were based on her interview in Washington DC in March 2007, at which

warnings and assurances were given and at which she was accompanied by an AFSA attorney, and were set forth in her March 28, 2007 affidavit, as well as in her September 2007 correspondence.

Grievant also admitted to the conduct upon which the second Misuse of Position specification is based, i.e., having looked up the telephone number of a well-known band promoter in the NIV database, and providing that information to her boyfriend.

The conduct underlying both of the above specifications of “misuse of position” violates several sections of the FAM relating to the protection and use of records of the Department of State, and of 5 CFR § 2635.702, which prohibits an employee from using his public office for the private gain of friends, relatives, or persons with whom the employee is affiliated in a non-governmental capacity.

With respect to the charge of Poor Judgment, the Department avers that grievant has admitted to the essential facts supporting the charge that she inappropriately facilitated and attended a dinner with her boyfriend and an FSN working in the Fraud Prevention Unit of the Embassy. The Department contends that grievant approached the FSN on several occasions in November and December 2006, and asked whether he would be the one conducting the pre-screening for her boyfriend’s band, and then invited the FSN out to dinner with herself and her boyfriend. At the dinner, her boyfriend asked many questions about the visa process, but made no overt requests for assistance. The FSN, who attended the dinner after getting approval to do so from his supervisor, an ARSO at post, reportedly thought that the dinner was an attempt to “soften him up” and establish a personal relationship so that the pre-screening process would go more smoothly. The Department asserts that, following that dinner, grievant repeatedly called

the FSN investigator at his desk to be sure that he personally would conduct the pre-screening of the band.

The grievant, according to the Department, twice admitted unequivocally that her conduct surrounding this incident constituted poor judgment. In the Statement by Rated Employee section of her 2007 EER, she wrote:

I coordinated the time and place of a meeting with the FSN, whom my friend already knew personally, after the two had discussed meeting in person. The band was planning to tour in the U.S. It is my understanding that the FSN's American supervisor told him at the time it was permissible for him to meet with my friend to answer a few questions. Nevertheless, I understand that it was wrong to involve myself in the process.

Further, in her September 10, 2007 correspondence, grievant stated:

I could not have stopped [my boyfriend] from calling [the investigator], whom he had met personally, but I do now realize that it was poor judgment to carry messages back and forth between [them] and to be present when they got together.

On the question of timeliness, the Department argues that grievant's statement that the Department "has dragged this out through 4 years and 3 months of my life," and thus did not act in a timely manner consistent with 3 FAM 4321, cannot stand, in that grievant has included in that time frame the period during which her grievance was pending before this Board. The Department maintains that the relevant time period is from January 2007, when the misconduct was discovered, until March 2009, when DAS Chammas issued the Department's final decision.<sup>4</sup> Moreover, the grievant cannot establish that any delay prejudiced her ability to respond to the charges against her.

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<sup>4</sup> The Department cites as reasons for this two-year period the following factors: the lengthy written response submitted by grievant to the discipline proposal, the change in the agency's deciding official, grievant's submission of a supplemental rebuttal, and her reversal of course in insisting on her previously-waived right to appear for an oral response before the deciding official.

The Department further dismisses grievant's argument that the failure of embassy RSO personnel to give her written warnings and assurances before interviewing her in February 2007 is cause for dismissal of all charges. Citing this Board's previous rulings that a remedy will not be provided "absent a nexus between the denial of representation and the discipline" (FSGB Case No. 2008-029 (June 23, 2009), the Department argues that grievant cannot establish such a nexus, because her interview with the RSO in February 2007 did not form the basis for the "misuse of position" charge. That charge, it contends, was based on grievant's March 28, 2007 written statement to DS.

The Department asserts that the reliability of any statements by three of the DS agents involved in this case is irrelevant to a determination of whether the charges against grievant should be sustained. It also contends that grievant's arguments that she did not knowingly violate the FAM and did not undertake these actions "for private gain" are unpersuasive, because they were all made after she made both oral and written admissions of wrongdoing.

### **The Grievant**

Grievant contends that the Department has failed to carry its burden of: establishing the facts supporting the alleged misconduct; showing a nexus between the alleged misconduct and the efficiency of the Service; and showing that the penalty imposed is reasonable. Grievant contends that the majority of the Department's evidence supporting the charges consists of her admissions of and apologies for the misconduct. She vigorously denies that she has admitted to either the charge of Misuse of Position or Poor Judgment, and accuses the Department of misinterpreting her words on many

occasions. To cite one example, the Department relies on the following statement she wrote in the Rated Employee section of her 2007 EER:

After my many accomplishments in this rating period, it is with great remorse that I address the issues brought forth by the Reviewing Officer. On two or three occasions, I checked the computer to see if members of the well-established orchestra for which my friend works had previously been denied non-immigrant visas, and I coordinated the time and place of a meeting with the FSN, whom my friend already knew personally, after the two had discussed meeting in person. The band was planning to tour in the U.S. It is my understanding that the FSN's American supervisor told him at the time it was permissible for him to meet with my friend to answer a few questions. Nevertheless, I understand that it was wrong to involve myself in the process. I have always prided myself on good judgment and strong ethics in the workplace, and therefore I truly regret my mistakes in this area. I realize I should have handled the requests for assistance differently and will not repeat my errors.<sup>5</sup>

Grievant argues that the above statement:

is not admitting to HR/ER's charge of Poor Judgment. This was taking responsibility and apologizing. For one thing, I did not state that I was admitting to a charge of Poor Judgment. Secondly, this was written in February 2007. That charge was not made until August 2007, so I couldn't have been 'devastatingly' admitting to the charge of Poor Judgment as the author claims.<sup>6</sup>

Further, grievant asserts that there is no merit to the Department's argument that, having accepted responsibility and apologized for her actions, she cannot now challenge the accuracy of some of the allegations or the severity of the penalty.<sup>7</sup>

Especially with respect to Specification 1 of Charge 1, Misuse of Position, grievant argues that harmful error occurred when she was interviewed by RSO personnel

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<sup>5</sup> Department's Response to Grievant's Supplemental to FSGB Grievance Appeal, dated October 3, 2011, at 8.

<sup>6</sup> Grievant's Reply to Department's Response to Grievant's Supplemental Appeal, at 23.

<sup>7</sup> In support of this position, grievant cites this Board's decision in case FSGB 2010-051 (incorrectly cited by grievant as case No. 2011-025, a related but separate case – filed by the same grievant), in which the grievant admitted and apologized for his actions, but in which the discipline was overturned.

without benefit of the required warnings or assurances. She claims that, having been threatened with arrest for her actions during that interview, she was under duress, nervous, and, as a result, did not accurately recall some of her actions. Because of the threats of arrest, she speculated and erred on the side of caution by offering an overly high number of names that she checked, and how many times she did so. Moreover, she claims that the Department has never established how many names she actually searched the NIV database, how many of those had NIV records associated with them, and how many files she opened and viewed.

Grievant emphasizes that none of the material she accessed was Privacy Act-protected and that when this alleged misconduct occurred (before 2008) there was no “banner” or warning of any kind on the databases she accessed. She also claims she received no training, either at post or when she took consular training in 2004 at the Foreign Service Institute (FSI), about the impropriety of accessing consular databases for personal reasons.<sup>8</sup> Further, she introduced into the record copies of emails corroborating her contention that other FSOs, including her supervisor, sought information in the visa database to respond to queries from non-American-citizen friends and acquaintances about third-party visa cases. Thus, she maintains that 9 FAM 40.4 was not adhered to in practice, at least at her post, during the relevant time period. Grievant argues that as this is a discipline case, the Department has the burden to prove that the sharing of visa information with people other than the visa applicant was not common in her post from 2005 to 2007 as she alleges. It has utterly failed to do so. Further, she argues that,

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<sup>8</sup> Grievant also claims that DS Special Agent [REDACTED] told her AFSA attorney that the consular course offered in 2004 contained no information or training about the privacy of consular databases.

contrary to the Department's contentions, she did not take any of these actions for "private gain" – for either herself or her boyfriend.

Grievant admits the facts underlying Specification 2 of Charge 1, i.e., that she retrieved the business telephone number of a well-known music promoter from the NIV database and gave it to her boyfriend. However, she argues that it is "overreaching and severe" to charge that she misused her position by retrieving and sharing a publicly available telephone number. In addition, she maintains that this specification should not be sustained because her admission that she engaged in the charged conduct was obtained during the February 14, 2007 interview at which she was not given the required warnings and assurances. She also alleges that during that interview the ARSO threatened her by saying that the Bureaus of Diplomatic Security (DS) and Consular Affairs (CA) were going to search every single instance during which she accessed the NIV and IV systems and check every visa case she had adjudicated, and that now was the time to tell him about anything for which she had accessed the computer, or things would get "a lot worse" for her. As a result, under duress, she "wracked her brain" for any reason she had gone into the system, and recalled the occasion on which she looked up the promoter's telephone number, which she claims, and the Department does not dispute, was publically available.

Grievant maintains that the details relating to Charge 2, Poor Judgment, stem almost entirely from her February 14 interview with the ARSO at post. Moreover, the memo (the "██████ memo") resulting from that interview was written by an agent in Washington who had not been present. For that reason, and having identified several material and relevant errors in the memo, grievant argues that the entire document is

hearsay, and should therefore be disregarded. Many incorrect assertions from that memo found their way into DAS Chammas' final decision letter on the proposed discipline, rendering that letter inaccurate and exaggerated. Further, grievant disputes virtually every detail behind the charge of poor judgment and believes she was entrapped by the two ARSOs. She cites, as indicative of entrapment, the statement in the ROI that at the dinner she attended with the Fraud Prevention FSN and her boyfriend, she and her boyfriend made "no overt requests for assistance." Grievant maintains that she regrets having gotten involved at all in her boyfriend's attempts to meet with the Fraud Prevention FSN and in talking to the FSN on her cell phone when her boyfriend handed her the phone while he was driving; but she contends that these actions do not warrant discipline and are worthy of no more than an admonishment.

While regretting her actions, grievant maintains that the Department has exaggerated and misrepresented them, and that the penalty imposed upon her is out of proportion to the offense. She argues that she was more harshly disciplined than consular officers who inappropriately accessed the PIERS<sup>9</sup> database, that mitigating factors were not considered, and that the Deciding Official misapplied the Douglas Factors.

Grievant also argues that the Department violated the requirement set forth in 3 FAM 4321 that disciplinary procedures be carried out in a timely manner.

### **The Penalty**

### **The Department**

The Department contends that the decision to suspend grievant for five days is reasonable and appropriate. It notes that this Board generally considers only whether the

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<sup>9</sup>PIERS is the Passport Information Electronic Retrieval System, the Department's primary database containing passport information.

discipline imposed is within a zone of reasonableness, not whether it is the exact penalty the Board would have chosen.<sup>10</sup>

In this case, the grievant has admitted taking all the actions upon which the charges are based and the Deciding Official properly concluded that her conduct was indeed serious. Specifically with respect to grievant's having accessed consular databases to provide information to her boyfriend, the Deciding Official states that these charges relate to the "very core of [her] responsibilities as a consular officer to ensure the integrity of our visa system." In this regard the Merit Systems Protection Board (MSPB) has held that the most significant *Douglas* Factor is "the nature and seriousness of the misconduct, and its relation to the employee's duties, position and responsibilities..." The Department also cites the 2009 Selection Board's finding that the conduct was sufficiently serious to justify grievant's low ranking and possible referral for selection out of the Foreign Service.

In the Department's view, the grievant's argument that her conduct in looking up information on visa denials was also engaged in by others in the consular section does not establish that the conduct was "common." Moreover, she cannot and does not make similar arguments about her actions upon which the "poor judgment" charge is based.

The Department also argues that several aggravating factors were properly considered and applied when determining the discipline in this case. Specifically, the Deciding Official regarded the following as aggravating factors: that grievant's conduct in accessing the consular databases was not an isolated incident, but was repeated over the course of several months; as a result of the misconduct post management restricted

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<sup>10</sup> The Department cites the following cases for this proposition: FSGB No. 2006-037 (September 28, 2007), FSGB Case No. 2000-042 (June 21, 2002), and FSGB Case No. 2002-029 (January 27, 2003).

grievant's access to the Department's computer systems and facilities; and investigators reported that during her initial interview she was evasive and "at times deceptive" in answering questions.

With respect to grievant's contention that the Deciding Official failed to consider mitigating factors, the Department states that Ms. Chammas did not find that the factors grievant cited warranted mitigation. The Department also dismisses grievant's argument that her discipline is overly severe when compared to several employees who inappropriately accessed the PIERS database and only received Letters of Admonishment for such conduct, by citing FSGB cases stating that "there is no precedent that holds that the principle of 'similar penalties for like offenses' requires mathematical rigidity or perfect certainty regardless of variations in circumstance."<sup>11</sup> The cases are distinguishable because grievant, by accessing systems for the benefit of her boyfriend, created the appearance of possible fraud.

Finally, the Department disagrees with grievant's contention that the reference in the decision letter to her boyfriend's marital status is irrelevant, and should therefore be deleted. The Department contends that the reference to his having been married at the time of the events in question appears to be accurate, and thus inclusion of this language is not grievable. It argues that the March 2009 Decision letter should not be altered.

### **The Grievant**

Grievant maintains that the five-day suspension imposed in this case is disproportionate to the charges and violates the precept of like penalty for similar offenses. She notes that the Department's reliance on this Board's long-stated view -- that the Board limits its review of penalties to a determination of whether the penalty

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<sup>11</sup> FSGB Case 2000-042 dated June 21, 2002.

imposed is reasonable, not whether it is the exact penalty the Board would have imposed – is misplaced. She maintains that the Board has in many cases shown itself willing to reject an agency’s choice of penalty in a discipline case, especially where the grievant has shown either that the agency has not established that the action is justified or that the penalty is inconsistent with those imposed in similar cases.<sup>12</sup>

With regard to Charge 1 and the Department’s emphasis on the seriousness of the two specifications included in that Charge, grievant contrasts her case with those of officers who inappropriately accessed the PIERS database and received only an admonishment. The PIERS database, the contents of which are by definition data concerning American citizens, is protected by the Privacy Act, whereas the visa databases grievant accessed are not. Moreover, her conduct occurred before March 2008, when the Department’s protection of its data came under close public and Congressional scrutiny, and new warnings and “banners” were added to many of the Department’s databases. In particular, she cites the “very recent”<sup>13</sup> case of a DS Special Agent who accessed a sensitive database of the Department of Homeland Security, and whose more severe penalty was differentiated from other PIERS cases because “those [PIERS] offenses occurred prior to March 2008 when the Department came under close scrutiny based on employees’ unofficial uses of databases. Since that time employees have repeatedly been warned about the serious consequences of misusing government...databases.” Further, grievant argues that the DS Special Agent in the case only received a reprimand, notwithstanding that he was an experienced law enforcement officer and accessed the database after the government began its enhanced warnings system in 2008. By contrast,

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<sup>12</sup> Citing FSGB Case 2000-042, in which the grievant cited cases showing that the agency had not correctly considered penalties imposed in similar cases.

<sup>13</sup> Exhibit 4 to grievant’s Nov. 3, 2011 Reply to the Department’s Response to her Supplemental Appeal.

grievant, a first-tour junior officer whose conduct occurred prior to the enhanced warnings put in place in 2008, is being suspended for five days without pay.

Moreover, grievant challenges the judgment of the Deciding Official that “the integrity of the visa system was impacted” in that no visa was improperly issued as a result of her action, no pressure was ever put on a consular officer to issue visas, and the Department has not proven how the system’s integrity was violated. Grievant notes that the applicants about whom she sought information in the NIV database did not even apply for visas until several months after she accessed the records, and that she was not authorized to issue NIV’s at the time they applied.

Grievant also takes issue with the significance the Department attaches to the 2009 Selection Board’s low ranking of her based on the conduct at issue. According to the Department’s argument, “an independent group of Foreign Service Officers concluded that the conduct resulting in the challenged five-day suspension was so serious that it warranted a low ranking<sup>14</sup> and possible consideration for selection out of the Foreign Service.” Grievant maintains that the Department’s argument ignores the fact that the Commissioning and Tenure Board, another group of independent Foreign Service officers which could have directly recommended grievant’s separation from the Foreign Service, granted her tenure, even after reading her file when it contained the discipline letter. Moreover, she notes that the Selection Board that low ranked her was required by its precepts to low rank a certain number of candidates,<sup>15</sup> and that it did not refer her file

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<sup>14</sup> We note that the low ranking was later rescinded, because Grievant’s disciplinary letter was improperly included in her OPF considered by that year’s Selection Board.

<sup>15</sup> Until 2009, most Selection Boards were required by the promotion precepts to low-rank five percent of the candidates they reviewed.

directly to a Performance Standards Board for selection out, a referral it had the authority to make.<sup>16</sup>

Grievant also points out that the Deciding Official made her decision on the penalty partly based on grievant's alleged admissions to DS investigators that she had told her boyfriend, after accessing the NIV database, that one band member had a wife in the U.S. and that the back-up singer worked in a bank. As stated in the Department's discovery responses, there is no record of such an admission; therefore, to consider it as a factor in assessing the penalty was erroneous.

With respect to other aggravating factors relied on by the Department, grievant contends that there were only three isolated instances of the conduct at issue, and denies that it was "repeated on several occasions over the course of six months" as the Department alleges. Further, the Deciding Official should not have considered the denial of her access to State Department systems and facilities as an aggravating factor. In fact, she contends, her access was denied for a total of only seven workdays prior to her departure from post because of the criminal investigation DS was then conducting against her. Finally, she argues that the charge that she was "evasive and at times deceptive" during her initial DS interviews is based on hearsay which is unreliable, untrue,<sup>17</sup> and thus should not have been found aggravating. She characterizes as "ludicrous and ridiculous" the Department's charge that part of her evasiveness or deception was in characterizing her boyfriend as her "friend" instead of as her "boyfriend."

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<sup>16</sup> With respect to low ranking, Selection Boards (SB) have two options: they can low-rank a candidate who does not meet the performance standards of his or her grade, and provide to the candidate a low-ranking, or counseling statement; or, in cases where performance is deemed to be especially lacking, the SB can refer a candidate directly to a Performance Standards Board for consideration for selection out of the Foreign Service.

<sup>17</sup> Grievant's assertion is based on the "[REDACTED] memo" regarding her interviews at post, drafted by an agent who had not been present at those interviews.

In examining the Deciding Official's consideration of the *Douglas* factors; grievant contends that: she did not intentionally violate the FAM (factor 2); her actions were not committed for personal gain (factor 3) because her boyfriend already had a 10-year visa and the Department has not shown that he gained anything as a result of her actions; her position as a first-tour junior officer in a "visa mill" was not prominent (factor 4); about 115 Foreign Service Officers accessed the more sensitive PIERS database and received admonishments for what, in her view, is a more serious offense (factor 6); there was no notoriety involved (factor 7); and mitigating factors grievant presented were not considered by the Deciding Official (factor 11).

The grievant also maintains that reference to her "married boyfriend" in any official personnel record is both irrelevant and of a "falsely prejudicial character."

## **B. THE EER GRIEVANCE**

### **The Grievant**

Grievant maintains that Agency regulations specifically prohibit matters related to an administrative inquiry from being discussed in an EER and included in the Official Performance File. 3 FAM 4324.4 states that, "All documents related to an administrative inquiry shall be kept separate from the employee's Official Performance File (OPF), except for the placement of a decision letter in the OPF..." She also claims that inclusion in her OPF of the EER for the period of October 3, 2006 through February 23, 2007 (the 2007 EER) violates the 3 FAM 2815.1(b)(6) prohibition against mentioning in an EER any grievance proceedings. Given that at the end of the rating period she was still under active investigation by DS, any document that referenced actions relating to that investigation, including her EER, may not be included in the OPF. She dismisses the

Department's argument that an EER account is no more a document related to an administrative inquiry than a newspaper article about a traffic accident is part of a criminal inquiry. She contends the analogy is flawed because a newspaper reporter is not a part of the prosecutorial body, but her reviewing officer was part of Agency management.

Grievant also dismisses the Department's contention that because she admitted engaging in the conduct on which the discipline case is based, the temporary protection afforded by 3 FAM 4324.4 should not apply. She explains that she had to defend herself as best she could (in view of what she thought at the time might be a criminal case against her) while also taking responsibility and expressing regret, so as not to risk not getting tenured or promoted with the EER in her file.

Finally, she disagrees with the agency's arguments that a prohibition on reference to an ongoing administrative inquiry would lead to "absurd results," and that the FAM provisions she cites cannot have been intended to shield misconduct from scrutiny in EERs. She argues that the FAM provision was in fact intended to permit completion of the full investigative and grievance processes before any mention can be made in the OPF, noting that the final decision letter is specifically permitted to be placed in the OPF. The right to due process embodied in the regulations was denied her. She cites emails from two officials in the Department's Office of Performance Evaluation (HR/PE), one of whom stated that the review statement's reference to her conduct was "inappropriate because the matter is still under investigation in DS."

Grievant claims that much of the conduct under investigation and cited by her reviewing officer occurred outside the rating period. The DS investigators claim that she

accessed consular databases on behalf of her boyfriend in May or June of 2006 and looked up the publicly available telephone number shortly thereafter. The rating period of the EER did not commence until October 3 of that year. She disputes the Department's assertion that it was appropriate for the Reviewing Officer to refer to "lapses that occurred over a long period of time and were not isolated instances," even if they occurred outside the rating period. She calls this assertion "contrary to regulation, precedent, and practice." In her view, the Department did not establish that she in fact looked up any names in the consular databases during the rating period. The only actions the Department established, through the grievant's own admission, that definitely occurred within the rating period, were those related to the dinner with her boyfriend and the Embassy FSN on December 12, 2006, the subject of Charge 2.

Grievant also contends that the review statement in her 2007 EER contains an inadmissible comment about her marital status. Contrary to the Department's arguments that reference to a "continuing personal relationship" does not identify grievant's marital status, she argues that it denotes a dating relationship, implying that she was single, and is therefore inadmissible under 3 FAM § 2815.

Grievant argues that the reviewing officer's statement about "lapses in judgment" encompasses her failure to report her relationship with her boyfriend. In response to the Department's contention that her argument in this regard is speculation, grievant argues that she has proven the intent of her reviewing officer by producing earlier drafts of the EER statement in which reference was made to the fact that she failed to report the relationship.

Finally, grievant contends that DS' failure to provide a *Garrity* warning before her first interview with the Embassy RSO and an ARSO and their having threatened her with arrest during the interview, rendered her unable to discuss frankly the events under investigation or defend herself to her Reviewing Officer while she was negotiating with him about his EER review statement. Grievant and the Department disagree on the extent to which this was important or relevant to the content of the final EER review statement, but grievant contends the threat of arrest, her AFSA attorney's advice not to discuss the matter with anyone, and the grievant's resultant inability to fully discuss the events in question, disadvantaged her ability to negotiate the content of that statement.

### **The Department**

The Department maintains that it did not violate the FAM by referring to grievant's misconduct in the 2007 EER, covering the period of October 3, 2006 through February 23, 2007. Specifically, it contends that, while 3 FAM 2815.1(b) prohibits the mention in an EER of "any grievance, equal employment opportunity, or Merit Systems Protections Board proceedings" and letters of reprimand, it does not prohibit discussion of the underlying facts that may have given rise to such proceedings. The Department contends that the EER language with which the grievant takes issue (see citation in "The Grievance" section, above) is appropriate for inclusion in an EER, in that it discusses her conduct and actions during the rating period, and is relevant to future career decisions about the grievant. The Department also dismisses grievant's arguments that some of the conduct for which she is being charged occurred outside the rating period of this EER, contending that at least some of the database checks and her facilitation of and participating in the dinner with her boyfriend and the FSN from the fraud unit, occurred

within the relevant rating period. Moreover, the grievant admitted to and apologized for her actions in the rated officer's statement section of the EER.

The Department contends that 3 FAM 4324.4's prohibition on the inclusion in an employee OPF of any document "related to an administrative inquiry" does not apply to the review statement of grievant's 2007 EER, or, for that matter, to any part of the EER. If rating and reviewing officers were banned from discussing any conduct or performance that led to an administrative inquiry, this would lead to "absurd results" – and would mean that reference to any misconduct would be disallowed in EERs.

The grievant's contention that the EER contains an inadmissible comment about her marital status (i.e., that she was single) fails because the EER does not state that grievant was single, or that she was dating her boyfriend, but only that she had a "continuing personal relationship" with him. The Department contends that this statement is not inadmissible, in that, as is true in this case, one can engage in a personal relationship whether one is single or married.

The Department claims that there is no merit to grievant's argument that her allegedly inappropriate treatment by DS personnel in her first interview impacted her ability to have an open discussion with her reviewing officer about her performance, and thus inhibited the possibility of negotiating changes to the alleged inappropriate comments in her 2007 EER. First, grievant cannot show that any of the conclusions she feared her reviewer had drawn about her<sup>18</sup> were reflected in the EER, and in fact it contains no mention whatsoever of those conclusions. Second, notwithstanding her claim that a possible pending criminal investigation rendered her incapable of discussing these

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<sup>18</sup> Grievant claims the reviewing officer judged her as "someone who was potentially engaged in visa smuggling, who had potentially committed a crime or crimes, who would possibly be arrested, who was being sent home from post, who was being excluded from the [Embassy] premises, etc."

issues with her rating and reviewing officers (and thus unable to negotiate language in her EER), grievant was “very successful” in negotiating extensive changes to the final 2007 EER, in that a number of items included in initial drafts of that document were deleted from the final EER. Third, grievant’s assertion that her reviewing officer believed that she had violated the policy about reporting foreign contacts cannot stand, because all reference to violation of the reporting requirements was eventually deleted from the final EER that went into grievant’s OPF.

#### **IV. DISCUSSION AND FINDINGS**

In all cases involving discipline, the Department bears the burden of proving by a preponderance of the evidence that the conduct in question occurred, that there is a nexus between the conduct and the efficiency of the Service, and that the discipline imposed is reasonable and complies with the precept of like penalty for similar offenses.<sup>19</sup> We find that the Department has carried its burden of demonstrating that the charged conduct occurred, and there is a nexus between the conduct and the efficiency of the service. However, we find that the misconduct was relatively minor, and the Department has not shown that the discipline imposed was reasonable and comported with the precept that like penalties should be imposed for similar offenses. Accordingly, we conclude that the penalty should be mitigated to a Letter of Reprimand.

With respect to the grievance over her 2007 EER, grievant has the burden of showing, again by a preponderance of the evidence, that her grievance is meritorious.<sup>20</sup> The Board finds that she has met that burden with respect to certain remarks in the reviewer’s statement.

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<sup>19</sup> 22 CFR 905.2

<sup>20</sup> 22 CFR 905.1.

## **THE MERITS**

### **THE DISCIPLINE GRIEVANCE**

#### **Charge I – Misuse of Position**

The Board sustains the two specifications included in the Misuse of Position charge. Although not all of the alleged details surrounding the charges have been proven, the key aspects of them have been. This proof is largely based on grievant's admissions – not including any admissions made during the February 2007 interviews when she was not given the warnings and assurances and did not have an attorney from AFSA or anyone else with her. In her March 2007 statement to DS – written after the interview at which she was given the warnings and assurances and was accompanied by an AFSA attorney – grievant stated that as best as she could recall on possibly three to four occasions she ran a total of 20-23 band members' names through the systems and told her boyfriend that three or four of the members had previously been denied non-immigrant visas. Similarly, in September 10, 2007 correspondence, she admitted accessing the consular database to run the names of band members and telling her boyfriend unclassified information about visa denials. Grievant's statements are consistent with the evidence that sometime in January or February 2007, the ARSO checked activity on the database and found that in May 2006 grievant ran the names of the band members who later applied for visas (although the Department introduced evidence of only one instance in which grievant accessed the database whereas grievant stated that she did so "possibly three or four times").

By engaging in such conduct, grievant violated several regulations. Under 9 FAM 40.4 the consular office's records on the issuance or refusal of visas are

“confidential” and may only be used for specified official purposes. Under 5 FAM 471(2), access or use of these records is on a “need-to-know” basis; an employee may only access them when needed for performing official duties. In accessing the INK/CLASS and NIV for purely personal reasons unrelated to her government job, and passing information obtained to her boyfriend, grievant compromised the “confidential” nature of the information, in violation of 9 FAM 40.4, and violated the “need-to-know” limitation on access set forth in 5 FAM 471(2).

Further, 5 CFR 2 635.702 prohibits an employee from using his public office for the private gain of friends, relatives or persons with whom the person is affiliated in a non-governmental capacity. The Board finds that by accessing visa records to which grievant had access only by virtue of her employment with the Department, and passing certain information she obtained from the records on to her boyfriend in response to his concerns about the band members’ visa applications, grievant violated this regulation.

Grievant disputes the contention that she received any “private gain.” To be sure, grievant did not gain financially by her conduct, and there is no evidence nor is it alleged that it led to a more favorable adjudication of the visa applications. At the same time, she did not just access the records out of idle curiosity, in which case there would apparently be no gain. Rather, she accessed the record for a specific purpose, namely, to address a matter of concern to her boyfriend and, by extension, to her, in view of their relationship. She stated in her September 2007 correspondence that her boyfriend was worried that the application for visas by the band members might jeopardize his tourist visa, which he needed in order to visit family members in the U.S. (including his ill mother) on a relatively frequent basis. Although grievant could not, by obtaining this information,

assure her boyfriend as to the outcome of the band's visa applications (at the time grievant had moved to the Immigrant Visa Section and was no longer authorized to issue non-immigrant visas), she nevertheless sought and accessed "confidential" information, and passed it on to her boyfriend, for whatever use he might make of it in pursuing the band's applications and to try to address his concerns. By helping her boyfriend in this way, as well as to assuage her own concerns about his tourist visa, we find that grievant engaged in the charged misconduct for private gain within the meaning of the regulation.

With respect to the second specification on which the Misuse of Position is based, there is no dispute that grievant engaged in the charged misconduct. She admitted she checked and retrieved from a consular database the phone number of a music promoter from the NIV system and gave that number to her boyfriend. This constitutes a violation of 9 FAM 40.4, as she accessed a "confidential" record for non-official business, and of 5 FAM 471(2), as she did not have a "need to know" or access the record in performing her official duties. As this information was apparently also available through public sources and there was no "private gain" involved, the Board finds that grievant did not violate 5 CFR 2635.702.

### **Charge 2 – Poor Judgment**

The Board sustains the second charge, poor judgment, as key aspects of the charged misconduct have been proven. In her March 2007 statement to DS (quoted from in the Background section above), grievant stated that: it was her understanding that her boyfriend wanted to ask the Fraud Prevention Unit FSN whether his having been the road manager for the band for only a short period of time would affect his visa or the band members' applications; at work one day she told the FSN that her boyfriend wanted to

ask him a couple of questions; subsequently, while in the car with her boyfriend, as he was driving and at his request, she telephoned the FSN and told him her boyfriend wanted to meet and then coordinated a meeting for them; a few days later, again while in the car with her boyfriend and he was driving, she called the FSN and they arranged to meet for dinner a short time later; and she attended the dinner with her boyfriend when he queried the FSN about the visa application process.

Grievant's admissions are consistent with the statement provided by the FSN. He stated that: grievant had earlier introduced her boyfriend to him and described (to her boyfriend) his function and responsibility, including screening musical groups applying for visas; she subsequently approached him at work and indicated that her boyfriend wanted to talk to him about some issues; the three met for dinner on December 12, 2006; and her boyfriend asked questions about visas, the screening process and whether he would be screening his group's petition.

At a minimum, grievant coordinated the meeting knowing that her boyfriend wanted to ask questions related to his band members' future applications. She contacted the FSN at work about such a meeting and later spoke to him by phone to coordinate it. She also attended the dinner at which her boyfriend questioned the investigator about the P1 visa screening process, including whether he would be the one doing the screening. Grievant thereby used her work-related connection with the FSN to provide her boyfriend access that would not otherwise be available.

With respect to grievant's alleged repeated contact with the FSN between the day of the dinner and the day the band applied for its visas, we note that the only reference to such contact is contained in the so-called "[REDACTED] memo." Because the memo was written

by a DS Agent in Washington about interviews he did not attend, his account of the interview constitutes double-hearsay and is therefore entitled to little weight. Moreover, the written statement made by the FSN Investigator mentions no follow-up contacts on grievant's part, and grievant denies that she made such contact. In view of these considerations, the Department has failed to prove by preponderant evidence that grievant in fact made the alleged follow-up contacts with the FSN Investigator.

While we agree that grievant's having facilitated the dinner between her boyfriend and the FSN Investigator constituted poor judgment, we also note that the FSN Investigator did not have the authority to issue or deny visas to the band or to grievant's boyfriend –the investigator was in charge of pre-screening such groups, which would have meant only that he could have made a recommendation, either favorable or unfavorable, to the American consular officer who had visa issuance authority.<sup>21</sup> There is no record evidence that grievant attempted to influence the visa issuance decision.

Although there is no evidence of (and grievant has not been charged with) fraud or undue influence, her actions could give rise to a perception of such conduct. It thereby constituted poor judgment as the agency has charged.

### **Penalty**

The burden is on the agency to persuade the Board of the appropriateness of its chosen penalty. However, penalty determination is “committed primarily and largely to the discretion of the agency.” FSGB No. 2006-037 (September 18, 2007), quoting, FSGB No. 2000-037 (November 3, 2000). The Board defers to its determination “unless the penalty imposed is grossly disproportionate to the offense, given all the circumstances and mitigating factors.” FSGB No. 2002-029 (December 2, 2002). Applying this

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<sup>21</sup> See 9 FAM 40.1 (d), definition of “consular officer.”

standard of review, the Board finds that the decision to suspend grievant for five days based on the charges sustained is excessive and should be mitigated.

The most important *Douglas* factor is the “nature and seriousness of the offense, and its relation to the employee’s duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.” For several reasons we find that the grievant’s misconduct – at the time it was committed - was not viewed as seriously as the agency portrays. First, it is true, as the Deciding Official stated, that grievant’s actions demonstrated a lack of good judgment. However, the record reflects that, at least as of 2007 when the misconduct was committed, the agency did not treat such misconduct as seriously as it has since 2008. There is unrefuted evidence that other consular officers at grievant’s post, including her supervisor, searched the NIV database at the request of third parties, and it was not until 2008 that the agency posted a banner or warning on the database, so anyone accessing it would immediately be advised not to access it for non-official purposes.

With respect to the poor judgment charge stemming from grievant’s facilitation of a dinner meeting between her boyfriend and the FSN fraud investigator, the Board agrees that her actions constituted poor judgment. Grievant’s attendance at the dinner could have given the appearance that she and her boyfriend were in fact seeking preferential treatment, but note that the FSN Investigator was not in a position, even if he had been so inclined, to provide any assurance as to the outcome of the visa application.<sup>22</sup> We thus consider this charge, while valid, to be minor.

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<sup>22</sup> Id.

Second, the Department does not aver that either grievant's accessing of the consular databases, or her facilitation and attendance at the dinner meeting, resulted in the improper issuance of a visa. As noted above, the investigator with whom grievant and her boyfriend dined on December 6, 2007, was not a consular officer who could issue visas, and we find no evidence that grievant sought to contact or influence any American consular officer. There is no evidence that her actions resulted in a more favorable or expeditious adjudication of the applications or impacted whatever effect the applications had on her boyfriend's tourist visa.

Third, while we have found in sustaining the charge that there was private gain within the meaning of 5 CFR 2 635.702, such gain was minimal. Grievant did not gain financially, and there is no evidence that her actions resulted in any more favorable decisions on the band members' visa applications, or the status of her boyfriend's tourist visa, than would otherwise have been obtained.

Fourth, although the agency argues that the 2009 Selection Board's decision to low rank grievant based on the misconduct reflects how serious the misconduct was considered, this argument is neutralized by the later decision of the Commissioning and Tenure Board to grant her tenure, suggesting that the second Board did not consider the conduct serious enough to deny it.

Fifth, the Deciding Official cited the decision to deny her access to the Department computer systems after her interviews in February 2007 as a reflection of the seriousness of the misconduct and, therefore, an aggravating factor. But the decision to deny her the computer access was, according to the preponderance of the evidence, taken because she was at the time being investigated for alien smuggling, which she was never

charged with. For these reasons, the decision to deny grievant access to the computer system should not have been considered as reflecting on the seriousness of the misconduct or as an aggravating factor. Moreover, her access was denied only for the last seven workdays of her tour at her post, so its impact on post operations was minimal.

Sixth, the Department also cited grievant's "evasiveness" during these interviews as an aggravating factor. But again, any such alleged evasiveness occurred during the February interviews, when grievant claimed she was being accused of much more serious transgressions. We thus find that her "evasiveness" should not be used as an aggravating factor. There is no evidence that grievant was uncooperative or at all evasive in the March 2007 interview, or anytime thereafter.

In addition to considering the nature and seriousness of the offense in determining the reasonableness of the penalty, there are two other Douglas factors that the Board finds are of particular importance in this case. These are: "the consistency of the penalty with those imposed on other employees for the same or similar offenses" [Douglas Factor 6]; and "the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question." [Douglas Factor 9]

With respect to the consistency of the penalty, grievant has shown, and the agency has not refuted, that the agency has assessed substantially less severe discipline against employees who unlawfully accessed PIERS. Unlike the databases grievant accessed, the information in PIERS concerns American citizens and is protected by the Privacy Act. Thus, accessing PIERS for personal and non-official purposes would presumably be considered at least as serious, if not more serious, than accessing databases like the ones

grievant accessed that do not <sup>23</sup> fall under the Act. Nevertheless, the preponderance of the evidence reflects that in virtually all of the cases involving inappropriate access to PIERS, the officers were not disciplined, but were only admonished. While it is difficult, because the redacted agency-level cases do not specify which employees were Foreign Service and which were Civil Service, to determine the exact number of Foreign Service employees admonished for PIERS violations, it is clear that more than 100 Foreign Service employees were only admonished for those violations. The record contains evidence of only one comparable case in which a more severe penalty was imposed, that of a DS Special Agent who accessed PIERS after the enhanced warning system was implemented in 2008, who received a reprimand. Grievant was far more severely disciplined than this agent, receiving a five-day suspension, even though she accessed a database that was not Privacy Act protected and did so prior to 2008. Although in this case there is an additional charge (Poor Judgment) against her, based on a consideration of all the facts and circumstances we find a five-day suspension to be overly harsh.

With respect to the clarity with which grievant was on notice of the rules she violated, there is no record evidence that she was ever informed, either in Consular training at FSI or at post, of the FAM prohibitions on accessing the consular databases. Moreover, there is evidence that others in the consular section, including grievant's supervisor, were accessing the databases in response to third-party requests and for non-official purposes. Any such action by the supervisor may have led grievant to believe that accessing the databases for these purposes was not a rule violation and, if it were, not

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<sup>23</sup> For most of these PIERS cases, the ROP only includes the letters of admonishment, which provide little or no information on the reasons the employee accessed PIERS. In the 27 cases for which we received more detail, most of those admonished claimed not to have passed on information they found in PIERS to third parties. However, most of the cases occurred after early 2008, when the Department upgraded its privacy notification and warning banners.

treated seriously. It is also noted that at the time of the conduct at issue grievant was an untenured junior officer on her first overseas tour and first consular assignment. These factors do not absolve grievant of the misconduct. This Board has consistently ruled that employees have a responsibility for knowing their agency's regulations on conduct, and thus grievant should have known about the FAM requirements and used better judgment. But these circumstances are entitled to some, albeit relatively minor, mitigating weight.<sup>24</sup>

With respect to coordinating the dinner meeting between her boyfriend and the FSN Fraud Investigator, we find that the grievant's conduct constituted poor judgment as charged. She should have realized that inserting herself into arranging a meeting between her boyfriend and the FSN at which her boyfriend planned to discuss the band's visa applications, and then attending that meeting, was unwise. However, no actual harm or wrongdoing occurred at the meeting. To DS personnel, who it appears may have been investigating more serious misconduct, such as alien smuggling, grievant's actions may have had the appearance of impropriety. In the final analysis, grievant's actions, albeit constituting poor judgment, resulted in no harm to the government.

Under these and all the circumstances of this case, the five-day suspension is overly harsh and not within the zone of reasonableness. The Board concludes that the maximum reasonable discipline is a Letter of Reprimand. We base this conclusion on our belief that, for accessing the local consular databases, grievant should have received punishment no more severe than that received by most of those who accessed the PIERS database (admonishments), but that her poor judgment charge with respect to arranging

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<sup>24</sup>*See Faitel v. Veterans Administration*, 26 M.S.P.R. 465, 469 (1985) (“ . . . [L]ack of notice of a regulation alleged to be violated is considered a mitigating factor rather than a defense to the charge”).

the dinner between the FSN fraud investigator and her boyfriend then raises the maximum reasonable penalty to a Letter of Reprimand.

### **Timeliness**

Grievant argues that the charges should be dismissed because of the Department's repeated delays in this case. She claims that the Department violated the regulatory requirement that discipline should be timely.

While it is true that it took an unduly long time (about two-and-one-half years) from the date of the alleged conduct for the Department to issue a final Decision Letter, grievant has failed to establish, as required by Board precedent,<sup>25</sup> a nexus between the delay and her ability to defend herself against the charges, or other prejudice.

Accordingly, the Board finds that any lack of timeliness is not an appropriate basis in this case for dismissing the charges. However, as this Board has ruled previously, the delay may be considered a mitigating factor.<sup>26</sup>

### **THE GRIEVANCE OVER THE 2007 EER**

Although the Board is troubled by inclusion in grievant's EER of information that came to the reviewer's attention at least in part as a result of the interviews in [REDACTED] [REDACTED] on February 13 and 14, 2007,<sup>27</sup> we do not find that the Department has violated any law, regulation, or due process protection in including it.<sup>28</sup> The inclusion of the information does not violate the FAM provisions cited by Grievant. In this regard, 3

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<sup>25</sup> See FSGB No. 2006-057 (September 9, 2008).

<sup>26</sup> See FSGB No. 2010-014 (July 22, 2011), also citing FSGB No.98-011 (January 5, 1999).

<sup>27</sup> The reviewing officer says in his statement, quoted on page 7 of this decision that he got information about the misconduct from the RSO in the concluding weeks of the rating period. Also, in other areas of this appeal, the Department argues that the charges against grievant were not based on the February interviews at which DS did not provide required warnings or assurances, but instead on either the March 20, 2007 Washington interview or on grievant's written statement of March 28, 2007.

<sup>28</sup> We also note the email from an official in the Department's office of Performance Evaluation which says the comments are inappropriate because they were part of an ongoing DS investigation.

FAM 2815.1.b renders inadmissible any comments in an EER on a list of subjects, but information obtained from an interview that is part of an administrative inquiry is not on this list. 3 FAM 4324 requires that, except for a decision, letter “[a] *documents* related to an administrative inquiry” be excluded from the OPF. (emphasis added) It does not however prohibit the inclusion in the OPF of a document unrelated to the administrative inquiry, such as an EER, from mentioning conduct that was the subject of an administrative inquiry. Moreover, if all reference to misconduct that might have ever been the subject of an administrative inquiry had to be excluded from EERs, that would negate one of the purposes of the EER under the FAM, i.e., to evaluate both the positive and negative aspects of a Foreign Service Officer’s performance.

But we find certain parts of the review statement inadmissible, and order it amended.

First, grievant has established that one paragraph in that statement refers, in part, to conduct outside the rating period. In this regard, it has been shown that only one of the instances in which grievant wrongfully accessed the NIV database, i.e., when by her own admission she accessed it in December 2006, occurred during the rating period covered by the EER. Although there may be instances in which it is permissible to refer to conduct occurring outside the rating period, we find in any event that the characterization of the misconduct as occurring “over a prolonged period of time and . . . not isolated instances” to be falsely prejudicial. It may well create the impression that the misconduct (even including instances occurring outside the rating period) occurred more frequently and over a longer time period than it actually did. For these reasons, we order that the

final clause of the reviewer's statement referring to conduct "which occurred over a prolonged time period and were not isolated instances" be expunged.

Second, in the same paragraph, we find inadmissible under 3 FAM 2815.1.b (4), which prohibits reference to marital status, part of the following sentence: "[REDACTED] confirmed that she ran these name-checks at the request of a local musician with whom she had a continuing personal relationship." Grievant argues that this statement strongly suggests she is single, and we agree. We find unpersuasive the Department's argument that one can have a "personal relationship" whether one is single or married, finding that it is more reasonable to assume that a "continuing personal relationship" denotes a relationship much more likely to be openly conducted, at least in our culture, by a single person than by a married person. Accordingly, we order deleted the last phrase ("with whom she had continuing personal relationship") of the sentence cited above.

Grievant's request for reconstituted promotion and tenure Boards is denied. Because we do not find that the deletions ordered alter the substance and tenor of the reviewing officer's statement or to be significant enough to have made a difference in the deliberation of these boards, she has not carried her burden of showing that the inclusion of these remarks may have been a substantial factor in any of its decisions to deny her promotion or tenure (which she later received).

## **V. DECISION**

1. Specifications 1 and 2 of Charge 1, and Charge 2 are sustained. Given the relatively minor nature of the wrongdoing found, and the other mitigating factors discussed above, the penalty is mitigated to a Letter of Reprimand.

2. The Department shall reimburse grievant for the five-day suspension without pay she has already served, in accordance with the Back Pay Act, and shall delete all references to a suspension from all of grievant's and Department personnel records.

3. The third paragraph of the Review Statement of the 2007 EER shall be amended in its second and fourth sentences, as noted above.

4. The request for reconstituted Promotion and Tenure Boards and all other relief is denied.

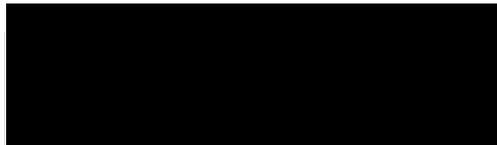
**For the Foreign Service Grievance Board:**



Elliot H. Shaller  
Presiding Member



Jeanne L. Schulz  
Member



Nancy M. Serpa  
Member