

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB No. 2009-031

July 8, 2010

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Nancy M. Serpa
Lois E. Hartman

Senior Advisor

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Department met its burden with respect to proving charges of 1) Failure to Report Contact with a Criterion Country National and 2) Poor Judgment. It failed, however, to meet the burden of establishing that the penalty imposed on grievant was reasonable. Accordingly, the seven-day suspension was mitigated to five days.

OVERVIEW

Grievant, a first-tour Human Resources Specialist (HRO), engaged in a personal sexual relationship with a Foreign Service National (FSN) candidate for a position in his office. After the relationship became known within the Embassy, the candidate withdrew from consideration for the job. Grievant voluntarily curtailed from post and was transferred to Washington.

After investigation by the Bureau of Diplomatic Security, the Department proposed to suspend grievant for seven days due to his failure to report contact with a criterion country national and for poor judgment (pursuing a sexual extramarital relationship with a candidate for employment under his supervision). The grievant argues, *inter alia*, that he was unaware of the security regulations regarding contacts with criterion country nationals, and that his selection of the FSN with whom he had the sexual relationship for a position in his office was based on purely objective factors, not on the relationship. Moreover, he argues that the punishment proposed is excessive when compared to punishment imposed in similar cases.

The Board agreed with the Department that, as an HRO assigned to a criterion country, grievant should have been aware of the security regulations regarding contact with host country nationals, and should have been aware that his actions were improper or at least had the appearance thereof. However, the Board found the penalty imposed unduly harsh when compared to other cases involving similar offenses. Accordingly, the Board mitigated the seven-day suspension to five days.

DECISION

I. GRIEVANCE

██████████ (grievant), a Foreign Service Human Resources Specialist career candidate, appeals the decision of the Department of State (Department, agency) to suspend him for seven days for having a sexual relationship with a Foreign Service National (FSN) employee he was in the process of hiring into a position in his Human Resources office. The relationship occurred in a “critical threat” or “criterion” country under the Department’s regulations.

Grievant requested and was granted interim relief from discipline pending the decision of the Board. For relief he requests:

- 1) That the seven-day suspension without pay and letter in his file (to remain there until he is tenured or next promoted) be overturned;
- 2) In the alternative, that the seven-day suspension without pay and letter in his file be mitigated;
- 3) That all references to charges that are not sustained be expunged from any final disciplinary letter that is inserted in his OPF; and
- 4) All other appropriate relief deemed just and proper.

II. BACKGROUND

██████████ was assigned as the Embassy Human Resources Officer (HRO) on his first tour in the Foreign Service. He was in the process of filling a clerical position in his office. He asked two staff members to join him in the selection process. After interviews on May 14, 2008, ██████████ and the two staff members agreed there were two best qualified candidates. One candidate was external to the Embassy; the other was an internal candidate, Ms. ██████████ a telephone operator in the Embassy. In ranking these top candidates, the two staff members ranked the external

candidate highest; grievant ranked Ms. [REDACTED] highest. Grievant delayed making a final selection pending further reviews of the candidates' qualifications. After talking to Ms. [REDACTED] supervisor, grievant overruled the recommendations of his staff and selected Ms. [REDACTED]

Meanwhile, grievant had begun a personal relationship with Ms. [REDACTED] they talked occasionally and texted messages – often of a personal and flirtatious nature. Prior to the interview, grievant had asked Ms. [REDACTED] to accompany him on a trip to [REDACTED] scheduled for May 26-28, 2008. Between the May 14 interview and May 20 when grievant selected Ms. [REDACTED] for the position, she agreed to accompany him on the trip.

Grievant and Ms. [REDACTED] (both married) traveled separately to [REDACTED] on May 26 with grievant paying Ms. [REDACTED] travel expenses. They shared a hotel room and engaged in a sexual relationship. While grievant and the FSN were in [REDACTED] a member of grievant's Embassy staff tried to call grievant at his hotel. The FSN answered the phone in the hotel room, and the staff caller recognized Ms. [REDACTED] voice. The caller then reported the phone contact to the Embassy Regional Security Officer (RSO).

The staff caller also informed the Acting Management Counselor about the phone call. The Acting Management Counselor called grievant at the hotel in [REDACTED] and informed him that there were rumors about Ms. [REDACTED] being with him in [REDACTED] Grievant denied that Ms. [REDACTED] was with him. Before the grievant and Ms. [REDACTED] returned to post, the FSN told grievant that she was withdrawing from the selection process for the position in grievant's office.

When grievant returned to post, he was informed by the RSO that he was immediately being placed on administrative leave, his security clearance was being suspended, and he could either request voluntary curtailment or the Ambassador would seek involuntary curtailment.

Grievant elected voluntary curtailment and left post June 3, 2008, transferring to a job in Washington. The Diplomatic Security Office investigated grievant's relationship with the FSN and a Report of Investigation (ROI) was issued on November 20, 2008.

On January 6, 2009, grievant received a letter proposing his suspension for seven days without pay. The letter detailed two charges: First, failure to report a contact with a criterion country national; and second, poor judgment as evidenced by his having selected for a position in his office the woman with whom he had a personal and a sexual relationship. The proposed suspension was sustained in a March 19, 2009 decision letter. Grievant filed a grievance with the Department regarding the suspension; that grievance was denied on August 13, 2009. Grievant filed a grievance appeal with this Board on August 27, 2009. After completion of discovery, grievant filed a supplemental submission, the Department responded and grievant submitted a final rebuttal on January 20, 2010. The ROP was closed on March 24, 2010.

III. POSITIONS OF THE PARTIES

GRIEVANT

██████ contends that the Department has not met its burden of proving the charges against him, and that the penalty is not reasonable and consistent with like offenses. Regarding the "failure to report" charge, he claims the ROI wrongly suggests that he ignored the training and security briefing he received pertaining to the reporting requirements applicable to contacts with a criterion country national. In his view, "the amount and variety of training subjects covered in a short period of time can be quite overwhelming. ...I cannot recall the training and briefing." He adds that he understands the severity of the charge and regrets any mistake he might have made.

He disputes how the hiring process is portrayed in the disciplinary proposal letter and claims that he did not display poor judgment -- the second charge. The hiring process was open and transparent; his staff was involved in the interviews of candidates and in ranking the best qualified candidates. He sought input from Ms. [REDACTED] supervisor to determine if she was the best qualified. Further, even though he had a personal relationship with Ms. [REDACTED] he claims that he could separate his personal from professional life. He avers that the decision to hire Ms. [REDACTED] was based solely on objective criteria and careful evaluation of the candidates' qualifications.

Grievant argues that some factors considered as aggravating should not have been. The proposal letter states that his security clearance was suspended. He argues that this is "absolutely false" and should not be considered. The fact that he and Ms. [REDACTED] were both married should not be considered as an aggravating factor. He did not know that Ms. [REDACTED] was married as she did not wear a ring. Further, "the state of my marriage and of Ms. [REDACTED] should be considered private and exempt from review by my place of employment. I do not believe that any regulation or authority allows this facet of my life to be considered when making an administrative determination."

Grievant also challenges the Department's analysis of most of the *Douglas* Factors. His summarized positions on each are:

- 1) **The nature and seriousness of the offense and its relationship to the employee's duties and responsibilities.** The grievant states in part "...that contrary to how HR/ER characterized the situation, the FSN was never hired for the position."

- 2) **Whether the offense was intentional or technical or inadvertent.** Grievant argues that he did not recall the contact reporting requirement regulations and did not intentionally violate them. “Once again, the FSN was not hired.”
- 3) **Whether the offense was committed for personal gain.** Part of grievant’s argument: “At the time I decided to hire Ms. [REDACTED] I had nothing to gain by hiring her. In fact, as the record bears out, I have only lost since making that decision.”
- 4) **Contacts with the public and prominence of the position.** Grievant claims that: “My ‘minimal public prominence’ cannot be used to support a seven–day suspension. The Department sets great store on the fact that I was the HRO at post and thus in charge of advising other section heads on personnel policies and hiring practices. Yet the Department provides no evidence that my position was negatively impacted by this situation and thus that the factor can be considered aggravating.”
- 5) **The employee’s past disciplinary record and work record.** Grievant argues that: “This should have been considered a mitigating factor and it was not. HR/ER acknowledges that I have no past disciplinary record. It fails, crucially, however, to cite to my strong EERs and accomplishments in the Foreign Service.”
- 6) **The consistency of the penalty with those imposed upon other employees for similar offenses and with the table of penalties.** Grievant believes his penalty is not consistent with penalties imposed for like offenses. His extensive discussion of comparison cases will be covered in a separate section.
- 7) **The notoriety of the offense or its impact upon the reputation of the Department of State.** Grievant claims: “It appears that because HR/ER conceded that there was no public notoriety in this case, this consideration should be a mitigating factor. I also do

not understand the relevance of my voluntary curtailment in terms of affecting the “reputation” of the Department. ... Thus, I submit that this factor was erroneously vetted.”¹

- 10) **The potential for the employee’s rehabilitation.** Grievant strongly disagrees with the Department’s treatment of this factor. He states: “I believe I have amply expressed my potential for rehabilitation. I have apologized, I have stressed my commitment to apprising myself of all security regulations and I have demonstrated excellent work performance since I have been back in Washington.”
- 11) **Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, harassment or bad faith, malice or provocation on the part of other(s) involved in the matter.** Grievant claims he has presented numerous mitigating factors in his grievance filings. He believes the Department erred in putting “none” under this factor.
- 12) **The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.** Again grievant takes issue with the Department’s responding “none” to this factor. “Without any sort of reasoned explanation, it can only be concluded that the deciding official failed to properly consider this factor.”

Grievant believes that the penalty imposed in his case is not consistent with penalties for like offenses as required by 3 FAM 4374. He points to previous FSGB cases where this Board has questioned the severity of penalties. He addresses the seven cases on the Case Comparison Worksheet where the penalties range from a Letter of Reprimand to a five-day suspension. Grievant claims that none of the seven cases contains the same charges sustained against him and

¹ Grievant made no reference to *Douglas* factors 8 and 9.

that there is absolutely no rationale for the Department's imposition of a seven-day suspension in his case. He points to Case No. 2006-052² where the penalty was only a five-day suspension for not only a charge of failure to report a relationship with an FSN but also spousal abuse and domestic violence. In Case Nos. 2007-028 and 2007-080, the charges included a relationship with an FSN and a lack of candor and both employees were suspended for only five days. Those cases contain facts "far more egregious" than in this case, yet the penalty imposed here is more severe. In Case No. 2005-129, there were numerous contacts/relationships with FSNs in a criterion country. Grievant had only one. In Case No. 2004-161, the employee lied about her relationship with an FSN when the two of them were involved in a vehicle accident resulting in the FSN's erroneously receiving workers compensation. Yet, this employee received only a three-day suspension. In FSGB Case No. 2003-045, the Board sustained a three-day suspension for a senior officer who had several relationships with FSNs – one of whom he hired as his secretary. Grievant also references Case No. 2003-188, where an RSO had a relationship with an FSN and failed to report the relationship. The RSO, who is reputedly held to a higher standard, received a one-day suspension. "To assert that a seven day suspension in my own case is reasonable in light of such a case ... does not meet the standards of reasonableness."

In further support of his argument that the Department has disregarded the FAM's requirement of similar penalties for like offenses, grievant cites several Board decisions. Specifically, "... in FSGB No. 2008-019, this Board has found that where individuals have engaged in far more serious conduct but received lesser or equal penalties than the grievant, the action proposed is not consistent with the precept of similar penalties for like offenses."

² These case numbers are the Department's references to its internal disciplinary case tracking system.

Grievant also cites FSGB Case No. 2008-045 “holding that the penalty imposed in that case indicated disparate treatment compared to other comparable cases, warranting mitigation in the penalty.”

Grievant points out that in this case, the FSN was never hired in his office. “Therefore, it is incorrect for the Case Comparison Worksheet to note ‘lack of transparency in hiring this employee.’” Another example of the Department’s mishandling of his case is the Case Comparison Worksheet which states he is charged with “failure to follow regulations” whereas the decision letter charges him with “Failure to Report Contacts with Criterion Country National.”

THE DEPARTMENT

The Department disputes grievant’s arguments that the Department has failed to meet its burden of proof. Grievant, through his own admissions in the ROI, has established that he had a relationship with the FSN, and that he failed to report the contact. He argues that the charge of poor judgment is without merit as he involved his staff in the hiring process for the clerk position. He claims that the process was open and transparent, and that he made the decision to select Ms. [REDACTED] for the position because she was the best qualified. However, in spite of grievant’s claims that the hiring process was open and transparent, his relationship with the FSN was not. “It is disingenuous of Grievant to claim openness or transparency in the hiring process when by his own admissions, he did not intend to tell his wife, his colleagues, his staff, the RSO, or anyone else at the Embassy about his relationship with Ms. [REDACTED]”

Grievant further argues that the FSN was never actually hired for the position. In the Department’s view, this argument overlooks the fact that he selected her, she would be in his direct chain of command, and if she had not withdrawn her name from the selection process, she

would have been hired. Grievant has stated in the record that if the FSN had not withdrawn he would have continued the hiring process.

Grievant had extensive training in human resources subjects and standards of ethical conduct, recruitment, counterintelligence and security, HR management, and related matters prior to entering the Foreign Service. His continuing arguments that the hiring process was transparent “underscore the lack of responsibility Grievant has taken for his actions but also highlights the glaring misperception Grievant has of his conduct.”

Grievant’s position that the hiring of Ms. [REDACTED] was not for personal gain “is unreasonable and belied by the facts.” The Department notes that grievant did not make the selection decision to hire Ms. [REDACTED] until after she agreed to meet him in [REDACTED] “The Department does not presume but rather submits based on Ms. [REDACTED] statements that this selection was made for personal gain, since Ms. [REDACTED] has admitted she accompanied Grievant to [REDACTED] because she felt she owed him something--in this case, sex and companionship--after being selected for the HR clerk position. Whether or not Grievant believes his review of Ms. [REDACTED] qualifications was objective, there is no denying the obvious appearance of impropriety inherent not only in his actions, but also in the timing of this sequence of events.”

Grievant’s repeated claims that the hiring process was transparent and that Ms. [REDACTED] was never hired “... not only splits hairs but also overlooks the fact that but for her request to withdraw her name, Ms. [REDACTED] would have been hired. ... These positions highlight Grievant’s poor judgment and lack of appreciation for the appearance of impropriety and violation of ethical standards created by engaging in this behavior while serving as the selecting official for this position.”

Further, the Department states "...there was a monetary cost and disruption associated with his return to Washington. He was unable to continue working at the Embassy and to provide the full range of services for which he was extensively trained and paid to perform. Grievant stated he had no intention of telling his wife about the affair, and has emphasized that his marital situation was inappropriately considered by the Department. To the contrary, Grievant's intent to conceal his conduct made him more susceptible to being blackmailed, which could have jeopardized the national security of the United States."

The Department disputes grievant's assertion that the seven-day penalty imposed was "unreasonable." While grievant claims that he received a seven-day suspension for failing to report a contact with an FSN, in fact his suspension was based on two charges: failure to report a contact and poor judgment. "These are critical omissions which not only illustrate Grievant's lack of responsibility in this case but which also serve to justify the reasonableness of the penalty that has been proposed."

Grievant cites FSGB Case No. 2003-045 as an example of why his penalty should be mitigated. The employee in that case had sexual relationships with two subordinates at one post and another relationship at a different post. The FSGB sustained the three-day penalty imposed. Grievant claims that in FSGB Case No. 2003-045 the employee's behavior was more egregious than his because there were multiple relationships. The Department argues that the relationships in FSGB Case No. 2003-045 did not involve criterion country FSNs and that senior management was not aware of these relationships until after the employee had left post – so there was no disruption to operations and no curtailment.

In Case No. 2003-188, an RSO received a one-day suspension for a relationship with an FSN. Grievant argues that if an RSO received only a one-day suspension, and RSOs are held to

a higher standard, then clearly grievant's seven-day suspension should be something less. The Department points out that the case grievant cites did not involve a criterion country FSN and there was no disruption of operations due to a curtailment.

The Department argues: "Grievant's poor judgment in having a sexual affair with a criterion country national could have had a negative impact on mission effectiveness, morale, and the reputation of the United States had it become even more publicly known than it already was. The Grievant himself cites the damage to his own career; namely, a curtailment from his Embassy, which resulted in his inability to perform his job, as well as the loss of an onward assignment in Paris. It is clear from these actions that the Department lost confidence in Grievant, and that his arguments to the contrary lack merit. Moreover, Grievant fails critically to recognize that Foreign Service officers are on duty 24 hours a day, seven days a week when serving overseas. It is not simply a matter of how well Grievant performs his job while in the workplace, but also how well Grievant represents himself and the United States while living and serving as a diplomat overseas, that complete the true and total assessment of work performance, leadership, and judgment."

IV. DISCUSSION AND FINDINGS

In grievance appeals challenging disciplinary actions, the Department has the burden of establishing, by a preponderance of the evidence, that the disciplinary action was justified. 22 CFR 905.2. In the instant grievance appeal, the Department must prove that [REDACTED] committed the offense; that the offense affected the efficiency of the Department's operations; and that the penalty is reasonable considering mitigating and aggravating factors and in comparison to other cases with similar offenses.

Upon review of the entire record, the Board finds that the Department has met its burden with respect to both charges: Failure to Report Contacts with Criterion Country National and Poor Judgment. We find that the Department has not met its burden of establishing that the penalty imposed was reasonable.

Charge 1: Failure to Report Contacts with Criterion Country National

Grievant admitted that he had a relationship with Ms. [REDACTED] and that he failed to report the contact in violation of 12 FAM 262.1(b).³ Grievant stated that he did not recall being informed of the contact regulations in the extensive training he received before being posted at the Embassy. Nor does he recall being briefed on the regulations when he first arrived at post. As a Foreign Service Officer assigned to a criterion country, and, more importantly, as a Human Resources Officer, there is no doubt that [REDACTED] should have been cognizant of these regulations. Based on grievant's own admission and the statements made by Ms. [REDACTED] the Department has met its burden of proving this charge. And, there is a clear nexus between grievant's misconduct and the efficiency of the Service. Grievant left post early under the circumstances, having served less than 18 months of his assignment. As a married officer who tried to conceal the relationship with Ms. [REDACTED] from his wife, grievant could have been blackmailed.

Charge 2: Poor Judgment

The Department claimed that grievant displayed poor judgment by selecting for a position in his office an FSN with whom he had a personal and a sexual relationship. Grievant argued that the selection process was open and transparent, and that the FSN selected was the

³ 12 FAM 262.1(b) states: "Employees must also report the initial contact with a national from a country with critical threat (counterintelligence) posts listed on the Department's Security Environment Threat List when that national attempts to establish recurring contact or seems to be actively seeking a close personal association, beyond professional or personal courtesies."

best qualified. Further, grievant claimed that he is able to keep his personal and professional lives separate; that his selection of the FSN was an objective decision; and most importantly, that the FSN was never hired, making the Department's charge moot.

The Board agrees with the Department that grievant exercised poor judgment in this case. We conclude that [REDACTED] engaged in actual wrongdoing in addition to creating an "appearance of impropriety" when he invited the FSN to accompany him to [REDACTED] at grievant's expense and engaged in a personal and sexual relationship with her while the FSN was being considered (and ultimately selected) for a position in the Human Resources Office he managed. It is inconceivable that a person with years of experience in the Human Resources field would not consider it improper to involve himself in a selection process in which a person with whom he had a personal and sexual relationship was a candidate. Grievant's contention that the hiring process was open and transparent is belied by the fact that he was engaged in a personal and sexual relationship with one of the candidates without revealing that relationship to anyone, including the two other members of his staff who served on the selection committee. Moreover, his statement that he can keep separate his personal and professional lives is a dangerous contention for a Human Resources Officer, who, more than most FSOs, must be acutely aware of even the appearance of impropriety. The Department has met its burden of proof on this charge.

V. THE PENALTY

Douglas Factors

We have reviewed grievant's arguments regarding the ten out of twelve *Douglas Factors* with which he takes issue. With the exception of Factor 6, we reject all of grievant's challenges to the Department's application of those *Douglas Factors*.

Factors 1 and 2 – The nature and seriousness of the offense and its relationship to the employee’s duties and responsibilities, and whether the offense was intentional or inadvertent. Grievant reiterates his argument here that the FSN was never hired. It is clear to this Board that grievant completely misses the point, and that, had Ms. [REDACTED] not withdrawn from the selection process, he would have hired her. The issue here is not only the appearance of impropriety. As an HRO whose primary duties directly relate to the integrity of merit principles in general and the selection process in particular, grievant knew or should have known how improper his conduct was in this case. Further, he selected Ms. [REDACTED] deliberately after having established a personal relationship with her – one that he chose to conceal rather than report as required.

Factor 3 – Whether the offense was committed for personal gain. Grievant states that he never did anything for personal gain and in fact lost a great deal as a result of his conduct. The Department disagrees, suggesting that grievant “gained” by facilitating his personal relationship with Ms. [REDACTED] even if not financially. In the Board’s view, even if the Department’s argument on this *Douglas* factor were rejected and we were to find the absence of personal gain to anyone, such determination would not be significant enough in the instant case to require a different outcome or compel the Department to reconsider its decision.

Factor 4 – Contacts with the public and prominence of the position. Grievant claims that his position as HRO has “minimal public prominence” and cannot be used to support a seven-day suspension. However, the Department conceded that grievant’s position is not publicly prominent and did not rely on this factor to support the length of his suspension. Rather, the Department merely noted that the HRO is important internally because he advises others within the Embassy on personnel and hiring practices.

Factor 5 – The employee’s past disciplinary and work record. Grievant claims that the absence of prior discipline and strong performance record as reflected in his EERs should have been considered as mitigating factors but were not. However, the Department did note that grievant had no prior disciplinary record between the time that he joined the agency in 2006 and the events of May 2008, and that he received a group meritorious award in December 2007. We have no basis for disputing the Deciding Official’s statement that she considered these matters in arriving at the level of discipline to impose in this case.

Factor 7 – The notoriety of the offense or its impact upon the reputation of the agency. Grievant claims that because the Department acknowledged there was no public notoriety in this case, it should have been considered a mitigating factor. However, the fact that knowledge of [REDACTED] conduct was confined within the Embassy and thus did not become an aggravating factor does not require the Department to consider it a factor in grievant’s favor when deciding upon the appropriate level of discipline. Not all *Douglas* factors must be considered either aggravating or mitigating. Depending upon the circumstances presented in a particular case, some of the listed factors simply may not apply.

Factor 10 – The potential for the employee’s rehabilitation. Grievant claims that he has “amply expressed my potential for rehabilitation”; apologized; committed to learning all the security regulations; and “demonstrated excellent work performance since I have been back in Washington.” Although we acknowledge that grievant has the right to defend himself with these arguments, they do not refute the Department’s determination that grievant “does not appear to accept responsibility for failing to report a personal relationship with an employee from a criterion country” or accept the inappropriateness of his plan to hire such person who would be under his direct supervision.

Factor 11 – Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, harassment or bad faith, malice or provocation on the part of others involved in the matter. Grievant asserts that he raised several mitigating factors for consideration, and that the deciding official improperly failed to address them by declaring that there were “none.” However, what grievant raised in mitigation – such as his marital problems, his good performance record, and his lack of experience with overseas postings – are not, in our view, mitigating factors in this case. Accordingly, we conclude that the Department did not act improperly by declaring that there were no cognizable mitigating circumstances under this *Douglas* factor.

Factor 12 -- The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. Grievant again argues that without a reasoned explanation, the Department’s response of “none” reflects that the deciding official failed to properly consider this factor. In our view, this factor does not require the deciding official to list other types of sanctions (reprimand, admonishment, etc.) that might have been taken in lieu of a suspension and explain why each is inadequate. Rather, the critical question is whether the sanction chosen is reasonable under the circumstances.

Accordingly, the Board finds that except for *Douglas* Factor 6 -- the consistency of the penalty with those imposed upon other employees for similar offenses and with the table of penalties -- grievant has not demonstrated that the listed factors were misapplied. We consider Factor 6 immediately below.

Comparison Cases

The requirement of similar penalties for like offenses is found in 3 FAM 4375 and in two other provisions related to the standards for determining the appropriate penalty. Specifically, 3 FAM 4324.3 (a) states:

Before proposing disciplinary action, the proposing official will review any prior similar cases within the agency, in order to foster equity and consistency in the imposition of discipline.

And 3 FAM 4374(1) provides in part:

The disciplinary action taken should be consistent with the precept of similar penalties for like offenses with mitigating or aggravating circumstances taken into consideration. The action taken should be fair and equitable; and if a penalty is warranted, it should be no more severe than sound judgment indicates is required to correct the situation and maintain discipline.

FSGB Case No. 2000-042 lends further clarification regarding penalties, quoting *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), in part as follows:

Lastly, it should be clear that the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. . . . The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. . . . However, when the appellant challenges the severity of the penalty . . . the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official.

Using the above as the standard for reviewing this record, we find that grievant's arguments regarding the cases on the Case Comparison Worksheet merit close scrutiny. In the first of the seven listed decisions, inaccurately described as "Case No. 2008" but apparently referring to FSGB Case No. 2005-129 (April 23, 2008), the employee received a five-day suspension for failure to report multiple relationships with criterion country nationals. In FSGB Case No. 2007 – 080 (January 2009), the employee received only a five-day suspension for

failure to report a contact with a criterion country national; failure to report in advance a personal trip to a critical threat post (criterion country); and lack of candor (this employee lied to the Ambassador, the Deputy Chief of Mission and the RSO regarding his travel). In FSGB Case No. 2004-161 (September 6, 2005), the penalty was mitigated from a 10-day suspension to a three-day suspension. The employee was charged with making false statements for the benefit of a fellow employee and for failing to report a relationship with an FSN. The employee, a married woman, was driving with the FSN when they had a vehicular accident. She claimed to have been attending a business conference to cover up her affair with the FSN. As a result, the FSN erroneously received workers compensation benefits for his medical expenses. In another decision, FSGB Case No. 2006-052 (February 7, 2007), involving a relationship with a criterion country FSN and spousal abuse, the employee was sent to Washington for a psychiatric evaluation and subsequently was curtailed from post. He received a five-day suspension.

Grievant also cites and relies upon FSGB Case No. 2003-045 (March 8, 2004), in which the Board sustained a three-day suspension for a senior Foreign Service Officer who had several relationships with FSNs and hired one as his secretary. The Department concedes that the two cases share some similarities, but claims that grievant's conduct here is more egregious. The Department argues that grievant had an affair with a criterion country national; the senior officer did not. In grievant's case, his misconduct was discovered while he was at post; the senior officer's misconduct was not discovered until after he left post and therefore was not as disruptive because no curtailment occurred. Grievant quotes from the Board's decision in FSGB Case No. 2003-045, at page 18, as follows:

We agree with the grievant's assessment that disclosure of his past behavior would damage his job performance and possibly his marriage and conclude that his fear, if it became known, might even cause him to be subject to blackmail, coercion or improper influence. In addition, it is clear that his behavior

jeopardized and possibly damaged the reputation, if not the careers, of at least two Foreign Service Nationals (FSN) at the embassy in []. The record shows that [] lied to DS investigators during an interview on February 25, 2003 when she denied having had sexual relations with grievant.

Grievant argues that based on this Board's findings in the above three-day suspension case, his seven-day suspension is "outside the bounds of reasonableness." We agree.

This Board has carefully considered the circumstances described in the decisions included on the Case Comparisons Worksheet and in others cited by grievant that do not appear on the list made available to the proposing and deciding officials in this case. With some variations from one case to another, we find that there are a number of recurrent factors that should lead to the imposition of predictably consistent penalties but in some instances do not. As an example, the primary violation in this case is failure to report a personal relationship with an FSN. A second aspect, and perhaps a more important one, is that the FSN is from a criterion country. There are other "add-on" aspects such as that the FSN was a subordinate; or that the employee involved lied about the relationship; or that the grievant intended to hire the FSN with whom he/she had a relationship. Having reviewed many cases related to the failure to report contacts with FSNs, including the cases presented on the Case Comparisons Worksheet, the Board finds several cases with more egregious behavior that resulted in lesser penalties, although some of the cases may not have involved FSNs in criterion countries. We agree that if a case involves a criterion country, the agency should have the discretion to impose a more severe penalty for failure to report such personal contacts. However, we find it difficult to reconcile why a three-day suspension would be appropriate for a senior officer who had multiple unreported relationships with FSNs, including one he hired, whereas the grievant in this case should incur a penalty more than twice as severe; or why an officer who had an unreported affair with an FSN, was also guilty of spousal abuse and was curtailed as a consequence, also received

only a three-day suspension as compared to the seven-day suspension imposed on this grievant who had one relationship and displayed poor judgment. The penalties should be more consistent with each other.

Such divergences in outcomes are not explained away by the Department's reliance on an "unofficial rule" whereby cases decided more than five years ago are deemed unworthy of comparison with the circumstances of the pending matter. In the first place, some of the inconsistencies noted here relate to decisions on the Case Comparisons Worksheet that are less than five years old. Secondly, the Department's unofficial rule on case comparisons is too limiting. 3 FAM 4324.3(a) states in part that "...the proposing official will review any prior similar cases...in order to foster equity and consistency...." There is no mention of a five year limitation on the cases which can be included in the case comparison exercise. To the contrary, the above-quoted FAM provision requires the official proposing discipline to review *any* prior similar cases. The Board appreciates the Department's concern regarding the labor-intensive research that may be necessary to find prior similar cases; however, its arbitrarily established unofficial time limit of five years necessarily results in like or similar cases being excluded from review by the proposing official and thus conflicts with published FAM requirements.

In summary, grievant's seven-day suspension exceeds the reasonableness standard and is not consistent with like or similar offenses. We mitigate the penalty to a five-day suspension.

VI. DECISION

The grievant's appeal is denied in part and sustained in part. The Department is directed to reduce the penalty to a five-day suspension, and is further ordered to submit to the Board a revised suspension letter within 30 days after receipt of this decision.