

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{ Grievant }
Grievant

Record of Proceeding
FSGB No. 2010-016

And

November 10, 2010

Department of State

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Alfred O. Haynes
Lois E. Hartman

Special Assistant:

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 to show, by a preponderance of the evidence, that the discipline it imposed on grievant for having violated the Mission Firearms Policy of his Post of assignment was justified. The grievance was denied.

OVERVIEW

Grievant is an experienced DS Special Agent who was assigned to a post that had a reputation for having a high rate of crime and ruthless violence resulting from drug trafficking and active drug cartel activity. A part of grievant's responsibilities was a requirement to respond to security incidents involving violence near the Consulate and to provide protection for American Citizens who resided in U.S. Government housing. Because of this responsibility, grievant was required to have a firearm and ammunition in his home.

During the course of his assignment, grievant's U.S. Government residence was burglarized and his weapon and some ammunition were stolen. Grievant's weapon was stored in an unlocked cabinet. An investigation was undertaken and, as a result of that investigation, the Department proposed to reprimand grievant for violation of the Mission Firearms Policy. The Mission Firearms Policy states that firearms must be stored, unlocked, out of reach, out of sight and under lock and key; the ammunition must be stored separate from the firearm and under lock and key.

Grievant admitted that he had stored his weapon in an unlocked cabinet. That, alone, was a violation of the Mission Firearms Policy.

In deciding this grievance, the Board cited a ruling from the Merit Systems Protection Board (MSPB) that described law enforcement officers as employees who "occupy positions of great trust and responsibility and must therefore conform to a higher standard of conduct than those who are not employed in the law enforcement field." This Board has often noted that DS Special Agents hold public trust positions. The potential for adverse impact to the efficiency of the Service is high and good judgment is imperative.

The Board agreed with the Department and denied the grievance.

DECISION

I. THE GRIEVANCE

{Grievant}, a member of the Foreign Service with the Department of State (Department), filed a grievance with the Department on February 16, 2010. He asserts that the Department's decision to issue a letter of reprimand to him for violation of the Mission Firearms Policy¹ is overly harsh, in light of the mitigating circumstances he has presented on his behalf. He asks that the reprimand be mitigated or rescinded. On April 29, the Department issued its decision denying the grievance, and on May 18, {Grievant} appealed that decision to the Foreign Service Grievance Board (FSGB).

II. BACKGROUND

Grievant is an FS-02 Diplomatic Security Officer. He has had a lengthy and rewarding career with the Department's Bureau of Diplomatic Security for more than 20 years. He had completed the Department's Job Search Program in the fall of 2009 and indicated that he was scheduled to retire on November 30, 2009. However, as of August 20, 2010, {Grievant} was an FS-02 officer in {post 1}.

¹ 3 FAM 2.8A-3 provides that a Regional Security Officer (RSO) assigned abroad shall secure his firearm in a safe storage location in accordance with the Chief of Mission's firearms policy. Section XX D of the U.S. Embassy Mexico Firearms Policy states that any SPE (firearm) stored in an official residence must be stored, unloaded, under lock and key and separate from the ammunition.

At the time of this incident, grievant was serving as the Regional Security Officer (RSO) at the U.S. Consulate in {post 2}, having arrived there and assumed the position as the first Regional Security Officer (RSO) in {post 2} on September 10, 2007.

The U.S. Mexican border is a violent place. {post 2} has the highest rate for crime and ruthless violence occurring from drugs and illicit drug cartel members. Many of the drug cartel members lived in the same neighborhood as the Consulate American Citizens (AMCIT). As the RSO, grievant had to respond to security incidents involving violence near the Consulate or Consulate AMCITs. This required grievant to have a firearm at his residence as well as have one at the Consulate.

The matter giving rise to this grievance occurred on May 27, 2009. On that date, grievant's U.S. Government residence was burglarized. On May 28, grievant reported this matter to the Diplomatic Security Command Center. On May 29, DS assigned a Special Agent to investigate the matter.

On June 18, the Investigation ended and a Report of Investigation (ROI) was completed. The synopsis of the ROI included the following:

On 28 May 2009, US Consulate {post 2} {Grievant} . . . reported that his DS-issued pistol . . . was stolen during a residential break-in at his U.S. Government residence in {post 2}. According to [grievant] the pistol was not stored in a

locked container but had a trigger lock attached. This is not in accordance with the U.S. Embassy Mexico Firearms Policy for storing a firearm in an official residence. Based on his statement, [grievant] was in compliance with DS policy for securing firearms with a trigger lock attached at a DSS Special Agent residence but may not be in compliance with DS policy requiring adherence to the Chief of Mission's Firearms Policy abroad.

Included as an attachment to the ROI (Attachment A) was a formal cable ({post 2} 118) prepared by grievant, reporting the theft. In paragraph 6 of that cable, grievant stated that his "DS-issued pistol was stored in a night stand that also contained three magazines of ammunition for the pistol." A copy of the ROI was forwarded to the Director, Office of Employee Relations, Bureau of Human Resources (HR/ER).

On August 25, HR/ER sent a letter to grievant informing him that it was proposing to reprimand him for violation of the Mission Firearms Policy of the U.S. Embassy Mexico. The letter included the following charge:

Charge: Violation of the Mission Firearms Policy:

Your U.S. Government residence in {post 2} was burglarized on May 27, 2009. Among the items stolen were your DS-issued Sig Sauer P228 pistol and three magazines of ammunition. A trigger lock was attached to the pistol; the firearm and ammunition had been stored in your unlocked night stand. You violated the policy by failing to store your firearm and ammunition separately, out of reach and under lock and key.

On November 13, grievant sent his response to HR/ER's proposed disciplinary action. Included in that response was the following statement made by grievant:

Extra ammunition was kept in a separate location. While I initially believed this ammunition to have been taken in the burglary, I subsequently discovered that it had not been. I immediately contacted the Procuraduria General de Justicia (Sonora State Prosecutor's Office) with this information. Licenciado (Attorney) Miguel Rios then provided a second report (attached) that did not include the ammunition as a stolen item.

On January 15, 2010, the Department informed grievant that it had decided to sustain the proposed charge of Violation of the Mission Firearms Policy. In that letter to grievant, the Department made the following statements, in part:

In your written response . . . [you] acknowledged that your DS issued weapon was stolen when your residence was burglarized in May 2009 but that although you initially thought that your extra ammunition had also been taken, you subsequently discovered that it had not. When notified to that effect, the Sonora State Prosecutor's office provided another report of the burglary (Report). You submitted that Report as part of your written report.

. . .

The Report you submitted in November 2009, for which you were the source of information, states that, at the time of the burglary, your firearm was loaded with one magazine holding 14 rounds of ammunition. Regardless of whether a trigger lock satisfies the Policy's

requirement that the weapon be kept under lock and key, the storage of a loaded pistol violated Section XX, paragraphs C and D of the Policy.

On February 16, 2010, {Grievant} filed his grievance with the Department, asking that the letter of reprimand be mitigated or rescinded. He also asked for interim relief from issuing the letter of reprimand, pending the outcome of his grievance. On April 29, the Department issued its decision, denying the grievance and on May 18, {Grievant} appealed that decision to the FSGB. In that appeal, {Grievant} asked for a continuation of interim relief from the issuance of the letter of reprimand.

On May 24, the FSGB acknowledged receipt of {Grievant}'s grievance, assigning the case as FSGB Case No. 2010-016. In that letter the FSGB granted {Grievant}'s request for interim relief until May 17, 2011 or until a decision is reached, whichever comes first.

On June 17, grievant filed his First Discovery Request. On July 6, the Department responded to grievant's First Discovery Request and on August 29, grievant filed his Supplemental Submission. On August 31, the Department submitted its response to grievant's Supplemental Submission.

On September 2, AFSA, on behalf of grievant, informed the Board that grievant would not be replying to the Department's Response to his Supplemental Submission and asked that the Record be closed.

Following a meeting of the Panel, on September 30, 2010, the Board informed the parties that the Record of Proceedings was closed.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant acknowledged that the Mission Firearms Policy for Mexico provided that “Firearms must be stored unloaded, out of reach, out of sight and under lock and key; and ammunition must be stored separate from the firearm and under lock and key.” He claims that the firearm was unloaded with a trigger lock in place, and that the ammunition was stored in a separate location.

Grievant initially believed that the ammunition was taken in the theft; however, he later learned that it was not a part of the initial burglary. He informed the authorities and they provided a second report, excluding the ammunition as being a part of the theft.

Grievant acknowledges that he violated that part of the policy that calls for weapons and ammunition to be stored, separately, under lock and key. He asserts that, from the outset, he had no way of storing the firearm under lock and key and did not know that the Embassy in Mexico City had pouched a weapon safe to his post, which had arrived before the burglary occurred. He believed that, by using the Department’s trigger lock, he was

in compliance with that part of the policy requiring firearms to be stored under lock and key. He concedes that he violated the policy regarding separate storage of ammunition under lock and key.

Grievant believes that the deciding official erred in not taking into account the high crime and violence rate in {post 2} and the need for him to have the weapon at his home for protection. He noted that the deciding official did not recognize any mitigating factors, such as unusual job tensions, under item 11 of the *Douglas* Factor's Work Sheet. In sum, grievant considers that, in light of these mitigating factors, his penalty be mitigated from a reprimand to an admonishment.

THE DEPARTMENT

The Department rejects grievant's presentations in this case. It concludes that grievant's violation of the Mission Firearms Policy was based on his failure to store his firearm and ammunition separately, out of reach and under lock and key. The Department also rejects grievant's notion that the Deciding Official failed to consider his perceived mitigating claims regarding the trigger lock, his lack of a storage container and the high crime rate situation in {post 2}. The Department relies on its April 29, 2010 final decision letter in which it cited the following statement made by the Deciding Official:

The Report you submitted in November 2009, for which you were the source of the information, states that, at the time of the burglary, your firearm was loaded with one magazine holding 14 rounds of ammunition. Regardless of whether a trigger lock and key satisfies the Policy's requirement that the weapon be kept under lock and key, the storage of a loaded pistol violated Section XX, paragraph C and D of the policy.

The Department notes that, while grievant now claims that his firearm was unloaded, the Sonora Report, for which he was the source of the information provided, indicated that his Special Protective Equipment had its magazine installed, loaded with 14 rounds of live ammunition with one additional round in the chamber.

The Department concludes that it stands by the contents of its April 29, 2010 final agency decision letter, that law enforcement officers are to be held at a higher standard of conduct and their actions must be beyond reproach. The Department relies on a finding by the Merit Systems Protection Board that law enforcement officers "occupy positions of great trust and responsibility and must therefore conform to a higher standard of conduct than those who are not employed in the law enforcement field."² It also cited another case from the FSGB³ where the FSGB found that "DS special agents hold public trust positions where the potential for adverse

² *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 79 (1987); 1987 MSPB Lexis 1527, quoting *Hickman v. Department of Justice*, 11 M.S.P.R. 153, 156 (1982).

³ FSGB Case No. 2006-037 (September 28, 2007)

impact to the integrity and efficiency of the service is high or moderate and where good judgment is paramount.”

IV. DISCUSSION AND FINDINGS

This is a disciplinary case. In grievances over disciplinary matters, the agency has the burden of establishing, by a preponderance of the evidence, that the disciplinary action was justified.⁴

This case involves a decision by the Department to issue a letter of reprimand to grievant for violation of the Mission Firearms Policy. The Mission Firearms Policy states:

Firearms must be stored, unloaded, out of reach, out of sight and under lock and key; the ammunition must be stored separate from the firearm and under lock and key.

Grievant acknowledges that he kept his weapon in an unlocked cabinet. He also admits that he stored his ammunition, separate, but it was not under lock and key, as required by the Mission’s Firearms Policy. He argues that he did have a trigger lock on the weapon, which, he thought would meet the requirement of having the weapon under lock and key.

While acknowledging the above, grievant’s remaining argument is his contention that the Deciding Official erred by not taking into consideration the high crime/violence rate in {post 2}, and the fact that he had the weapon

⁴ 22 CFR 905.2

at home so that he could protect himself and others who lived in his neighborhood, and that he did not have a weapon safe. Grievant asks this Board to mitigate the reprimand to an admonishment.

The Department rejects grievant's charge that the Deciding Official failed to consider the mitigating factors regarding the trigger lock, the lack of storage container, and the high crime rate in {post 2}. Grievant is being disciplined because he violated the Missions Firearms Policy. Law enforcement officers, such as grievant, do occupy positions of great trust and responsibility. They are required by that position to conform to a higher standard of conduct than those who are not employed in the law enforcement field.

We agree with the Department regarding this matter. Grievant is a law enforcement officer with more than 20 years in the Service. As such, grievant is to be held to the highest standards of conduct. His actions must be beyond reproach and in strict compliance with Department's rules and regulations. This is particularly true where agents are responsible for the handling and caring of firearms.

This Board has often held that DS Special Agents hold public trust positions. The potential for adverse impact to the integrity and efficiency of

the Service is high and exercising good judgment is of the utmost importance.

While grievant could not control the theft that occurred, as an experienced law enforcement officer and, having served for almost two years in {post 2}, he knew or should have known the requirements of the Mission Firearm Policy, and should not have stored his firearm and ammunition in an unlocked cabinet. He also knew or should have appreciated the heightened potential for a break-in at his residence that might lead to the theft of his loaded weapon. In fact, in his submission of May 18, 2010, Mr. {Grievant} makes note of the high “crime and ruthless violence” of {post 2} and the area around the consulate neighborhood.

Throughout this record, {Grievant} has argued that he was never provided any specific instruction or container to store his weapon at home. Thus, in his view, the use of a trigger lock fulfilled the requirement of the weapon being “stored under lock and key.”

However, the Deputy Regional Security Officer (DRSO) in Mexico City recalled that the RSO in Mexico City purchased and shipped safes to all RSOs in Mexico prior to the burglary at grievant’s home. Had grievant demonstrated some concern over the manner in which he was storing his weapon, he could have asked the post to remind him when the safe arrived.

In a supplemental submission, dated August 20, 2010, {Grievant} acknowledges that the Embassy in Mexico City had pouched a weapon safe to the post for his use at his home. The safe had arrived at the Consulate in advance of the burglary at grievant's home and was available and placed in the Consulate's pouch room. He states that he was not aware that the safe was available, but would have used it if he had known of that fact.

In sum, while grievant expressed deep regret for this incident, he was and is an experienced Diplomatic Security Officer. He knew that he was in a dangerous area and should have taken the precautions necessary to protect his weapon and ammunition in the manner required by the Mission Firearms Policy. The penalty imposed by the Department in this case – a Letter of Reprimand – is the mildest form of formal discipline. There was no showing that this discipline was unreasonable or inappropriately severe. Accordingly, and on the basis of the foregoing, this Board finds that the Department has met its burden to show that the discipline being imposed is justified.

V. DECISION

The grievance appeal is denied.