BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted] Grievant	Record of Proceedings FSGB Case No. 2010-051
And	September 22, 2011
Department of State	EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	Susan R. Winfield
Board Members:	Lois E. Hartman Gail M. Lecce
Special Assistant	Joseph Pastic

Representative for the Grievant:	*Pro se*
Representative for the Department/Agency:	Melinda Chandler Director Grievance Staff
Employee Exclusive Representative:	American Foreign Service Association

OVERVIEW

HELD: The Department did not carry its burden of proof to show that the sexual banter and physical conduct engaged in by grievant with a Locally Employed Staff (LES) junior employee were unwelcome and non-consensual. The grievance appeal was sustained.

SUMMARY

Grievant, a supervisory American officer in the Embassy in [redacted] was charged with Improper Personal Conduct on the basis of his conduct on three separate occasions with a female probationary LES employee. On the first occasion, grievant entered the junior colleague's hotel room while they were on TDY and engaged in sexual banter and limited, clothed physical contact of a sexual nature. The next morning, grievant and the colleague went to the beach together before departing, and grievant made the statement, "What happens in [redacted] stays in [redacted] On the third occasion, the female colleague was acting as grievant's expediter at the airport and grievant once again made comments to her of a sexual nature. The LES employee recorded parts of both the conversation in her hotel room and at the airport.

Grievant did not dispute the basic facts of the case. However, he contended that the female colleague invited him into her room and initiated the sexual banter and that both the conversation and physical contact were consensual. He claimed that his statement at the beach was not meant to be threatening, but rather was said jokingly and to reassure the woman that he intended to be discreet. Further, grievant claimed that he made the sexual remarks at the airport only because he thought, based on her earlier actions, that the female colleague was pursuing a relationship with him.

In its later submissions, the Department contended that grievant was charged with Improper Personal Conduct on the basis of what he said and did, as proven by the voice recordings, regardless of the context in which such actions took place. The Board found, however, that both the letter sustaining the charge as well as the decision letter in the agency-level grievance demonstrated that the Department not only credited the female colleague's allegations that grievant's behavior was unwelcome and non-consensual, but disciplined grievant on that basis.

The Board found that the female's actions in the hotel room, at the beach, and at the airport, as well as her statements on the voice recordings, were not consistent with her claims that she was intimidated and afraid of grievant. The Board also found that the Department did not attempt to resolve discrepancies between the parties that could have either undermined or supported its conclusion that the female colleague was more credible. The Board concluded, therefore, that the Department did not carry its burden of proving that the sexual banter and physical contact were unwelcome and non-consensual, which were essential elements of the charge as brought by the Department. Furthermore, although grievant was a married man, he informed his wife of the conduct with which he was charged, mitigating the possibility of blackmail, which had been considered an aggravating factor. The Board sustained the grievance appeal and overturned the

disciplinary action.

DECISION

I. THE GRIEVANCE

[redacted] an FS-04 Foreign Service Officer with the Department of State, contests a 5-day suspension arising from a charge of Improper Personal Conduct. Grievant contends that there are factual inaccuracies in the specifications of the charge and that the penalty is too severe. He also challenges the use of voice recordings that were used, in part, to sustain the charge.

II. BACKGROUND

The incidents on which the charge was based occurred in [redacted] and [redacted] in February 2010. At that time, grievant was one of three GSOs in the embassy in [redacted] On February 4, 2010, grievant traveled with two colleagues, [redacted] and [redacted] [1] to [redacted] for a tour of the port facilities. [redacted] was a Locally Engaged Staff member (LES) who worked in the Customs and Shipping section of the GSO office in the embassy. She was a probationary employee with less than one year of employment in the embassy.

After they had finished their work on Friday, February 5, the three colleagues had dinner in their hotel and then went to a club. All three had drinks at the club. They played pool and [redacted] and grievant danced together. They returned to the hotel at approximately 2 am. [redacted] went to his room, which was in a different part of the hotel, and [redacted] and grievant took the stairs to their rooms, which were on the 2nd and 3rd floors. At this point, the stories of [redacted] and grievant differ. Grievant

[1] [redacted] is also referred to in various documents in the ROP as [redacted]

contends that [redacted] invited him into her room to watch TV; [redacted] alleges that grievant entered her room uninvited. A conversation of a sexual nature took place, as did a limited amount of clothed, physical contact of a sexual nature. [redacted] recorded parts of the conversation with grievant on her cell phone. At approximately 3:30 a.m., grievant left and went to his own room.

The next morning, the three checked out of the hotel. [redacted] left to visit a relative in [redacted] prior to going to the airport, while grievant and [redacted] went to the beach together for approximately 1½ hours. Again, grievant and [redacted] provide different versions of what happened at the beach, but both agree that during that time, grievant said: "What happens in [redacted] stays in [redacted] Afterwards, grievant and [redacted] purchased mangoes for their colleagues in [redacted] and the three coworkers proceeded to the airport for their return to [redacted]

On Monday, February 8, [redacted] learned that her brother had been killed. She was out of the office from February 8th until the 15th. When she returned, grievant sent her two text messages, one of which said, "Okay?" and a second that said, "Need mangoes?" [redacted] responded to the first message with "??" but did not respond to the second message.

No further contact took place between the two until the evening of February 23. Grievant was on his way to the airport to leave for a TDY[2] when, at approximately 7 p.m., he received a text message from [redacted] saying that she was going to act as his expediter,[3] even though grievant had not requested one. [redacted] supervisor, [redacted]

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[2] Temporary Duty.
[3] An "expediter" assists travelers to and from the embassy through airport administrative procedures, such as customs.

[redacted] testified that [redacted] the head GSO, had asked [redacted] to assist grievant if she had time after she finished her primary duties, since she was going to be at the airport expediting others. Grievant and [redacted] engaged in another conversation of a sexual nature at the airport and [redacted] again recorded portions of it on her cell phone.

Immediately afterwards, [redacted] told [redacted] an Assistant Regional Security Officer (ARSO) who was a friend of hers, what happened in [redacted] and at the airport. [redacted] advised her to report the incidents to her supervisor, which she did the next day. [redacted] then referred the matter to a LES/EEO[4] counselor, [redacted] The same day, [redacted] and [redacted] went to see [redacted] who was [redacted] second line supervisor and [redacted] direct supervisor, as well as an EEO counselor. [redacted] told [redacted] that she believed she might have a conflict since she supervised both employees and that she would have to think about it over the weekend. On the following Monday, [redacted] asked [redacted] if she would be comfortable working with a different EEO counselor, [redacted] instead. [redacted] agreed. [redacted] thereafter initiated an EEO investigation.

When grievant returned from his TDY trip, [redacted] and Human Resources Officer [redacted] advised him of the allegations that had been made against him. The Office of Diplomatic Security (DS) and the Office of Civil Rights (S/OCR) conducted joint investigations, with most of the work done by two ARSOs from the embassy, Special Agents [redacted] and [redacted] The investigations were concluded on May 12,

[4] Equal Employment Opportunity

2010 and April 19, 2010 respectively and were sent to the Department's Office of Human Resources (HR) for possible disciplinary action.

On June 8, 2010, the Department sent grievant a letter advising him that it proposed to suspend him for 20 days on the basis of two charges: Improper Personal Conduct and Lack of Candor. There were five specifications under the first charge: 1) inappropriate sexual comments made in the hotel room while grievant and [redacted] were in [redacted] 2) inappropriate and unwelcome physical contact between the two in the hotel room; 3) making the statement: "What happens in [redacted] stays in [redacted] 4) sending the text message on February 19 stating, "need mangoes;" and 5) inappropriate sexual comments and advances at the airport on February 23, 2010. The Lack of Candor charge against grievant was based upon his denial that he made certain statements to [redacted] in the hotel room; his claim that he did not recall making certain statements to her; his assertion that the sexual contact with [redacted] was consensual; and his denial that his supervisor, [redacted] had given him details about the cell phone recordings. An aggravating factor that the Department considered was grievant's lack of sensitivity to his position as a supervisor in the same office as [redacted] and her vulnerability to unwelcome advances as a [redacted] woman and probationary employee. A second aggravating factor was grievant's vulnerability to blackmail as a married man.

In a letter dated August 24, 2010, the Deciding Official sustained four specifications of Charge 1 (1-3 and 5). He did not sustain the fourth specification under Charge 1 ("Need mangoes" text) or any of the specifications under Charge 2 (Lack of Candor). The Deciding Official repeated the aggravating factors that had been included

in the proposal letter, but also cited grievant's lack of prior discipline and satisfactory work history as mitigating factors. The penalty was reduced to a five-day suspension.

Grievant contested the discipline in an agency-level grievance filed on September 17, 2010. The Department issued its decision letter on December 10, 2010 denying the grievance in its entirety. Grievant filed an appeal with this Board on December 22, 2010. On July 20, 2011, the panel requested that the parties submit copies of the Records of Investigation (ROIs) that had been prepared by DS and OCR and that were relied upon by the Deciding Official in making his determinations. On July 27, 2011, the panel further requested that the parties provide copies of the cell phone recordings and transcripts of those recordings that were attachments to the ROIs, but that had not been included with the ROI submissions because of objections from the grievant. When requesting these recordings and transcripts, the panel advised the parties that it recognized the limitations of the recordings, including: the fact that they did not include the entire conversations between [redacted] and grievant; that [redacted] had made a compact disc (CD) of the recordings rather than provide the actual cell phone containing the original recordings to the investigators; and that grievant raised several objections to their being admissible. The record was closed on August 18, 2011.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

The Department contends that grievant made inappropriate sexual comments to [redacted] on two occasions and engaged in unwelcome sexual contact on the first of those occasions. It argues that even if grievant perceived the conversations and contact to be consensual, as a more senior American supervisory officer, he should have understood

that [redacted], a [redacted] woman and a probationary employee, would feel threatened and vulnerable to his advances. Additionally, as a married man, grievant's behavior exposed him to potential blackmail. The Department notes that grievant admitted that his behavior reflected bad judgment on his part, in essence admitting to the charge. The Department contends that [redacted] assertions are fully supported by the recordings of the conversations that she made on her cell phone. The Department further asserts that the proposed discipline is reasonable under the circumstances and promotes the efficiency of the Service.

B. GRIEVANT

Grievant admits making sexual comments in the conversations he had with [redacted] in her hotel room in [redacted] and at the airport, as well as having limited sexual contact with her in the hotel room. However, he portrays a very different context from that described by [redacted]. Grievant contends that [redacted] was flirting with him at the club and that as he was headed to his own room when they returned to the hotel, she invited him into her room to watch television. He states that he assumed that was all they would do. He further contends that after a period of general conversation, [redacted] turned the conversation to sexual topics and began to ask him questions of an explicit sexual nature. According to grievant, it was at that point that he joined in the conversation. He states that all physical contact, which both agree lasted less than five minutes, was strictly consensual. He argues that [redacted] did not give him any indication that the conversation and contact were anything other than consensual, or that they were unwelcome, or made her uncomfortable. To the contrary, he understood that she was initiating and pursuing a sexual encounter with him.

According to grievant, the next day the three colleagues had breakfast together during which time, there was again no indication that [redacted] was uncomfortable. Indeed, he notes that she agreed to accompany him to the beach for approximately one and one-half hours before they departed [redacted] Grievant argues that if his conversation or physical contact with [redacted] had been unwelcome, she would not have gone to the beach with him the next morning. Moreover, grievant contends that while they were at the beach, she sat in his lap and made both physical and verbal sexual advances toward him. He acknowledges that he said, "What happens in [redacted] stays in [redacted] but contends he did not mean the statement as a threat. Rather, he claims he was speaking somewhat jokingly and was asking for and providing what he considered an assurance of discretion regarding the events of the night before.

Grievant also acknowledges making sexually provocative statements to [redacted] at the airport, but he claims that, again, the statements were within the context of the events that took place in [redacted] He states that he did not ask for an expediter and was surprised when [redacted] sent him a text message while he was en route to the airport around 7 p.m., saying she would be assisting him at the airport. When he made the sexual comments that she recorded, he thought that he was following up on [redacted] desire to pursue a relationship with him, as manifested by her actions in [redacted] He also stated that she acted strangely at the airport, sometimes speaking loudly and sometimes softly. Finally, grievant asks why, if she was uncomfortable, [redacted] stayed with him at the airport after he cleared customs, which was not the usual practice. She could have left at any time, but chose not to.

Grievant also challenges the use of [redacted] cell phone recordings to support the discipline. He argues that the recordings were not the originals, but rather a CD which [redacted] made to give to the investigators. He states that she could have manipulated the evidence in doing so. Moreover, [redacted] recorded only those statements that could be used to make him look bad. According to grievant, [redacted] did not record her invitation to him to come into her room or other statements made by her, either in the hotel room or at the beach that would have established that she, in fact, initiated the conversations which were consensual in nature.

Finally, grievant questions the role that ARSO [redacted] may have played in [redacted] complaint against him. [redacted] and [redacted] were very close friends who spoke frequently, as evidenced by the phone records produced in discovery. Grievant believes that [redacted] may have "coached" [redacted], particularly in recording the airport conversation.

IV. DISCUSSION AND FINDINGS

Because this is a disciplinary action, the Department has the burden of establishing, by a preponderance of the evidence, that the discipline is justified. 22 CFR § 905.2 In order to carry its burden, the Department must first show that the grievant committed the actions with which he is charged; that there is a nexus between those acts and the efficiency of the service; and that the penalty imposed is proportionate to the offense(s) and consistent with penalties imposed for similar offenses.

Objection to Voice Recordings

Before turning to the merits of the case, we first address grievant's objection to consideration of the voice recordings by the proposing and deciding officials and their

introduction into the record of these proceedings. Grievant argues that the recordings are inadmissible under the Federal Rules of Evidence and therefore should be inadmissible in these proceedings as well; that they capture only selective portions of the conversation between himself and [redacted] that misrepresent the conversation as a whole as well as the context; and that because the recordings were provided via a CD prepared by [redacted] and not by submission of the original cell phone tapes, the recordings could have been altered.

In the agency-level grievance decision, the Department concluded that the Federal Rules of Evidence do not control the introduction and consideration of evidence in these proceedings. The proposing and deciding officials were permitted to consider the recordings and give them the weight they believed they merited, taking into consideration grievant's objections. In fact, the Deciding Official recognized grievant's objections in the final disciplinary letter, stating:

> I have also listened to the voice recordings, but have taken into account the fact that these recordings capture only a portion of your conversations with [redacted] and may have omitted some of [redacted] remarks.

The Board agrees with the Department that although we use the Federal Rules of Evidence as guidance, we are not bound by them. Moreover, grievant has listened to the recordings and acknowledges that they are, in fact, recordings of portions of conversations he had with [redacted]. Thus, his claim that the recordings have not been authenticated and are not admissible is undermined by his own acknowledgement that the voices on the recordings are his and hers. We also acknowledge the shortcoming of the recordings that grievant has raised and, as discussed further below, have taken those shortcomings into account in reaching our decision. However, given that the voice

recordings are important evidence in this case, the Board determined that it was necessary that they be included in the record and reviewed in order to make an informed and fair decision.

Nature of the Charge

Many of the facts of this case are not in dispute. Both grievant and the Department agree that grievant and [redacted] were together in her hotel room in [redacted] and that they participated in a conversation of a sexual nature. The recordings made by [redacted] confirm these facts. Nor is there any dispute that grievant made remarks of a sexual nature to [redacted] at the airport. These facts, too, are confirmed by the recordings made by [redacted]

However, there are many other facts surrounding these conversations that are in dispute. Grievant contends that the conversations and physical contact were consensual; that, in fact, [redacted] invited him into her hotel room; that she initiated the sexual conversation with explicit questions and comments to him. The Department accepted [redacted] version of the facts: that grievant entered her room uninvited; that he constantly turned the conversation to sexual issues despite her attempts to deflect those comments; that he forced himself on her physically; that she was uncomfortable with him in her room; that to the extent that she participated in the sexual banter, she did so because she was afraid that grievant had power over her job security and she was physically afraid of grievant; and that several times she tried, unsuccessfully, to get grievant to leave her room. The Department asserts that at the airport [redacted] repeatedly tried to turn the conversation away from personal and sexual issues, but grievant kept returning to them.

In its later submissions, the Department argues that whether grievant was invited into [redacted] hotel room; whether the sexual banter in the hotel room and airport were consensual; and what conversation took place that was not recorded, are not relevant. Grievant was charged with Improper Personal Conduct on the basis of what *he* said and did, as proven by the voice recordings. Regardless of the context in which his actions took place, the Department contends that as a senior American supervisor in the same office as [redacted] as someone who occasionally supervised her and should have known he would be perceived to be a threat to her, and as a married man, grievant's actions constituted Improper Personal Conduct.

The August 24, 2010 letter sustaining the charge of Improper Personal Conduct, with four specifications, however, does not support this assertion. It is clear from this letter that the Deciding Official sustained the charges and arrived at the penalty imposed based on his determination that [redacted] version of events was more credible.

The description of specification 1 begins with the Deciding Official adopting the version of the events given by [redacted]

> . . . After dinner on February 5, you and your colleagues went out for drinks. According to [redacted] March 18, 2010 sworn affidavit, when you returned to the [redacted] in the early hours of February 6, instead of going to your room, you went to [redacted] room, although she did not invite you to do so. You proceeded to sit on [redacted] bed, and to speak to her about her appearance, and to make comments of a sexual nature.

Specification 1 then quotes grievant extensively from the recordings. [redacted] side of the conversation is paraphrased, but not quoted. No other context is presented. Although grievant's contention that he was invited into [redacted] room is cited toward the end of the specification, the Deciding Official concludes by stating that

grievant exercised poor judgment by ". . . putting her in a position where she was concerned about the repercussions on her career of rejecting your sexual advances," essentially dismissing grievant's claim that [redacted] invited him into her room and that the banter was initiated by [redacted] and was consensual.

Specification 2 begins with the statement, "In the hotel room in [redacted] you also touched [redacted] inappropriately and made unwelcome advances." The specification then goes on to recount in detail [redacted] version of the nature of the physical contact. According to [redacted] as credited by the Department, grievant rolled over on top of her, pinning her down on her bed, and began rubbing himself against her in a sexual manner. Again, at the end of the specification, the Deciding Official recognizes grievant's contention that the physical contact was consensual; however, he concludes by stating, "Even if you perceived the contact to be consensual, it was inappropriate for the reasons stated above." The Deciding Official acknowledges that grievant may have *perceived* that the actions were consensual, but not that they actually *could have been* consensual, again essentially accepting [redacted] version of events.

(Specification 3 is different in nature and will be treated separately below. Specification 4 was not sustained in the final decision letter.)

The introduction of Specification 5 again recounts [redacted] version of events:

> On February 23, 2010, [redacted] was instructed by her supervisor to assist (expedite) your departure at the airport that evening. During the time at the airport, you continued to make inappropriate comments of a sexual nature to [redacted]. According to [redacted] sworn March 18 affidavit and the recording, you asked her if she was a 'troublemaker'

> (V0004 0:20). Because of what happened in [redacted] [redacted] again recorded your conversations at the airport.

The specification then extensively quotes grievant from the recordings, paraphrasing [redacted] side of the conversation. At the conclusion, the Deciding Official again acknowledges grievant's contention that, '[redacted] willingly engaged in the conversation, initiated some leading questions, and could have left the airport sooner had she wanted." However, it does not appear that the Deciding Official carefully considered whether grievant's contentions were credible. Instead, he concluded earlier in the specification that, '[redacted] was intimidated by this repeated insistence that she invite you to her house, and your inappropriate comments," and "Throughout the wait at the airport, you continuously turned the conversation to sexually-oriented comments and requests for sexual favors." Although the Deciding Official cites grievant's explanations, he clearly credits [redacted] claims that the airport conversation was uninvited, non-consensual, and intimidating to her.

The Deciding Official's determinations regarding aggravating factors further support the conclusion that grievant was disciplined for unwelcome, non-consensual behavior towards [redacted] that he initiated and continued to pursue despite her repeated efforts to rebuff him and that his assertions to the contrary were not deemed credible. The Deciding Official stated:

> You breached that standard when you made repeated sexual advances to [redacted], particularly after she had rebuffed you.
> You should have shown more sensitivity to the position that you put [redacted] in by repeatedly pursuing her.
> She was intimidated by your repeated sexual advances.
> Fortunately for both you personally and the security interests of the United States, [redacted] recorded your conversations for the purpose of defending her employment at the embassy, rather than pursuing blackmail against you.

Additionally, when he discussed aggravating factors, the Deciding Official encouraged grievant to familiarize himself with the Department's Anti-Sexual Harassment Policy. As quoted by the Deciding Official, that policy proscribes "unwelcome" actions, but not consensual encounters. The Deciding Official stated that, "[Grievant's] behavior could be construed as falling within the parameters of this policy . . . ."

Consistent with his conclusions regarding the aggravating factors, the Deciding Official did not cite as a mitigating factor that the interactions described were, or could have been, consensual. In his conclusions, he stated that he took into account the fact that the recordings did not capture the entire conversations and may have omitted some of [redacted] remarks; however, he provided no specific indication of how that influenced his conclusions or the penalty he decided to impose.

The decision letter in the agency-level grievance states at a number of points that grievant merited the discipline imposed even if the conversations and actions were consensual. However, the decision letter also quotes [redacted] extensively as saying that she participated only because she felt "scared" of grievant, both physically and as a threat to her job and "powerless." The decision letter accepts [redacted] statements as credible. It does not appear to consider whether the activities at issue may have been consensual or whether grievant's contentions are at all credible. On the whole, the agency-level decision appears to concur in penalizing grievant for engaging in unwanted, non-consensual sexual banter and physical contact without actually considering and deciding whether grievant's claims and contentions to the contrary have any merit. It appears further that the Department's conclusions about what happened between grievant

and [redacted] were an important factor in determining the penalty. The Board therefore analyzes the merits of the charge on that basis.

Merits of the Charge

Specifications 1 and 2

Specifications 1 and 2 both relate to what occurred in the hotel room in [redacted] Specification 1 charges the grievant with entering the hotel room uninvited and making comments of a sexual nature. Specification 2 charges grievant with unwanted physical contact of a sexual nature. The Department has the burden of proving the activities in question, including that they were non-consensual, given that the non-consensual aspect of the activity was an integral part of the disciplinary decision, as discussed above. The Board finds that the Department has not fully carried its burden.

The Department relies heavily on the voice recordings to establish the credibility of [redacted] claims and to support its conclusions. However, as both parties concede, the recordings do not establish under what circumstances grievant entered [redacted] room, since [redacted] began recording at a later time. There is, therefore, no direct evidence about whether grievant entered the room invited or uninvited. The Department did not state a basis on which it decided to credit [redacted] version of events over what grievant averred.

Once [redacted] and grievant were inside her hotel room, [redacted] claims, as stated in her affidavit, that she felt both physically and professionally threatened by grievant, and for those reasons alone participated in the sexual banter heard on the recordings. The Board is not persuaded that the record evidence, especially the voice recordings, supports this claim. As [redacted] herself stated, grievant sat on her bed

immediately after entering the room. [redacted] first turned on the television, then elected to get under the sheet in the same bed. If she were uncomfortable with grievant's presence in her room, as she states, it would have been more consistent for her to have sat in one of the chairs, as she claims grievant should have done when he entered the room.

There are also several points on the recording where [redacted] initiates or pursues a discussion of sexual topics. She asks grievant if he is sex crazy. When grievant tells [redacted] "You should get naked," she responds by asking him "Why?" When he responds, "Aren't I in your bed?" [redacted] pauses and replies that he has a bed in his own room. She does not say that he should leave her bed or her room. [redacted] then reminds grievant of a female who had been at the club and says that she (the woman) would have "given [grievant] some. She was all over you." When grievant replies that she was not his type, [redacted] repeatedly asks grievant what his type is. She asks him, "It doesn't matter how she looks?" and "It doesn't matter if she's taller than you?" When grievant asks if [redacted] knows anyone who wants a discrete sexual relationship, she names a friend of hers and repeatedly asks if grievant wants her to contact the friend, even after grievant says he was just "kidding," "teasing," and that it would be "awkward and embarrassing." [redacted] responds by stating that the friend she wants to introduce to grievant "wants what [he's] looking for." When grievant claimed that he hadn't had sex in a while, [redacted] responds by asking him, "How long? When was the last time?" When grievant responds "three months," [redacted] replies "Only?" When grievant states that he wanted to have sex several times a week, [redacted] responded by saying "Then you're not a sex maniac. They want it every day."

A movie portraying sexual activity can be heard in the background on the voice recording. There is a long pause in the recording during which it appears that the parties were watching the movie. Grievant is heard to express surprise that a movie with that level of sexual activity was on television. [redacted] explains to grievant that this was a channel generally not familiar to the Americans, denoted "[redacted] " As she explains, the channel included sex scenes (S) and strong language (L) and was restricted to viewers age 16 and older. [redacted] decision to turn on this channel after she and grievant entered her hotel room and her decision to leave the movie playing with obviously explicit sex scenes in it appears inconsistent with her assertion that she was scared and uncomfortable with grievant in the room.

At only one point on the recording does [redacted] tell grievant that he should "go and sleep;" at no other time does she ask him to leave her room or tell him that she is tired and wishes to retire. Although it may be difficult to judge emotions accurately from a voice recording, [redacted] does not sound as if she is either afraid or anxious on the recordings. Her voice sounds calm and flirtatious. Nor does grievant appear to be speaking in an aggressive or intimidating manner. If anything, he appears at times to be somewhat timid and uncertain.

Furthermore, in arriving at a conclusion that [redacted] was credible and grievant was not, the Department had an obligation to resolve the discrepancies in their stories to the extent that it could. We find that the Department failed to resolve several conflicts during its investigation. For example, grievant claims that [redacted] suggested that they all visit a strip club on their way to the night club and that she led the way into the strip club. [redacted] states that she did not enter the strip club at all. In

addition, [redacted] states that she had breakfast alone in her room the next morning. Grievant states that the three colleagues had breakfast together in the hotel, and that [redacted] appeared normal and unconcerned. [redacted] the third colleague, who was with them at both times, could have verified who was telling the truth. Although neither of these issues was key to the charges, they could have shed light on the credibility of the parties and either supported or undermined the Department's conclusion that [redacted] was more credible.

Nor did the investigators pursue with [redacted] why she went to the beach with grievant the following morning or what happened at the beach. Since the third colleague, [redacted] decided to visit his sister in town instead of spending any time at the beach, it appears that [redacted] could have declined to go to the beach as well. Grievant raised a relevant question that the Department did not resolve: why did [redacted] go with him to the beach if she was afraid and intimidated by him based upon his actions during the previous night? Moreover, what, if anything was said or done at the beach? Grievant claims that [redacted] was aggressive with him sexually at the beach, but she did not record any of their conversations during the hour and a half they spent together. Her actions in going to the beach with grievant, regardless of what took place at the beach, seem inconsistent with the feelings she portrays in her affidavit regarding the events of the previous night. The Department did not confront her about this discrepancy.

The Board has taken into consideration the fact that both [redacted] and the Department quoted selectively from the voice recordings; that the Department did not attempt to resolve discrepancies in the testimony of the two principal parties; and that

[redacted] actions in the hotel room and at the beach as well as her statements on the voice recordings do not appear to be consistent with her claims that she was intimidated and afraid of grievant. The Department has the burden of proof in disciplinary actions. The Board finds that the Department has not carried that burden to show that the sexual banter and contact in the hotel room in [redacted] were unwanted and non-consensual. These were specific elements of the two specifications of the charge against grievant as brought by the Department. Specifications 1 and 2 are therefore not sustained.

Specification 3

Specification 3 charges grievant with saying to [redacted] on the morning following the incidents in the hotel room, "What happens in [redacted] stays in [redacted] There is no dispute that grievant made the statement. What is not clear is why the Deciding Official found that it warranted discipline. In the agency-level decision, the Department concluded that grievant was not "threatening" [redacted] but was "warning" her.

The panel finds it equally likely that grievant was advancing a guarantee to [redacted] that he would not talk about what happened, although he may also have been looking for a pact of mutual discretion. Given that the Board has found that the actions in the hotel were not proven to be non-consensual, we find that the Department has not carried its burden of proof to show that this fairly innocuous statement in itself constitutes improper conduct. Specification 3 is not sustained.

Specification 5

Specification 5 charges grievant with making inappropriate and demeaning sexual comments to [redacted] while she was assisting him at the airport on February 23, 2010.

Grievant does not deny that he made the comments and the recordings confirm the content of his statements. Again, however, the context of the encounter is important to the disciplinary action.

Apart from two brief emails from grievant, this was the first encounter between grievant and [redacted] since they returned from [redacted] on February 6. Grievant did not pursue or harass [redacted] during that time. From the record, it would appear that he did not speak directly to her at all, although they worked in the same office. Grievant had not requested an expediter and was surprised when [redacted] sent him a text message that she would be assisting him at the airport.

[redacted] stated that at several points in the conversation at the airport, she tried to turn the conversation away from sexual topics introduced by grievant. There are occasions on the recording that support this contention. However, there are other times when [redacted] appears to encourage grievant to make or repeat sexual remarks for the purposes of recording them. For example, after grievant said they could teach each other things, he then says, "Soooo . . . ." [redacted] leads him to continue, by saying, "You were saying sooooo, when you get back?" When grievant says that he won't pursue her if she does not want him to, and she says, "Don't," she immediately follows up with a playful question, "Are you going to cry?" evidently reacting to a gesture or face he has made. Grievant then continues the conversation by saying that, "You gave me a taste of you." [redacted] asks, "How did I do that?" When grievant says "I don't know" [redacted] repeats: "You say I gave you a taste. How did I do that?" A bit later in the conversation, [redacted] tells grievant, "I'm not giving it to you." Grievant responds playfully "You're mean." [redacted] responds, "I'm not mean. I'm saving it for

someone else." When grievant asks if this person is a man, [redacted] responds: "No, definitely a man. I don't swing that way." She states finally, "Now somebody else gets it."

The conversation then turns to innocuous topics for several minutes. When grievant says, "You're killing me," [redacted] repeats three times, "How am I killing you?" When grievant says, "I want to be on the beach with a beautiful woman and . . . ," [redacted] follows up with "And . . . ?" Grievant states, "Then we came back to [redacted] . . ." and [redacted] again encourages him to continue, repeating his words, "Then we came back to [redacted] . . .?" followed by, "You're going to cry – when is the last time you cried?" A few minutes later, she insists that he tell her the name and other information about another [redacted] woman with whom he claimed to have had an encounter. Grievant declines to give this information and sounds clearly uncomfortable.

As the conversation draws to a close, [redacted] again encourages grievant to articulate his wishes/requests clearly or amplify them. He states, "All right, you can take me out drinking." She replies, "Then what?" She later states again, "When you get back? Then what?" When he states, "You'll have to school me when I get back," she replies, "In what?" None of these remarks appear to be consistent with [redacted] statements, credited by the Deciding Official, that she was offended and intimidated by grievant and repeatedly tried to turn the conversation away from sexual topics.

Grievant also raised a number of questions about [redacted] behavior at the airport that should have been pursued by the investigators. First, he questioned why [redacted] stayed with him at the airport for so long when she could have left after clearing him through customs, which he claimed was the usual practice of the embassy. [redacted]

who was the senior GSO, supervisor and the person who asked to expedite grievant, also stated in her affidavit that it was not the usual embassy practice for expediters to stay and converse with travelers after they had cleared customs, although it was not prohibited. Generally, an expediter would leave the traveler at the departure area, but stay at the airport to ensure that the flight departed. The investigators did not question about this issue in their interview of her, or otherwise follow up on it.

Grievant also raised concerns that an ARSO, may have coached in coming forward with her allegations. It appears clear from the record – from own statements, from the statements of other witnesses, and from the phone records grievant requested in discovery – that had a close personal relationship with . Since other ARSOs from the same office carried out the investigation, they needed to have been scrupulously careful to avoid any appearance of conflict or bias in favor of

was asked whether he had any involvement with in relation to her charges. His response was that he knew nothing of the incidents until told him about them after the airport encounter with grievant. The phone records establish that called and/or sent text messages to eleven times between 6:20 and 9:38 p.m. on the night that acted as grievant's expediter at the airport. This would appear to be close to, and perhaps even during, the time she was with grievant. Had acknowledged this frequent contact with during the time she was at the airport, or had the Department addressed it in its final submission, it could have resolved any concerns or questions that the phone records raise

regarding [redacted] possible involvement in the airport recordings. However, both the Department and [redacted] were silent on this issue.

Taking into consideration the above, that both [redacted] and the Department quoted selectively from the voice recordings; that in its investigation the Department did not pursue possible discrepancies between [redacted] statements and her actions that could have undermined the Deciding Official's finding that [redacted] was the more credible party; and that [redacted] phone contact with [redacted] while she was at the airport remains unexplained, the Board finds that the Department has not carried its burden of proof to show that the statements of a sexual nature made by grievant at the airport were unsolicited and non-consensual, elements that were inherent in this specification of the charge by the Department. Specification 5, therefore, is not sustained.

Aggravating Factors

In keeping with the above findings, the Board further finds that to the extent the aggravating factors considered by the Deciding Official included findings that [redacted] was intimidated by grievant; that she repeatedly rebuffed him; and that grievant's remarks were unwelcome (by virtue of the reference to the Department's Anti-Sexual Harassment Policy), they are not proven by the record.

With respect to the Deciding Officer's consideration that, as a married man, grievant opened himself to blackmail by engaging in sexual banter and pursuing a sexual relationship with [redacted], the Board notes that grievant has made an undisputed statement that he informed his wife of the actions with which he was charged, mitigating to some degree this concern.

V. DECISION

As with all disciplinary actions, the Department bears the burden of proving both the charges and that the discipline imposed is reasonable. As discussed above, the Board finds that the Department has not carried its burden of proving that the sexual banter and physical contact alleged in Specifications 1, 2, 3, and 5 of the charge of Improper Personal Conduct were unwelcome and non-consensual, which were essential elements of these specifications as brought by the Department. Furthermore, although grievant was a married man, he informed his wife of the conduct with which he was charged, mitigating the possibility of blackmail.

The grievance appeal is sustained and the disciplinary action overturned. All references to the disciplinary action are to be expunged from grievant's records and files.