

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceedings
FSGB Case No. 2011-007


Grievant
and

January 24, 2012

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Nancy M. Serpa
James E. Blanford

Special Assistant:

Jill E. Perry

Representative for the Grievant:

Pro Se

Representative for the Department:

Melinda P. Chandler
Director, Grievance Staff

Employee Exclusive Representative:

American Foreign Service Assoc.

CASE SUMMARY

HELD: The Department proved by a preponderance of the evidence most of the specifications included in the charge of improper personal conduct and the charge of poor judgment against grievant. It also proved a nexus between the grievant's behavior and the efficiency of the Service. The discipline imposed, i.e., a two-day suspension, is justified and within the zone of reasonableness.

OVERVIEW

Grievant, a Diplomatic Security Special Agent with the U.S. Department of State, was charged with five specifications of Improper Personal Conduct and one specification of Poor Judgment while assigned as Assistant Regional Security Officer at the American Embassy in [REDACTED].

The Board found that the Department failed to prove Charge 1, Specification 1, that grievant sent an inappropriate text message to the husband of a woman he had just met at an after-hours Embassy gathering in a local [REDACTED]. Neither the woman nor her husband recalled the exact wording of the text message, the message itself was irretrievable by the time the Office of Civil Rights investigated the incident, and the Department offered no additional record evidence to prove this specification. Of the remaining specifications of Charge 1, only Specifications 4, 5, 6 and 8 were sustained by the Department. For all of these specifications, statements of the women who found grievant's behavior inappropriate, as well as corroborating statements by people who witnessed the behaviors, were credible. Grievant's failure to recall his behavior, or, in cases where he did recall it, his assertion that he was joking when he made statements or took actions, were found less credible than the statements made by others.

With respect to Charge 2, Poor Judgment, grievant admitted to having consumed alcohol in the office after bringing a few beers back from an office party in another section of the Embassy, but disputes the Department's contention that having done so (when he was the sole RSO on duty in the Embassy) constituted poor judgment. In response to the Department's argument that, had an emergency situation arisen, especially one which may have required grievant to use his firearm, grievant's alcohol consumption could have led to a bad outcome, grievant argued that no such situation actually arose. In the Board's view, the fact that no urgent or dangerous situation happened to arise that day did not excuse grievant's poor choice in drinking in the office that day, particularly when he was the only RSO on duty.

The Board examined how the Department analyzed both mitigating and aggravating factors, and found they were fairly applied. Further, given that there were no comparator cases involving the same set of charges or involving a DS agent, and given that the penalties imposed in the cases considered by the Deciding Official ranged from a letter of reprimand to a twenty-day suspension, the Board found a two-day suspension to be within reasonable limits.

DECISION

I. THE GRIEVANCE

██████████, an FS-03 Diplomatic Security (DS) Special Agent with U.S. Department of State (agency, Department), appeals his two-day suspension for improper personal conduct and poor judgment while he was assigned to ██████████ ██████████, in 2009 and 2010.

II. BACKGROUND

██████████ joined the agency's Foreign Service in 1996 as an Information Management Technical Specialist, and was assigned to the Department's Information Management offices in Springfield, VA, for approximately two years. In 1998, he applied for and was offered a position as a DS Special Agent, and graduated from Basic Special Agent training in October 1998. His initial assignment, to DS's ██████████, lasted about six months, at which time he received training and then an assignment to the position of Assistant Regional Security Officer (ARSO) in ██████████. He was briefly assigned to ██████████ and then served temporarily at the DS Training Center (until 2003), the Washington Field Office (until 2005), and then at DS's ██████████ branch. He arrived in ██████████ as one of three ARSOs in March 2009.

The misconduct with which grievant is charged took place during his ██████████ tour; he is charged with five specifications of Improper Personal Conduct, and with one specification relating to Poor Judgment.

The Improper Personal Conduct specifications stem from inappropriate behavior toward female Embassy employees, both at work and in social settings. Specifically, grievant is charged with:

- Sending a suggestive text message, on the cell phone of a woman he had just met, asking her husband how he could leave his “hot wife” alone at an Embassy gathering.
- Asking at least two female Embassy employees for a kiss on the cheek before he would provide them a security code for workplace access.
- Making inappropriate comments in the RSO office to and about the wife of a subordinate employee, referring to her as a “hot wife” and “eye candy.”
- Grabbing the knee of the same spouse at an Embassy social gathering.
- Making an inappropriate telephone call to the same spouse of his subordinate employee, in which grievant said: “Hey, no sleeping together you guys ... [redacted] [the subordinate employee] doesn’t deserve any action.”

The second charge, involving alleged poor judgment, arose after grievant consumed alcohol during duty hours at an Embassy function, returned to his office, and continued drinking. At the time in question, he was the sole RSO officer on duty.

After complaints of harassment based on sex were made to the Department’s Office of Civil Rights (S/OCR), that office conducted an inquiry and issued a report to the agency’s HR office dated June 15, 2010. S/OCR observed that grievant “may have violated 3 FAM 1525,” and forwarded its report so that HR might “determine if his behavior rises to the level of warranting official action.”¹ On August 18, 2010, the Department notified grievant that it was proposing a suspension without pay for five (5) calendar days for his actions. After receiving grievant’s rebuttal dated October 20, 2010, Deputy Assistant Secretary J. Robert Manzanares issued a final decision letter on December 10, 2010, in which he sustained only some of the charges against grievant, and mitigated the proposed suspension to two (2) days.

[redacted] then filed an agency-level grievance contesting the discipline on December 14, 2010, and supplemented his grievance on January 11, 2011. On February 10, 2011, in a letter

¹ S/OCR refrains from making findings and conclusions during investigations of alleged EEO violations.

from Deputy Assistant Secretary Linda S. Taglialatela, the Department denied the majority of his grievance.²

Grievant filed an appeal with this Board on February 24, 2011. After discovery, and, having sought and received an extension of time, grievant filed his supplemental submission on June 14, 2011. The Department responded to that submission on July 14, 2011 and grievant replied to that response on August 15, 2011. After the Board sought and received clarification and certain documents from the agency, the Record of Proceedings was closed on November 14, 2011.

III. POSITIONS OF THE PARTIES

The Department

The Department argues that it has met its burden of proof in showing that the grievant's behavior was inappropriate, and that it violated regulations and had a nexus to the efficiency of the Service. Moreover, it argues, the proposed discipline is both justified and reasonable.

For Charge 1, Specification 1, based on grievant's behavior at the [REDACTED] in June or July, 2009, the Department finds credible the statements of both [REDACTED] [REDACTED], as well as other witnesses who testified that the grievant was intoxicated that evening. In response to grievant's argument that the events in question took place while he was off-duty, and that he did not supervise [REDACTED], the Department responds that 3 FAM 4376 advises members of the Foreign Service that they are accountable for their actions 24 hours a day. Moreover, it argues that the Deciding Official's conclusion that the grievant's behavior at the [REDACTED] had a direct and negative impact on the Embassy community was not based solely on the text messaging incident, but on the totality of his comportment that evening.

² In its agency-level decision, the Department agreed to replace the words "sexual harassment" in its discipline letter with the words "improper conduct." This was the only change Taglialatela agreed to in her February 10, 2011 Decision Letter.

Finally, in response to grievant's contention that discipline regarding this charge was not imposed in a timely manner (he learned of the complaint over this incident almost a year after it took place), the agency argues that the FSGB has ruled that there must be a nexus between the delay in proposing discipline and demonstrable harm to the employee in presenting his or her defense. The Department argues that grievant has proved no such nexus here.

With regard to Charge 1, Specification 4, in which grievant was charged with making inappropriate comments to and about ██████████, the Department argues that grievant's inability to recall making remarks like "eye candy" and "hot wife," as well as allegedly requiring a kiss on the cheek in return for providing a security code, does not excuse such behavior. Neither did it find persuasive the fact that grievant claimed not to be on notice that his behavior was unwelcome because ██████████ did not so inform him at the time of the events. The Department cites 3 FAM 1525's listing of unwelcome actions, and cites the recollection of RSO ██████████ that he counseled the grievant and others about inappropriate behavior regarding EEO sometime prior to the spring of 2010.

The Department also rebuts grievant's arguments with respect to Charge 1, Specification 5 (grabbing ██████████ knee at a birthday party in grievant's home). Grievant defended his actions under this specification by saying that they occurred off-duty, that his wife was also in attendance, and that ██████████ did not inform him at the time that his actions were unwelcome. The Department avers that neither grievant's intentions nor ██████████ failure to note any objection at the time excused the inappropriate actions.

In Charge 1, Specification 6, grievant is charged with making a phone call to ██████████ at her home, in which he said, "Hey, no sleeping together, you guys... ██████████ doesn't deserve any action." The grievant admits he called ██████████ at home in an effort to reach her husband,

admits he was upset, but denies shouting or making inappropriate remarks. The Department found that the evidence supports the Deciding Official's conclusion that grievant made inappropriate remarks, given [REDACTED] contemporaneous sending of an email to grievant's supervisor, RSO [REDACTED], complaining about the incident. [REDACTED] subsequently held a counseling session with grievant, as did the Acting DCM, in which grievant was told that this sort of behavior would not be tolerated. Given the entire picture of events surrounding this complaint, the Department believes it reasonable to conclude that grievant in fact made the inappropriate comments.

The Department argues that Charge 1, Specification 8 (in which grievant is charged with asking another Embassy employee, [REDACTED], to give him a kiss on the cheek in order to obtain her new security code) should be upheld. [REDACTED] testified that a number of female employees had the same experience with grievant, discussed it afterwards, and learned that he did not ask men to do likewise. Given the other incidents outlined above, the Department finds [REDACTED] statement credible, and maintains that even if grievant intended his request as a joke, it was inappropriate.

Grievant is accused of Poor Judgment under Charge 2, Specification 1 for having consumed several beers while he was the sole RSO on duty during a workday. The Department bases its charge on the sworn statement of [REDACTED], among others. [REDACTED] also worked in the RSO suite, and was so concerned about grievant's impaired condition that, on his way out of the office, he told the Marine Security Guard (MSG) on duty that, if there was any trouble, he should call his detachment commander instead of the RSO. In response to grievant's claim that, although he was consuming beer, he was not inebriated, the Department notes that the Deciding Official made no finding with respect to the degree of grievant's intoxication. Rather, the

Deciding Official focused on the fact that grievant was the sole American law enforcement officer on duty that day, and would therefore have been the only law enforcement officer available to respond to an emergency. In those circumstances, the Department claims that grievant exercised poor judgment in consuming alcohol.

The Department's positions with respect to aggravating and mitigating factors in this case are the polar opposites of those mentioned by the grievant. The Department states that the Deciding Official's observations that grievant frequently used the "F" word, that he had made inappropriate comments about other women, and that alcohol appeared to be a factor in his behavior were not specific charges or aggravating factors, but merely observations. In the Department's view, the grievant's conduct "evidenced an overall insensitivity to appropriate conduct and decorum in the Department of State workplace." Grievant's statements that he was never counseled about his use of the "F" word, and that no one informed him that his conduct was inappropriate do not excuse his conduct, and are not reasons to mitigate discipline.

The Department also dismisses as irrelevant or dissimilar all the cases grievant cites as evidence that a two-day suspension is excessive. Without repeating here the details of each case cited, the Department claims that very few cases cited by grievant involved the repeated inappropriate behaviors involved in this case, and that most of the infractions were not committed by a DS Special Agent, who is held to a higher standard of conduct than other officers.

The Grievant

Grievant argues that the Department has failed to meet its burden of proof that he committed the acts with which he is charged, or to prove a nexus between his conduct and the efficiency of the Service. He further contends that, even if the Board were to find that the Department had proven both that the conduct occurred and that there was a nexus between such conduct and the efficiency of the Service, the discipline imposed is excessive and not in keeping with the principle of similar penalties for like offenses.

With respect to Charge 1, Specification 1, which concerns a text message grievant allegedly sent to the husband of a woman next to whom grievant was seated at an after-hours gathering at the [REDACTED], he claims not to recall sending that message because he was intoxicated at the time by several extra-strong Long Island Iced Teas, a beverage he had never before consumed. Because the incident occurred about one year before the woman disclosed it in her declaration to S/OCR, even she does not recall the exact wording of the text message.³ The woman's husband has an even less specific recollection, and the actual text message, which grievant requested in discovery, no longer exists. Grievant goes on to argue that, even if he had sent such a text, he would have done so in jest; that he was off-duty at the time; that he had no supervisory relationship to the woman or her spouse; that the woman did not tell him at the time that she was offended; and that he did not even learn of her concern about the incident until he became aware of the S/OCR investigation a year later. Finally, he argues that proposing discipline for conduct that occurred more than eighteen months earlier violates the requirement of 3 FAM 4321 that discipline be timely. In his August 15, 2011 Reply to Department's Response, grievant argues that he may have been prejudiced by the lengthy delay in bringing

³ The declarant's statement, dated May 10, 2010, says on page 1, para 4: "He asked if he could text my husband using my phone and typed, 'How could you leave your hot wife here?' – or something to that effect."

discipline on this charge because, had this issue been brought to his attention earlier, it may have been possible to retrieve the actual text message he sent.

Charge 1, Specification 4 concerns a complaint by ██████████, who avers that grievant told her he would not provide her a security code for consular section access unless she gave him a kiss on the cheek. She also stated that on more than one occasion when she went to the RSO's office to meet her husband, a subordinate of the grievant, ██████████ would make comments like "I have a hot wife here," or "I've got some eye candy." Grievant does not recall either action, but claims that, if he asked for a kiss in exchange for a security code, or made comments to ██████████ about his wife, such actions would have been done in jest. He was never put on notice that anything he did or said was offensive to ██████████, and believes that the allegations against him did not arise until after he was overheard telling his AFSA attorney that he was concerned that ██████████ may be a security liability.

In Charge 1, Specification 5, grievant is charged with grabbing the knee of ██████████ at a birthday party in grievant's home. He claims ██████████ never told him she felt uncomfortable with the gesture, and the first time he learned of this allegation was in June 2010. He contends that off-duty conduct such as grabbing the knee of someone with whom he was friends at his birthday party in his home does not constitute poor personal judgment, and that therefore no discipline is warranted.

Grievant is charged with making inappropriate remarks to ██████████ over the phone in Charge 1, Specification 6, an allegation he denies. ██████████ claims that grievant, who was upset by his inability to reach her husband, ██████████ one of his subordinate employees, told her: "Hey, no sleeping together you guys. ██████████ doesn't deserve any action." Grievant admits that he called ██████████ looking for her husband and asked her to have ██████████ call grievant back. He

admits to being upset, but claims he did not shout or say anything inappropriate. Moreover, the grievant argues that this charge surfaced only after [REDACTED] overheard the grievant talking on the telephone to his AFSA attorney, during which conversation grievant opined that [REDACTED] may be a security liability, owing to his failure to have secured all the hard drives in the RSO suite.

Charge 1, Specification 8, like Specification 4, states that grievant required another Embassy employee, [REDACTED], to give him a kiss in order to obtain her security code. On this specification too, grievant does not recall asking the employee to give him a kiss before he would give her the security code, but if he did so, he claims, it would have been in jest. Moreover, grievant argues, since [REDACTED] was the EEO counselor at post, he would have expected her to indicate at the time that she found his behavior inappropriate, and she did not.

Under Charge 2, Specification 1, grievant is charged with poor judgment in having consumed alcohol on duty. The grievant admits to having consumed several beers in the RSO office upon returning to work after attending an Embassy function at which alcohol was served, but he denies that he had been inebriated or that his drinking impacted his ability to do his job or violated any FAM, FAH, post or DS policy. Grievant says he did not violate 12 FAM 2.6 B, which prohibits consumption of alcoholic beverages while armed, or six hours prior to being armed, which was cited by the agency in response to grievant's discovery requests. He did not violate the policy because he was not armed on the day that he consumed alcohol on duty, and did not anticipate being armed within six hours. In response to the Deciding Official's statement that drinking in the office was not acceptable, especially given the fact that grievant was the only RSO on duty and may have had to respond to an emergency situation (including one in which he may have had to use his firearm), grievant says that no such emergency situation arose, so the

point is irrelevant. Furthermore, he points out, there were other situations in which all three ARSOs and the RSO consumed alcohol at the same time, citing a Christmas party at the RSO's residence as an example.

Grievant believes the aggravating factors cited by the Deciding Official were unfairly applied to his case. First, regarding grievant's use of the "F" word in the office, grievant acknowledges that he has used that word. But, he counters, so has his supervisor (the RSO) and co-workers, and no others are being disciplined. Second, the grievant disagrees with the Deciding Official's contention that he made other inappropriate comments about women he met in local bars, as no specifics were provided about this claim. Therefore, he states "I do not know what I am alleged to have said, to whom, when I said it, the context in which it was said, etc."⁴ Finally, grievant objects to the Deciding Official's statement that alcohol appears to have been a factor in some of the incidents upon which the charges are based. He argues that the Department has failed to meet its burden of proof with regard to this contention, so all reference to it should be expunged from any discipline letter that is placed in his Official Performance File (OPF).

Grievant also argues that a two-day suspension is disproportionately harsh for what he is alleged to have done. That is true, he avers, even if the Department could meet its burden of proving the facts for all the charges and specifications in his case. He cites several mitigating factors that the Deciding Official failed to mention, such as his recent enrollment in an EEO course, his lack of knowledge that the people he allegedly offended found his conduct offensive because they never confronted him about his behavior, and his [REDACTED] English, which people are prone to misunderstand. Finally, he cites several FSGB cases which, in his view, show that the penalty in his case is much harsher than that imposed in other comparable cases.

⁴ Grievant's Supplemental Submission dated June 14, 2011 at 8.

IV. DISCUSSION AND FINDINGS

In all cases involving discipline, the Department has the burden of proving, by a preponderance of the evidence, that the inappropriate conduct occurred, and that there is a nexus between the conduct and the efficiency of the Service.⁵ We find that the Department met that burden with respect to most, but not all, of the specifications set forth under Charge 1, and with respect to Charge 2.

Charge 1, Specification 1:

We find that the Department did not meet its burden with respect to Charge 1, Specification 1 (the alleged text message from grievant to the husband of a woman with whom he was conversing at an Embassy gathering). The woman involved, [REDACTED], claimed in her affidavit to S/OCR, written almost a year after the event, that grievant sent a text message saying, “How could you leave your hot wife here?” – *or something to that effect.*” (Emphasis added.)⁶ Her husband’s recollection of the incident, as recounted in his affidavit to S/OCR, was even less detailed: “I think it may have had something to do with a text message on my wife’s phone, but I don’t remember exactly.” Grievant, by his own admission, was intoxicated, and remembers nothing about the evening. In response to grievant’s discovery request, the Department stated that the text message allegedly sent that night no longer exists. Based on the fact that no one present that evening has a clear and specific recollection of the facts and the absence of the text message itself, the Board finds that this specification cannot be sustained. Moreover, the Board finds that the Department’s position that the “text message was merely the introduction to the grievant’s misconduct displayed that evening,” raised as an observation for

⁵ 22 CFR 905.2.

⁶ In her affidavit, [REDACTED] also stated incorrectly that the incident had occurred in November 2008 even though grievant did not arrive in [REDACTED] until March 2009; the record evidence indicates that the Embassy gathering actually took place in July 2009. Although not in itself conclusive, the foregoing tends to cast additional doubt on the events as [REDACTED] tried to recollect them after the passage of so much time.

the first time in its July 14, 2011 Response to Supplemental Submission, cannot stand. Grievant was charged solely with sending an offensive text message, not with misbehavior for an entire evening. Given that the record reveals no proof of what the text message said beyond one person's recollection followed by the words "or something to that effect," we do not sustain Specification 1 of Charge 1. The Board also notes that the lengthy delay between the evening that grievant allegedly sent an inappropriate text message and the date on which this allegation was brought to his attention, about one year, may well have impeded grievant's ability to defend himself. Had the charges been brought in a more timely manner, it is at least possible that the actual text message could have been retrieved.

Charge 1, Specification 4:

Grievant is charged with making inappropriate comments such as "I have a hot wife here" or "I've got some eye candy," about [REDACTED] (an Embassy Consular Officer) and with telling her that she could not receive a new security code until she gave him a kiss on the cheek. Grievant does not recall doing or saying these things, but declares that if he engaged in such conduct, it would have been intended as a joke. He also claims that he was unaware that he had offended the woman in question because she did not object to his conduct at the time.

The Board finds this specification credible and specific, and sustains this charge. We find that grievant should have known, by virtue of EEO training and common sense, that his comments and actions could be construed as inappropriate, irrespective of whether he meant them as a joke. Moreover, the woman's failure to inform him at the time that she was offended by his comments and conduct does not excuse them. Likewise, the fact that [REDACTED] husband may have shared personal or intimate details about [REDACTED] does not justify or excuse grievant's inappropriate comments and actions. Further, to the extent that grievant claims not to

recall the “kiss on the cheek” incident, [REDACTED] version is corroborated by [REDACTED], the Embassy’s EEO Counselor, who was treated in a similar fashion by grievant when she needed to obtain a security code from the grievant. Accordingly, we credit [REDACTED] version of events rather than grievant’s lack of recall.

Charge 1, Specification 5:

The Board sustains the Department’s finding that grievant’s conduct in grabbing [REDACTED] [REDACTED] knee at a birthday party was inappropriate behavior as defined in 3 FAM 1525. Grievant’s claims that the behavior occurred at an off-duty event, and that [REDACTED] did not tell him the conduct was unwelcome, do not excuse it. Grievant should have known that such an intimate touching in front of a gathering of her Embassy colleagues would put [REDACTED] in an embarrassing and awkward position. She may have felt more embarrassed and more awkward had she called further attention to the incident at that moment.

Charge 1, Specification 6:

Grievant is charged with making a telephone call to [REDACTED] at her home, while trying to reach her husband with whom he was angry over a work-related matter at the time, and reportedly said to her upon learning that [REDACTED] was not at home, “Hey, no sleeping together, you guys. [REDACTED] doesn’t deserve any action.” After this event, [REDACTED] sent an email to grievant’s supervisor complaining about the incident. The supervisor then counseled grievant about his conduct, informed the Acting DCM and the Charge d’affaires of it, and prepared a counseling statement which grievant signed. Grievant admits calling [REDACTED], and admits he was angry at her husband, but denies making inappropriate comments to her. He also implies that this specification is retaliatory, because the specific charges never arose until after [REDACTED]

██████ overheard a conversation between grievant and his AFSA attorney, during which grievant referred to ██████ as a possible security liability.

While the Board can find no corroboration as to what grievant actually said to ██████ during the phone call he admits to having made, we find the Department's conclusion that the conduct most likely occurred is reasonable. Given grievant's repeated claims, on several occasions cited in this case, that he was unable to recall saying anything untoward, countered by statements of others that he did so; his admission to having had "a few beers" on the afternoon that he made the telephone call; and his further admission that he was in an angry state of mind at the time of the telephone call, we find it more probable than not that ██████ account of the interaction occurred as she stated. We note in this regard that ██████ immediately complained about the incident to the RSO, and that grievant was promptly counseled by him and the Acting DCM. Accordingly, we sustain the Department's conclusions with respect to this specification.

Charge 1, Specification 8:

Under this specification, grievant is charged with demanding a kiss on the cheek from ██████ before he would provide her a security code. Grievant once again does not recall the incident, but states that if he made the request, it would have been a joke. Grievant also claims, as he has in response to some of the other specifications, that in ██████ it is customary to greet friends with a kiss on the cheek. He also claims that he was unaware that local custom meant this practice should in fact be an "air kiss," not a real one; that he had a social as well as professional relationship with ██████, and that she did not inform him of her discomfort with his behavior at the time.

The Board sustains this specification, both because we found [REDACTED] statement to be credible, and because she was not the only woman to claim grievant demanded a kiss before giving out security codes. The Board finds grievant's explanation of [REDACTED] custom with respect to kissing on the cheek to be irrelevant: this event took place in the U.S. Embassy and, as the Assistant Regional Security Officer in possession of the codes that others needed in order to do their work, grievant knew or should have known that requesting a kiss in exchange for the code was inappropriate. The fact that [REDACTED] did not tell him at the time that she was uncomfortable with his behavior does not excuse or justify it.

Charge 2, Specification 1:

Grievant is charged with poor judgment for having consumed alcohol during duty hours while he was the sole RSO at work. In this regard, the Department notes that grievant was the sole official in the RSO office that afternoon, and that his ability to perform if an emergency situation had arisen might have been compromised. Grievant responds that his ability to do his job was not impacted, that no emergency situation requiring the use of his firearm occurred, and thus he did not violate DS policy with respect to alcohol consumption prior to firearms use.

The Board finds it reasonable that the Department sustained this charge. In so finding, we are persuaded by the Department's argument that the fact that no emergency situation arose that afternoon does not negate its potential occurrence, a fact that grievant should have considered before consuming alcohol which impaired him to the extent that: 1) [REDACTED] notified the Marine Security Guard on duty that grievant had been drinking, 2) another Security employee stated that grievant "had a buzz that day," 3) grievant himself stated that his "EER is getting better and better the more" he drank, and 4) grievant placed an angry phone call to [REDACTED] that he later said he regretted placing. Grievant's argument that there were other

occasions at which all members of the RSO staff were consuming alcohol on the Embassy's premises does not mitigate or excuse his poor judgment in having done so during the workday.

Aggravating Factors:

The Board finds that the Deciding Official's identification of aggravating factors in this case was reasonable, and notes that these factors are just that – they are not specific charges or additional accusations. Specifically, with respect to the Deciding Official's reference to grievant's use of the "F" word in the workplace, we find that such observations were not a factor relied upon by him in determining the appropriate penalty to impose in this case. The same is true with respect to the Deciding Official's observation that alcohol appeared to be a factor in some of the behavior with which grievant was charged.

Mitigating Factors:

The Board believes the Department appropriately considered and took into account several mitigating factors. Grievant's expression of regret that he had offended others, his enrollment in EEO training, and his argument that none of the people he offended expressed displeasure with his behavior at the time were all fairly considered. Presumably, these factors contributed to the Department's decision to reduce the penalty from a five-day suspension to a two-day suspension.⁷

The Penalty:

The grievant and the Department understandably disagree on which cases may be considered "like" cases for the purpose of setting a penalty. In its Response to Supplemental Submission, the Department rightly discounts the relevance of many cases raised by grievant because the offenders in those cases were not DS Agents, who are law enforcement personnel

⁷ Also presumably contributing to mitigation of the penalty was the fact that several specifications of Charge 1 were not sustained by the Deciding Official.

and therefore held to a higher standard of conduct than other officials. Grievant, for his part, in contrasting himself with other grievants who apologized immediately for inappropriate behavior, claims that he did not apologize because he had no idea he had offended anyone, or of any claims against him, until he was interviewed by the Office of Civil Rights (S/OCR) in mid-2010.

Grievant cites several cases he characterizes as “much more egregious” than his own, but the Board finds them distinguishable from this case. For example, “Case No. 2006-092” involves a senior employee’s inappropriate touching of a junior-level female officer on several occasions, for which the employee received a five-day suspension. Grievant’s two-day suspension, for less egregious behavior but more instances than in 2006-092, strikes the Board as reasonable. None of the cases grievant cites as comparable to his own involves the conduct of a DS Agent such as himself, i.e., a law enforcement employee who is held to a particularly high standard of professional conduct, and few have as many charges and specifications as this case. The Board will not engage here in a detailed listing of all the possibly relevant cases considered in the formulation of a penalty, but notes only that the penalties attached to the discussed cases range from a letter of reprimand⁸ to a twenty-day suspension without pay. Given that range of penalties, the Board finds that a two-day suspension, for a DS Special Agent charged with both multiple specifications of Improper Personal Conduct and Poor Judgment, is within reasonable limits and therefore sustains the two-day suspension.

In making this finding, the Board is mindful of agency management’s primary responsibility for the discipline of its workforce, and its entitlement to reasonable discretion in deciding what is the most appropriate penalty.⁹ Moreover, we recognize the Board’s role is not to displace or replicate management responsibility, but to assure that management’s judgment

⁸ We note that a letter of admonishment is not, technically speaking, a penalty, and it is not included in a grievant’s Official Performance File.

⁹ See FSGB Case Nos. 2002-052 (July 18, 2003) and 2005-007 (July 14, 2005).

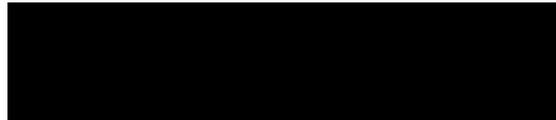
has been reasonably exercised. We further note this Board's previous rulings recognizing that "there is no precedent that holds the principle of 'similar penalties for like offenses' requires mathematical rigidity or perfect consistency..."¹⁰ and acknowledge that in this case reasonable people can disagree about the harshness of the penalty.

V. ORDER

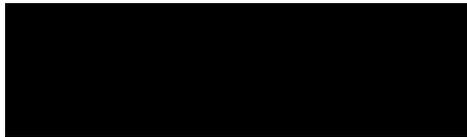
The Board does not sustain Charge 1, Specification 1, and orders reference to it deleted from any documents related to this case. In all other respects, the grievance appeal is denied.

¹⁰ See FSGB Case No. 2002-034 (February 23, 2004).

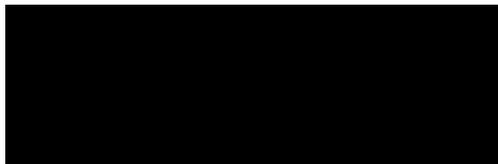
For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Nancy M. Serpa
Member



James E. Blanford
Member