

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB No. 2011-015

And

December 20, 2012

Department of State

DECISION
EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Alfred O. Haynes
Nancy M. Serpa

Special Assistant:

Carol Gullion

Representative for the Grievant:

Pro se

Representative for the Department:

Margaret E. McPartlin
Attorney, HR/G

Employee Exclusive Representative:

American Foreign Service Association

DECISION

I. THE GRIEVANCE

Grievant, [REDACTED] a member of the Foreign Service of the U.S. Department of State (the Department, the agency) appeals to this Board from the agency's remand decision, dated August 10, 2012, to revise its proposal for discipline to a Letter of Reprimand for conduct occurring at two overseas posts during the period 2006 to 2010.¹

II. BACKGROUND

The agency's initial decision on this matter, dated December 1, 2010, sustained three specifications under the charge of Improper Personal Conduct, for extramarital consensual sexual relationships grievant had with several women during two overseas assignments and ordered a five-day suspension without pay. [REDACTED] grieved the proposed suspension, which the Department denied. Thereafter, grievant appealed to this Board on May 13, 2011. Following discovery, the filing of a supplemental submission and a response by the Department, the Board issued an Interim Decision on July 13, 2012.

In the Interim Decision, the Board sustained two of the three specifications with which grievant was charged but found that the agency improperly found several aggravating *Douglas* factors that were unsupported by the record. The Board remanded the matter to the Department "for reconsideration of what, if any, penalty is appropriate for Specifications 2 and 3, consistent with the Board's findings." The Board retained jurisdiction of the grievance appeal, requesting that the Department advise of its action within 30 days. The Board also stated that, if grievant was not satisfied with the agency

¹ The details of the conduct leading to the agency's discipline decision is outlined in the Board's Interim Decision (see FSBG Case No 2011-015, Interim Decision dated July 13, 2012) and will not be repeated here.

decision on remand, he could file an additional pleading within 10 days of the Department's decision on remand.

The Department filed its Remand Decision on August 10, 2012, mitigating grievant's discipline to a Letter of Reprimand (LOR). Grievant appeals that decision by means of a memorandum to the Board, dated August 27, 2012. The agency filed a response to the memorandum on September 13, 2012 and the grievant replied on September 26, 2012.

III. POSITIONS OF THE PARTIES

A. The Department

After reconsideration of all the factors in this case, including this Board's July 13, 2012 Interim Decision, the Department decided to mitigate the proposed five-day suspension to an LOR. In its discussion of aggravating factors it found in this case, the Department noted that one of the women with whom grievant had an extramarital sexual relationship worked at a local bank and, therefore, it was "imprudent" of grievant, a Financial Management Officer, to carry on such a relationship. The agency claims that for an employee whose duties entail regular liaison with local banks, his affair with a bank employee created the appearance of impropriety. Moreover, the Department claims grievant's continued failure to tell his wife about "the nature and extent of his extramarital relationships" exposed him to potential coercion and/or blackmail.

In its decision letter, the Department states:

Given the nature of Foreign Service life, you are aware that you are on duty 24/7. These multiple extramarital affairs involving sexual relations with an estimated 13 women during two separate assignments overseas without your spouse's knowledge show poor judgment for a Foreign Service Officer.

The Department disagrees with grievant's assertion that the Deciding Official's assessment of the aggravating factors runs counter to the Board's findings in its Interim Decision. With respect to Douglas Factor 1 (the nature and seriousness of the offense and its relationship to the employee's duties and responsibilities), the Department quotes the Deciding Official who stated: "[grievant's] failure to explicitly disclose his extramarital affairs in [REDACTED] and [REDACTED] makes him vulnerable to blackmail, as foreign intelligence services operate throughout the world to exploit behavior of this nature."

On Douglas Factor 2 (whether the offense was intentional or technical and inadvertent), the Department dismisses grievant's argument that he did not knowingly breach a Department rule or policy because he did not know his off-duty conduct could subject him to discipline. The Department responds that the "FAM ... puts employees on notice that misconduct such as his could subject employees to discipline. Foreign Service Officers while on overseas assignments are on duty 24/7." The agency makes the same argument with respect to Douglas Factor #3 (whether the offense was committed for personal gain).

On Douglas Factor 4 (contacts with the public and prominence of the position), the Department disagrees with the Board's finding that grievant's position was not one of prominence, given that he served in a fiduciary role as the Financial Management Officer and was required to maintain liaisons with local banking officials. The Department states, moreover, that the Deciding Official cited the fact that grievant conducted high-level negotiations with government and banking officials for commercial loans for Foreign Service National employees, better exchange rates, and a commercial loan for the

American School in [REDACTED] and with a Minister in [REDACTED] to negotiate Value Added Tax issues.

While the employee's actions did not gain notoriety (Douglas Factor 7), the Department argues that grievant's involvement in multiple extramarital affairs, including one liaison with an employee of a local bank while he was serving as Financial Management Officer, had the potential to cause embarrassment to the U.S. Government.

On Douglas Factor 8 (where and when the misconduct occurred – in the US or abroad; on duty or off-duty), the Department reiterates that Foreign Service employees are considered to be on duty 24/7 while assigned abroad.

With respect to Douglas Factor 9 (the clarity with which the employee was on notice of any rules that were violated in committing the offense), the Department quotes 3 FAM 4139.14 which defines Notoriously Disgraceful Conduct as conduct which,

were it to become widely known, would embarrass, discredit or subject to opprobrium the perpetrator, the Foreign Service, and the United States. Examples of such conduct include but are not limited to the frequenting of prostitutes, engaging in public or promiscuous sexual relations...

With respect to Douglas Factor 10 (the potential for the employee's rehabilitation), the Department mentions that although grievant claims that his wife suspected his indiscretions, he failed to inform her of the details, leaving himself susceptible to blackmail. In addition, the Department notes that grievant has been subsequently charged and proposed for discipline for additional misconduct. Thus, it contends that grievant has not shown a strong potential for rehabilitation.

The Department argues that the above considerations make a Letter of Reprimand the only appropriate discipline that will deter such conduct in the future.

B. The Grievant

Grievant contends that the Department's decision to issue an LOR is based on the Department's failure to properly consider mitigating factors and the agency's consideration of alleged aggravating factors that are inconsistent with the findings of this Board in its Interim Decision. He provides detailed responses to the Department's arguments contained in its newly issued Douglas Factor worksheet and requests that the Board overturn the issuance of the LOR. On Douglas Factor 1, grievant notes that this Board found only a "minimal nexus between [his] off-duty conduct and the efficiency of the Service," while the Department claims that his failure to inform his wife about the details and the extent of his infidelity renders him vulnerable to blackmail. Grievant claims that his voluntary disclosure of all his infidelities to the Regional Security Officer (even those in a previous post) shows his honesty and good faith. He argues that the Department has not established that his failure to disclose to his wife "the gory details" of his extramarital affairs is an aggravating factor, or that the possibility of blackmail is more than remote.

Grievant concedes that the Department is correct in finding that his conduct and his failure to confess details to his wife were both intentional, however, he argues that this does not prove that he intentionally breached a Department regulation, rule, or policy, because he was unaware that his off-duty conduct would subject him to disciplinary action. Thus, he submits, this should not be considered an aggravating factor.

He argues that Douglas Factor 3 (whether the offense was committed for personal gain) should not figure into the penalty analysis because his conduct cannot be

considered an “offense” since he did not know that the conduct was prohibited by Department rules and regulations.

Grievant claims that the Department’s conclusions with respect to Douglas Factor 4 (contacts with the public and prominence of the position) are contrary to the findings and conclusion of the Board in the Interim Decision. Grievant contends that despite the Board’s findings that his relationship with the bank employee had no connection to his job and that his position was not prominent, the Department still maintains that his relationship with the bank employee created “the appearance of impropriety.” He also contends that the Department exaggerates the prominence of his position in the proposed LOR.

Although the Department continues to argue that the penalty imposed in this case is consistent with other cases (and thus conforms with Douglas Factor 6), grievant argues that the agency has not produced a single case in which a married employee was disciplined for extramarital affairs, in the absence of aggravating circumstances. He cites as support for his position this Board’s statement that it was “unable to identify a case that involved consensual sexual encounters by a married employee with no aggravating issues.”²

On Douglas Factor 7 (the notoriety of the offense and its impact upon the reputation of the Department of State), grievant argues that the Department erroneously speculates that his sexual behavior could have become known because the police were investigating the carjacking incident in which grievant and one of his girlfriends were in the car. Citing this Board’s Interim Decision, grievant argues that there is no evidence in the record that the police, or any other local authority, became aware that a woman was in

² Interim Decision at 24.

the car with grievant before he was carjacked. Grievant concludes that Douglas Factor 7 should have been considered a mitigating factor.³

Likewise, he argues that Douglas Factor 8 (where and when the misconduct occurred – in the U.S. or abroad; on or off duty), should have been deemed a mitigating factor because this Board found that his off-duty conduct had no impact on his ability to do his job or on the agency’s mission.

Grievant contends that Douglas Factor 9 (the clarity with which the employee was on notice of any rules that were violated in committing the offense) is a very strong mitigating factor because the Board found that “the Department has not demonstrated that the behavior at issue in this case was clearly identified in the regulations as that which could result in discipline.”⁴ He further avers that this factor alone should justify a reduction of the proposed discipline from an LOR to an admonishment.

Citing several decisions by the Merit Systems Protection Board (MSPB), grievant disagrees with the Department’s findings with respect to Douglas Factor 10 (the potential for the employee’s rehabilitation). The Department found that it was unclear that grievant’s improper conduct will cease because he did not inform his wife of the nature and extent of his improper conduct. He cites our Interim Decision in which we found no relevance to the Deciding Official’s conclusion that his marriage needed work.⁵ Moreover, he argues that his wife was aware of his infidelities, just not the details. Grievant also alleges that the Department’s reference to a second disciplinary case

³ With respect to this Douglas factor and others, the Board believes that grievant has conflated “mitigating” and “aggravating” factors with whether or not a Douglas factor has been found. Finding relevance of a Douglas factor does not make it aggravating, and not finding one does not make it mitigating.

⁴ Ibid, at 28.

⁵ We stated in our Interim Decision: “We see no relevance at all to the agency’s statement that grievant conceded that his marriage still needs work.” Ibid at 29.

against him is irrelevant to the issues in this case and the new allegations have not yet been proven.⁶

With respect to Douglas Factor 11 (mitigating circumstances surrounding the offense), grievant argues that this Board found that his strained marriage was a mitigating factor.

Lastly, grievant argues that this Board held that alternative sanctions exist which would be adequate to deter his repetition of the conduct at issue. Thus, he contends that the Department failed to consider correctly Douglas Factor 12 (the adequacy and effectiveness of alternative sanctions to deter such conduct in the future).

For these reasons, grievant contends that the issuance of an LOR should be overturned by the Board.

IV. DISCUSSION AND FINDINGS

As we stated in the Interim Decision:

In all cases involving discipline, the Department has the burden to show, by a preponderance of the evidence, that the disciplinary action was justified and that a nexus exists between the conduct and the efficiency of the Service.⁷ The Department must show that grievant committed the acts 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 and consistent with penalties imposed for similar offenses. *See* FSGB Case No. 2006-037 (September 28, 2007); FSGB Case No. 2004-035 (January 28, 2005).

Upon review of the agency's decision on remand, we consider only the penalty reconsideration.

For the reasons outlined below, this Board finds that issuance of the proposed Letter of Reprimand falls within a zone of reasonableness and may stand. At the same

⁶ The new case is pending resolution by the FSGB.

⁷22 C.F.R. 905.2.

time, the Board finds that several matters contained in the proposed LOR, dated August 10, 2012, are invalid or inappropriate in light of the Interim Decision and must be redacted. Per our Interim Decision and the discussion below, we order that the letter be amended before it is included in grievant's Official Personnel File. FSGB Case No. 2008-029 (Feb. 22, 2010).

1. Reference and Citation to 3 FAM 4139.14, Notoriously Disgraceful Conduct

During discovery in this case, when grievant attempted to learn more about the charges, the Department expressly disavowed that grievant was charged with either promiscuity⁸ or "notoriously disgraceful conduct."⁹ Instead, he was charged with Improper Personal Conduct. Given its earlier position in discovery, on which it based its refusal to produce documents grievant requested, the agency cannot now include in the LOR a definition that includes "promiscuity" as an example of notoriously disgraceful conduct. The Board finds the citation to 3 FAM 4139.14 in the LOR (page 2) with its reference to "promiscuous sexual relations" to be unsupported by the charges and specifications. It should therefore be removed.

2. Reference to the Bank Employment of One of Grievant's Sexual Partners

In its Interim Decision, the Board concluded that the Department had not proven that grievant's "sexual relationship with someone who worked for a local bank in [REDACTED] could give the appearance of impropriety."¹⁰ We stated:

We also do not find persuasive the Department's contention that there is an appearance of impropriety arising from grievant's

⁸ See, Department's July 1, 2011 Response to Grievant's First Request for Discovery, dated May 26, 2011 at 3: "[Y]ou were charged with three specifications of Improper Personal Conduct and not with 'promiscuity.'"

⁹ See, Interim Decision at footnote 8, in which we stated: "the Department claimed that grievant's discovery requests concerning regulations defining notoriety were irrelevant" because grievant was not charged with notoriously disgraceful conduct.

¹⁰ Interim Decision at 14.

position as a financial management officer and the fact that the woman he was with was a bank employee. ... [W]e find this contention by the agency to be overreaching and speculative. We deem it no more than happenstance that grievant developed a relationship with a woman who worked for a bank We therefore find that the agency erred in citing grievant's employment position and that of his friend as an aggravating factor.¹¹

We concluded that the woman's position at the bank and grievant's position at post were irrelevant to the behavior cited for discipline. Citing these facts in the LOR implies that there was something improper about grievant's relationship with this woman because of their respective positions. We therefore order both references to the woman's employment deleted from the LOR (on pages 2 and 3 of that letter).

3. Reference to the Prominence of Grievant's Position

In the Interim Decision, this Board cited the finding of the Deciding Official in the agency-level grievance in this case that "grievant did not hold a high-level or prominent position in either Embassy"¹² We concluded that grievant's position at post was irrelevant to the discipline. Thus, the statement in the LOR that grievant, "held a supervisory position which involves significant liaison with local government and banking officials," suggests that his position had some bearing on the decision to discipline him. However, the agency conceded that grievant's position was not prominent and the Board found that it had nothing to do with his contacts with the woman. This assertion must also be deleted from the Letter of Reprimand.

¹¹ *Ibid* at 15.

¹² *Ibid* at 16 and 23.

4. Reference to 3 FAM 4139.1.

Given the Board's finding in its Interim Decision that the agency regulations do not clearly put the grievant on notice that his behavior could subject him to discipline, the agency's reference to 3 FAM 4139.1 in the "aggravating factors" section of the LOR is inappropriate. Citing that regulation in the LOR suggests to the reader that grievant should have known his behavior violated that regulation. The Board found otherwise.

5. Additional References To Grievant's Position and To Exposure To Blackmail

We find, for the same reasons as stated in paragraph 3 above, that the Department's repeated reference to grievant's position in the Embassy (in the third paragraph under Aggravating Factors in the new LOR) is inconsistent with the Board's interim decision. We also find that the final sentence in that paragraph is repetitive and therefore unnecessary.

Finally, with respect to the reasonableness of the penalty, a Letter of Reprimand, the Board acknowledges that, while there are apparently no cases exactly like the instant one, a Letter of Reprimand is a reasonable response to the charged behavior in this case. The Department cites for context, three cases in which employees engaged in extramarital affairs without their spouses' knowledge.¹³ In each of the cited cases (AGS case numbers 2011-193, 2010-202, and 2005-141), there were significant aggravating factors associated with the extramarital activity, unlike in this case. However, the employees in those cases were suspended for seven, five and ten days, respectively, whereas grievant here will receive an LOR. We find this a reasonable outcome.

¹³ See Case Comparisons Worksheet dated 8/4/12, attached to the Agency's 9/13/12 Response to Grievant's Response to Remand Decision.

V. DECISION

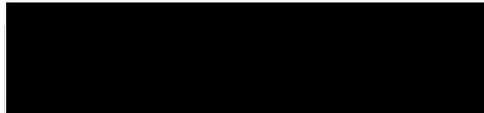
The grievance is denied. We deem a Letter of Reprimand to be a reasonable disciplinary action in this case. At the same time, we order the following changes to be made to the Agency's proposed Letter of Reprimand before it is placed in grievant's Official Personnel File:

- Delete in its entirety paragraph 2 on page 2 of the LOR. (The paragraph begins with “3 FAM 4139.14” and ends with “including separation for cause.”)
- Also on page 2, under “Specification 3,” in the non-italicized paragraph, delete the second and third sentences of that paragraph. The second sentence begins “One of the women you had an extramarital affair with,” and the third sentence ends with “an individual employed at a bank.”
- On page 3 of the LOR, under Aggravating Factors, delete the first sentence of the second paragraph (the first non-italicized paragraph). The sentence to be deleted begins with “As the Financial Management Officer” and ends with “local government and banking officials.”
- In the following paragraph (the last paragraph on page 3 of the LOR), delete the third sentence. The third sentence begins with “Nonetheless, as the FMO” and ends with “an employee of a bank.”

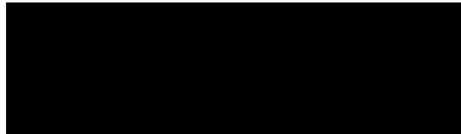
For the Foreign Service Grievance Board:



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