

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceedings
FSGB Case No. 2011-020


Grievant

March 29, 2012

and

Department of State

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

John M. Vittone

Board Members:

Alfred O. Haynes
Garber A. Davidson

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: That the Department demonstrated by preponderant evidence that the ten-day suspension it imposed on grievant was justified, that there was a nexus between the conduct and the efficiency of the Service and the penalty was within the realm of reasonableness.

OVERVIEW

Grievant, a Special Agent with the Bureau of Diplomatic Security, began working for the Department in May 2002. Following stints in [REDACTED] and a two-year assignment in [REDACTED] in 2010, grievant was assigned to [REDACTED] as an Assistant Regional Security Officer (ARSO).

While in [REDACTED] grievant, a female friend, and another co-worker visited a sports bar to watch a soccer game. Later, they were joined by two other co-workers. All members of the group were consuming alcoholic beverages. Grievant was armed with his government-issued weapon. Following the end of the soccer game, they all went to a liquor store with outside seating and continued to consume alcohol.

Shortly thereafter, an incident occurred between grievant and his female friend. The matter was brought to the attention of the Acting RSO who directed grievant to return to the Embassy. The Acting RSO confiscated grievant's weapon and reported the matter to the Bureau of Diplomatic Security. An investigation ensued and a Report of the Investigation was completed, a copy of which was forwarded to the Bureau of Human Resources, Office of Employee Relations (HR/ER).

On October 12, 2010, HR/ER informed grievant that it was proposing a ten-day suspension on him for violation of the Department's Deadly Force and Firearms Policy and the Mission Firearms Policy. Grievant filed a response to the Charge. The Department, however, upheld its ten-day proposal. Grievant challenged that decision, and the Board denied the grievance, ruling that the Department had met its burden as required.

The grievance was denied.

DECISION

I. THE GRIEVANCE:

██████████ (grievant), a Special Agent with the Department of State's (Department/agency) Bureau of Diplomatic Security (DS), filed a grievance with the Department on December 20, 2010. He argues that the ten-day suspension is overly harsh. He asks that the suspension be withdrawn and that his penalty be mitigated to a Letter of Reprimand. He also asked for interim relief.

On January 20, 2011, ██████████ filed a Supplemental Statement to his grievance, presenting further argument in support of his claim that the penalty imposed was overly harsh. He added the following statement:

I respectfully submit that my case warrants more than a two-day suspension, since I admitted that I consumed more alcohol than the agent who drank while on duty on an airplane, but less than an eight-day suspension, since I was not driving a vehicle, I was not arrested, there are no *Giglio* implications, and there was no notoriety.

On May 4, 2011, the Department issued its decision denying the grievance, and on May 17, ██████████ appealed that decision to the Foreign Service Grievance Board (FSGB). In that filing, grievant asked for a continuation of interim relief. On May 26, 2011, grievant withdrew his request for interim relief.

II. BACKGROUND:

Grievant began working for the Department as a DS Special Agent in May 2002. Following the completion of the Basic Special Agent training, in March 2003, grievant was assigned to a two-month TDY detail to ██████████. In the spring of 2004, upon his return and following various training assignments, he was activated by the National Guard and deployed to ██████████. In July 2005, at the end of his National Guard deployment, grievant returned to the

Department and volunteered for [REDACTED]. In October 2005, he was posted to [REDACTED] returning in January 2006. In March 2007, Grievant received a three-day suspension for misuse of a government computer when he connected a personal digital camera to the system in [REDACTED].

From August 2006 to May 2008, grievant was assigned to [REDACTED]. In August 2008, he volunteered for another tour in [REDACTED] and served there again from August 2008 to September 2009. Following that assignment, in May 2010, grievant was assigned to [REDACTED] as an Assistant Regional Security Officer (ARSO).

On June 26, while serving in [REDACTED] grievant, together with a female friend and ARSO [REDACTED], visited a sports bar in [REDACTED] to watch the World Cup soccer game between the United States and Ghana. Later they were joined at the sports bar by ARSO [REDACTED] and ARSO [REDACTED]. All members of the group consumed alcoholic beverages. At the time he was in the bar, grievant was armed with his government-issued weapon.

Upon completion of the soccer game, the group traveled to a liquor store with outside seating where they continued to consume alcoholic beverages. Shortly after their arrival, an incident occurred between grievant and his female friend. Suddenly, grievant's female friend left the group, followed by ARSO [REDACTED] and two others in the group. When [REDACTED] asked her what happened, she told him that grievant had hit her. Later, she recanted this allegation, and other witnesses stated that they did not see any argument or physical altercation between grievant and his friend. ARSO [REDACTED] informed Acting RSO [REDACTED] who immediately began to interview the members of the group. RSO [REDACTED] called grievant and Agent [REDACTED] back to the Embassy, where he confiscated grievant's weapon and interviewed each officer.

On June 29, 2010 Acting RSO [REDACTED] informed DS/ICI/PR of the incident, and on July 1, DS assigned a Special Agent to investigate the matter. On July 22, the investigation was

completed, and a Report of Investigation (ROI) was prepared. A copy of the ROI was forwarded to the Bureau of Human Resources, Office of Employee Evaluation (HR/ER).

On October 12, 2010 HR/ER informed grievant that the Department was proposing to suspend him for ten (10) calendar days without pay, based upon the ROI of the incident described above involving grievant while he was in [REDACTED]. The letter stated the following Charge:

**Charge I: Violation of 12 FAM, Exhibit 023, Section 2.6B
Department of State Deadly Force and Firearms Policy.**

2 FAM Exhibit 023 2.6B Activities Specifically Prohibited

The following activities are specifically prohibited for DSS Special Agents, while armed:

(5) Consumption of any alcoholic beverage while armed or six hours prior to being armed, or at any time prior to being armed sufficient to impair an agent's judgment or ability to perform his or her duties.

Your actions further violated **Mission Firearm Policy**, which states in Section VI (C):

... Employees who are authorized to carry firearms must maintain personal conduct at the highest and most consistent levels, in view of inherent dangers and the possibility of destructive outcomes... They are absolutely prohibited from consuming any alcoholic beverage while armed or six hours prior to being armed, or at any time prior to being armed sufficient to impair their judgment or ability to perform their duties. (Emphasis added)

The Mission Firearm Policy states in Section VIII- (Disciplinary Policy)

Nonjudicious use of a firearm, to include inappropriate display or use of the weapon, possession of a firearm while under the influence of alcohol or drugs, and similar acts of gross negligence, may result in disciplinary action against the employee ranging from a letter of reprimand to removal from Post.

The proposed suspension letter identified three (3) Specifications to the Charge:

Specification No. 1:

On June 26, 2010, grievant, [REDACTED], grievant's friend, ARSO [REDACTED] later joined by Agent [REDACTED] and Agent [REDACTED] were consuming alcohol, while attending a soccer game. Grievant was armed with his government-issued weapon.

Specification No. 2:

Following the soccer game, grievant and his friend traveled to a liquor store with outside seating and continued to consume alcoholic beverages, while still armed with his government-issued weapon.

Specification No. 3:

Following the visit at the outdoor bar, grievant traveled to a [REDACTED], while still armed. Grievant was required to check his weapon before entering the [REDACTED]. Grievant remained at the [REDACTED] until he received a telephone call from RSO [REDACTED] who ordered him and Agent [REDACTED] to return to the Embassy, where RSO [REDACTED] confiscated grievant's weapon.

On November 9, 2010, grievant filed his written response to the proposal letter in which he concurred with the facts cited in the letter. He did not make an oral response to the charges.

On December 10, the Deciding Official issued his decision. In that decision, the Deciding Official included the following:

I have independently reviewed and given full consideration to all of the available materials related to this action, to include your written response and consideration of the relevant Douglas factors and similar cases and penalties.

I find that the charge and sustained specifications are supported by the evidence. Taking the totality of your misconduct into consideration, it is my decision to suspend you for ten (10) calendar days as originally proposed.

On December 20, [REDACTED] filed his grievance with the Department, and on January 20, [REDACTED] filed a supplement to his grievance. On May 4, the Department issued its decision denying the grievance, and on May 17, [REDACTED] appealed the Department's decision to the FSGB.

In that filing, grievant had asked for continuation of interim relief. However, on May 26, grievant withdrew his request for interim relief. He noted that he would serve the ten-day suspension and seek reimbursement for any days served that may be mitigated by the Board's decision. On June 1, the FSGB acknowledged receipt of [REDACTED] grievance.

On June 10, grievant filed his First Discovery Request. Following the completion of the discovery process, on October 24, grievant filed a Supplemental Submission to the grievance, and on December 1, the Department responded to grievant's Supplemental Submission. On February 7, the parties informed the FSGB that there would be no further submissions in this case and requested that the Record of Proceedings (ROP) be closed. The ROP was closed on February 13, 2012.

III. POSITIONS OF THE PARTIES:

Grievant:

Grievant acknowledged that he violated the regulations relating to his consumption of alcohol while carrying his firearm. He also recognized that there is a nexus between his misconduct and the efficiency of the Service and agreed that he should be disciplined for having violated those instructions.

Grievant states that his grievance is not about whether he committed the misconduct of which he has been charged. Rather, this grievance is about the penalty that has been imposed against him for such conduct. He argues that the penalty being imposed is overly harsh and inconsistent with the precepts of similar penalties for like offenses. In his initial submission, grievant averred that the penalty should be more than two-days but less than an eight-day suspension. However, in his October 24, 2011 Supplemental Submission, grievant asked that the penalty be mitigated to a Letter of Reprimand. Grievant submitted a detailed analysis of the

comparator cases provided by the Department and articulated that he considers his admitted misconduct was far less egregious than those considered to be comparators by the Department.

The Department:

The Department notes that grievant has acknowledged that he violated the Department's Firearms Policy and the Mission's Firearms Policy. All that remains is grievant's challenge to the severity of the penalty imposed for grievant's misconduct.

In its December 1, 2011 Response, the Department undertook a thorough examination of the comparator cases and a detailed discussion of the Douglas Factors as determined by the Deciding Official. It noted that management has the inherent right to impose discipline on members of the Service in order to maintain employee discipline and efficiency and that the Deciding Official is the Officer who has the responsibility to exercise that managerial function.

The Department notes that, during HR/G's investigation of this grievance, it received a response to a request for information from grievant. Grievant was asked:

Were you aware of the prohibition against consuming alcohol while armed, prior to doing so on the occasion that resulted in the disciplinary action upon which your grievance is based?

Grievant's answer to this question was: "Yes, I was aware of the prohibition."

The Department rejects grievant's claim that the penalty is overly harsh. It notes that its analysis of the Douglas Factors and the comparator cases it had cited supports its conclusion with regard to the penalty being imposed. It further states that grievant's actions were a "serious" offense directly related to grievant's duties and must be considered "egregious" in light of the large amount of alcohol consumed while grievant was armed.

The Department asks the Board to affirm the level of discipline it imposed.

IV. DISCUSSION AND FINDINGS:

In grievances involving disciplinary actions, the Department has the burden of establishing, by a preponderance of the evidence, that the disciplinary action was justified, that the required procedures were followed, and that there is a nexus between the conduct and the efficiency of the Service.¹ For the reasons discussed below, we find that the Department has satisfied its burden of proof in this case.

There is no dispute with regard to the conduct with which grievant was charged and whether there is a nexus between the conduct and the efficiency of the Service. Grievant has admitted to these two elements of the case. The dispute is whether the penalty imposed by the Department was reasonable.

Grievant argues that the ten-day penalty is overly harsh and inconsistent with the precepts of like penalties for similar offenses. He admits that he should be disciplined but believes that such discipline should be reduced to a Letter of Reprimand.²

The Department disagrees with the grievant, noting the following:

(A)n analysis of the Douglas Factors used to determine the appropriate level of discipline reveals that the penalty imposed upon ██████ is neither totally unwarranted nor so greatly disproportionate to his offense to constitute an abuse of the Department's discretion in matters of discipline.

In its analysis of the Douglas Factors, the Department noted that grievant was totally aware of the prohibition against consuming alcohol while armed, that he had a prominent role at the post and had been suspended for misconduct less than four years prior to this incident. Regarding the consistency of the penalty with others, the Department, citing FSGB Case No. 2010-038, noted that case comparison is important, but is only one of the many factors to be considered in

¹ 22 C.F.R. 905.2

determining the appropriateness of a penalty. The most significant Douglas Factor is the nature and seriousness of the offense and the relationship to the employee's duties, position and responsibilities, including whether the offense was intentional or frequently repeated.

This Board has undertaken a thorough review of the record, including the Douglas Factors, the comparative cases cited by the parties, and the Mission Firearms Policy. We note that the Mission Firearms Policy clearly requires that agents and others who carry firearms become familiar with the restrictions contained therein. Section VI(C) outlines the standards of conduct for employees who are authorized to carry firearms. Such persons must maintain personal conduct of the highest level and are absolutely prohibited from consuming alcoholic beverages while or within six hours of becoming armed. When grievant was asked by investigators whether he was familiar with the Mission's Firearm Policy before he went out that evening, he stated that he was aware of the prohibition from consuming alcohol while armed. He further stated that he did not expect to be drinking that day, as he believed he was just going to be watching the soccer game and "having a couple of beers." Ultimately, the evidence shows that he consumed between seven and nine drinks during the period in question.

A comparison of the cases cited by grievant demonstrate that the penalty in this case is not inconsistent with the discipline imposed in those cases. There are significant factors here that were not present in most of the cases referred to by grievant. We view with great importance that grievant's conduct occurred in a foreign locale that he admits was notorious for the prevalence of guns. In only two comparative cases did the conduct at issue take place in a foreign location. One of the two cases did not involve the consumption of alcohol. All of the others involved conduct within the United States or in transit to the United States. Equally important is grievant's admission that he intended to drink a few beers while armed and that he

was aware of the prohibition in the Mission Firearms Policy. While his actions that night would have been serious enough, it quickly turned into more than just a few beers.

More specifically, the seventh and eighth cases discussed in grievant's submission of October 24, 2011, involved alcohol consumption cases that imposed an eight and a ten-day suspension. In both cases, the agents consumed enough alcohol to be considered under the influence. However, neither case took place in an overseas location that was stipulated to be a high crime area. Even in the one case to take place in a foreign location, Mexico, the grievant's service revolver was stolen during a burglary of his home while he was away and did not involve alcohol. Finally, in the fifth cited case, an agent was suspended for two days for consuming a single glass of wine on a flight to the United States. In that case, the deciding official found the offense to be not intentional, but did not consider it to be a mitigating factor since the agent was aware of the rules. In this case, grievant consumed considerably more than a glass of wine, admits to being aware of the prohibition, and engaged in this conduct in a foreign location known for the prevalence of guns.

In the sixth case referred to by grievant, the agent was suspended for two days for consumption of alcohol while armed in a foreign country in violation of the Department's policy. The Department states that a number of facts in that case required more lenient treatment than grievant. First, the agent consumed only one beer and a glass of orange juice that may have contained alcohol. Second, the agent had an outstanding performance record and no indication of a prior disciplinary record. Third, the agent was assaulted by several individuals while coming to the aid of a Foreign Service National after returning to a bar to warn other staff members of an unsafe situation. In that case, the Ambassador argued that the agent showed excellent judgment in returning to warn members of the mission community of the unsafe

situation. In the instant case, grievant consumed a great deal more alcohol and has a prior record of discipline. While the discipline in the sixth case was mitigated from a fifteen to a two-day suspension, it appears that a higher penalty would have been imposed if the assault and the outstanding performance record were not present.

In view of the foregoing and the entire ROP, we find that the Department acted within the zone of reasonableness in determining the ten-day suspension and did not abuse its authority. We find that the offense was serious, and it violated the Department's and Mission's Firearms Policies. We agree with the Department that the environment present in [REDACTED] is an important factor in this determination. The potentially violent nature of the places that grievant patronized while armed was demonstrated by the fact that at the [REDACTED] he was required to surrender his firearm upon entering the [REDACTED].³ We note that the Mission Firearm Policy very carefully sets the rules of engagement for the use of a firearm in such an environment. In pertinent part, the Policy states as follows:

The [Chief of Mission] will not authorize the use of firearms for any reason other than self-defense of the employee authorized to carry a firearm, or those he/she is charged with protecting, and/or when the employee believes he/she is in immediate and imminent danger of death or grievous bodily harm. Employees should not put themselves in danger but, if in the course of their duties danger arises, they should remove themselves from that situation. *If and only if he/she believes that it is impossible to leave the scene of danger safely, they may use their firearms for self defense. The sole purpose for drawing and discharging a firearm at another person is to STOP that assailant from continuing what is believed to be a direct, life-threatening attack on another person.* However, the employee must use every possible opportunity to extract themselves from the situation without firing their weapon. Unnecessary brandishing or display of a weapon is strictly forbidden.

³ The weapon was returned to him when he left the [REDACTED] to return to the embassy at the direction of RSO [REDACTED]

Considering the number of armed citizens in [REDACTED] and the obvious necessity for clear and acute judgment in executing the firearms policy, we believe the risks grievant incurred both to himself and potentially to those he is charged to protect were unreasonably high.

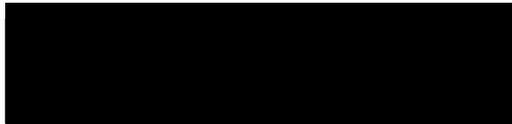
Grievant was fully aware from the outset that the consumption of alcohol while armed was a violation of the Mission Firearms Policy. Grievant was also aware of the level of conduct he was to display when armed and, notwithstanding such knowledge, he intentionally carried his weapon, knowing that he was planning to have a few beers while watching the soccer game. In fact, he consumed a great deal more than a few beers. Grievant visited two other bars and continued to violate the policy by consuming beer and whiskey, while armed, in those bars.

Accordingly, we find the Department's analysis of the comparator cases and the Deciding Official's presentation of the Douglas Factors as applied to grievant as well as the directives and prohibitions contained in the Mission Firearms Policy persuasive. We reject grievant's request for a reduced penalty and find that the penalty imposed by the Department is well within its discretion and reasonable.

V. DECISION:

The grievance is denied.

For the Foreign Service Grievance Board:



John M. Vittone
Presiding Member



Alfred O. Haynes
Member



Garber A. Davidson
Member