

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████
Grievant

Record of Proceedings
FSGB Case No. 2011-025

And

September 29, 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

CASE SUMMARY

HELD: The Department did not carry its burden of proof to sustain its charge of Improper Personal Conduct. The disciplinary action was overturned.

OVERVIEW

In a prior disciplinary action, grievant was charged with Improper Personal Conduct for allegedly entering the hotel room of a junior, Locally Employed Staff (LES) member uninvited; making inappropriate comments to her of a sexual nature; engaging in unwelcome physical contact; and three weeks later, again making unwelcome sexual comments to her at the airport while she was acting as his expeditor.¹

In an effort to defend himself against those charges, grievant sought information about whether the LES member had made similar charges at her previous places of employment. He first asked a LES HR Specialist for information in her personnel file about her places of prior employment. Having obtained that information, grievant went to the two employers and asked about possible earlier charges of sexual harassment. The LES member who made the original allegations found out about the visit to the first employer and complained to the Regional Security Office. Grievant was charged with four new specifications of Improper Personal Conduct, both for having sought the information from the file from the HR Specialist, and for having sought the information from the former employers. The Department asserted that the inquiries were personal rather than official in nature and thus inherently improper.

The Board agreed that the inquiries were personal in that they did not pertain to grievant's official job duties, but found that grievant's actions were not improper. He was truthful with the HR Specialist about what information he was seeking and why and did nothing to pressure her to give him the information. Grievant had a right to seek information to defend himself. It was the HR Specialist's duty to determine whether such information could be released to him.

The Department cited no authority that would establish that grievant was prohibited from seeking information from the prior employers to defend himself. Although he could not represent that he was seeking the information as a representative of the Department, the Department did not charge grievant with having done so. The Department therefore failed to prove that grievant acted improperly and the disciplinary action was overturned.

¹ In a decision issued September 22, 2011, in FSGB Case No. 2010-051, the Board sustained the appeal and overturned the disciplinary action.

DECISION

I. THE APPEAL

██████████ an FS-04 Career Candidate with the Department of State, contests a ten-day suspension arising from a charge of Improper Personal Conduct. ██████████ claims that there are factual errors in the letter of discipline and that the charges cannot be sustained on the record evidence; alternatively, if the charges are sustained, he claims that the penalty is not consistent with penalties imposed in similar cases.

II. BACKGROUND

On August 3, 2010, while serving as a GSO² at ██████████, ██████████ received notice that a proposed five-day suspension had been sustained on charges filed against him involving his interactions with ██████████ an LES³ employee.

██████████ claimed that ██████████ had entered her hotel room uninvited while they were on a temporary duty assignment (TDY); made inappropriate comments of a sexual nature; engaged in unwelcome physical contact with her; and three weeks later again made unwelcome sexual comments to her while she was acting as his expediter at the airport prior to his departure on another TDY. ██████████ recorded parts of the conversations on her cell phone which were used as evidence against ██████████

██████████ therefore decided to file a grievance in which he would challenge ██████████ assertions that their contacts were non-consensual⁴. He further intended to challenge the suspension and reviewed the Records of Investigation (ROIs) in order to

² General Services Officer

³ Locally Employed Staff

⁴ The five day suspension was grieved in a separate proceeding. On September 22, 2011, the Board issued a ruling that found that the interactions were not shown to have been non-consensual and found that the suspension was improper. FSGB Case No. 2010-051. The instant case addresses not the validity of the initial suspension decision, but whether the actions of the grievant in attempting to obtain facts relevant to his challenge to that suspension warranted the imposition of separate discipline.

prepare a defense against the charges. In doing so, he noted that [REDACTED] had told investigators that she recorded her conversation with grievant because she had encountered what she described as the same type of sexual harassment at her former place of employment and wanted evidence to prove her claims. Grievant decided to investigate her claim that she had been harassed in the past.

On August 30 or 31,⁵ [REDACTED] went to the HR office in the embassy and asked to see [REDACTED] file so that he could find out where she had been previously employed. An LES member, [REDACTED] obtained the file and permitted him to secure the names and addresses of two prior employers from the file. Grievant then requested an embassy vehicle and driver and went to visit the first employer, [REDACTED]. [REDACTED] told the receptionist at [REDACTED] that he wanted to speak to someone in their human resources department about a former employee, giving [REDACTED] name. When the receptionist refused to comply with his request, grievant asked her if she knew of any issues involving [REDACTED]. The receptionist stated that [REDACTED] had left on her own terms and asked [REDACTED] for his name. He said “[REDACTED] and left.”⁶

[REDACTED] then proceeded to the second employer, [REDACTED] ([REDACTED]), where he introduced himself as “[REDACTED] from the U.S. Embassy.” At [REDACTED] he met with someone from the human resources section who told him that he had no record of [REDACTED] having worked there, but that she might have been a temporary employee. [REDACTED] told the [REDACTED] staff person that [REDACTED] had stated that she had resigned

⁵ The ROI is unclear about the date.

⁶ Grievant argues that he left his identification at the security desk; thus, his true name was given when he first arrived at this employer.

because of harassment. The staff person said that if there had been a complaint of that nature, he would have known about it. [REDACTED] then left. Soon thereafter, he again spoke with [REDACTED] of the embassy HR office and asked her if she could help him to get the information he sought from the former employers.

On September 1, [REDACTED] sent an email to [REDACTED] one of the RSO investigators on the original case, advising him that a former colleague at [REDACTED] had informed her of [REDACTED] inquiries. She stated that she felt “very violated by an individual on malicious witchhunting” and “stressed and agonized by this recent development.” The Diplomatic Security Service (DSS) initiated a new investigation, which was closed on September 24, 2010. During the course of the investigation, [REDACTED] [REDACTED] agreed to a voluntary curtailment from post.

On November 2, 2010, the Department notified [REDACTED] that it was proposing to suspend him for an additional 40 days based on two charges arising from his efforts to investigate the first incidents: Improper Personal Conduct (with four specifications) and Willful Misuse of a Government Vehicle. The Improper Personal Conduct specifications were based on grievant’s having accessed information from [REDACTED] [REDACTED] personnel file; his having asked the HR Specialist to assist him in getting information from the former employers; and his visits to the two former employers seeking information about [REDACTED]

The proposal letter listed two aggravating factors: (1) that grievant had just received notice that the earlier suspension proposal was sustained by the deciding official and the new actions demonstrated that he had not learned from his previous mistakes; and

(2) that grievant's voluntary curtailment from post resulted in unnecessary disruption and expense to the U.S. Government.

The deciding official in this case issued his final decision letter on February 11, 2011. In that letter, he sustained all four specifications under Charge 1, but did not sustain Charge 2. Consequently, he reduced the penalty from 40 to 10 days.⁷

On March 10, 2011, [REDACTED] filed a grievance with the Department, contesting the 10-day suspension. The Department denied the grievance in its entirety, with one exception: the agency modified Specification 3 to delete the statement that grievant had asked [REDACTED] if [REDACTED] had filed an EEO complaint and replaced it with a statement that he had asked if there had been any issues involving [REDACTED].

[REDACTED] filed his appeal with the Board on May 22, 2011. The record was closed on September 21, 2011.

III. POSITIONS OF THE PARTIES

Agency

With respect to Specification 1, the agency claims that by representing himself as an American supervisory employee to the HR LES member, [REDACTED] was able to gain access to information in [REDACTED] personnel records, specifically her former places of employment, for "unofficial personal use." Specification 2 alleges that [REDACTED] returned to see the HR Specialist a second time, when he was unable to gather the information that he was looking for from [REDACTED] former employers, to ask for her help in seeking this information.

⁷ Willful Misuse of a Government Vehicle carries a mandatory minimum 30-day suspension.

The Department relies on [REDACTED] oral and written statements to the investigators in which he admitted that he accessed information in [REDACTED] personnel file and that he exercised poor judgment in doing so. The agency also relies on the HR Specialist's oral statement to investigators, captured in a summary in the ROI, that she allowed [REDACTED] to access this information because he "represented himself" as an American supervisory employee. In response to grievant's argument that he should be able to review the notes of the HR specialist's statements, rather than the investigator's summary of her remarks, the agency chastises [REDACTED] for challenging the accuracy and completeness of the summary as "questioning the integrity of the DS investigators."

The gist of the Department's contentions is that [REDACTED] sought sensitive information about [REDACTED] for unofficial, personal use. The charge at issue in this case is that grievant's actions in seeking information to defend himself in the disciplinary action were "purely personal in nature." The deciding official stated: "I therefore find your claims, that your pursuit of information concerning [REDACTED] former employers was strictly official in nature and was only carried out to defend your case, to be insufficient to excuse your misconduct." The agency contends that its decision to drop the charge of Willful Misuse of a Government Vehicle does not constitute an admission that [REDACTED] actions in the first charge were official.

With respect to Specifications 3 and 4, the Department cites the details of [REDACTED] [REDACTED] visits to support its charge that he exercised poor judgment in seeking information from [REDACTED] former employers. The agency also relies on grievant's admission that what he did was misguided. It notes specifically that [REDACTED] was

deceptive when he identified himself as ‘ [REDACTED] to the receptionist on the visit to [REDACTED] and that he used his affiliation with the embassy to try to gain access to information at [REDACTED]. It also cites the fact that [REDACTED] made these visits immediately after receiving notice that the Department had sustained its earlier charges that his prior actions toward [REDACTED] constituted bad judgment and, therefore, he had not learned from his previous mistakes. The Department asserts that [REDACTED] conveyed her “feelings of *intimidation* and frustration regarding his misconduct” to the RSO’s Office when she learned of grievant’s inquiries at her former places of employment. (Emphasis added.)

Citing [REDACTED] statement about why he found the information he was seeking from the companies relevant to his disciplinary action, the Department contends, “. . . he wanted to exploit any potential vulnerabilities that may have provided him a favorable advantage in his personal plight.” The Department also contends that the fact that [REDACTED] claimed he needed the information for his grievance was “ultimately irrelevant to the question of whether he engaged in the acts of misconduct for which he was charged.” Finally, the Department contends that [REDACTED] exercised poor judgment in seeking this information because:

While the grievant was responsible for effectively stating his claims in his agency-level grievance submission, he was required to do nothing more than provide any documentary evidence *readily available to him* on which his grievance rested. [REDACTED] personnel file and personal information regarding her former employment did not fall into [this] category. . . .

(Emphasis added.)

Charged Employee

With respect to Specifications 1 and 2, ██████████ contends that he did not seek information from ██████████ file for “unofficial personal use;” rather, he sought the information solely to defend himself against the Department’s disciplinary action. He argues that since ██████████ claimed to have been sexually harassed in a previous job, it would be useful to his defense if he could learn more about the previous claim. He argues, that if, for example, there was evidence that she had never made such a claim, then it would be relevant to his disciplinary action that she had testified falsely when she said that she had. Likewise, he argues, if she did make a similar claim against another supervisory employee under circumstances similar to the incident with him, this might have corroborated his claim that the encounter was consensual. ██████████ contends that his efforts to learn more about ██████████ previous claim was not personal, but rather official in nature and, therefore, did not constitute poor judgment on his part. ██████████ contends that the deciding official’s decision not to uphold the second charge of Willful Misuse of a Government Vehicle supports this conclusion. In other words, he argues, the decision not to sustain the charge is consistent with a finding that he used the vehicle for official, not personal, business.

██████████ also contends that he did not misrepresent himself as ██████████ supervisor when he requested information from the HR Specialist. He argues that, in fact, he made no representations at all about himself and that the specialist knew that he was not ██████████ supervisor. He argues that he was truthful and candid when he informed the specialist that he was seeking information about ██████████ former employers because of the pending disciplinary charge. He asserts that he did not access

██████████ file generally; rather, the only information he sought was her former places of employment.

With respect to Specifications 3 and 4, grievant again contends that the Department is mistaken in characterizing his attempt to gather information from ██████████ ██████████ previous employers as personal. He states that there is no Department guidance on how a charged employee should gather information in his own defense from private companies and that even now, he is not sure how the Department contends he should have gone about it. Although he admits that when he visited ██████████ he did state that he was from the U.S. Embassy, he contends that he was not charged with misuse of his official position in this specification and the Department cannot now amend the charge.

██████████ argues with respect to all four charges that a 10-day suspension is unduly harsh and inconsistent with the precept of like penalty for similar offenses as demonstrated by the comparator cases. ██████████ also contends that although the deciding official found a number of mitigating factors to be present, those mitigating factors were not taken into consideration in determining the final penalty. He argues that the penalty was reduced from 40 days to 10 solely because the Charge of Willful Misuse of a Government Vehicle, which carries a minimum penalty of 30 days, was not sustained. ██████████ further contends that the deciding official was incorrect in finding that his conduct was intentional, for personal gain, and that he knew or should have known that his request for information from ██████████ file was improper.

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 [REDACTED] 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.

According to the discipline proposal letter, [REDACTED] is charged with the following four specifications under the charge of Improper Personal Conduct:

Charge 1: Improper Personal Conduct

3 FAM 4138 (11): Conduct which clearly shows poor judgment or lack of discretion which may reasonably affect an individual or the agency's ability to carry out its responsibilities or mission.

Specification 1:

In your September 8, 2010 voluntary written statement, you admitted that on August 30 or 31st, after receiving the decision to suspend you for improper personal conduct, you visited the Human Resources office in the Embassy. In your role as an American GSO supervisor, you obtained from the HR specialist information from [REDACTED] personnel file, including her former employers.

Specification 2:

You also stated that on September 2, you asked the HR Specialist if she could inquire with [REDACTED] former employers about any possible harassment claims [REDACTED] had made. In a September 7 interview with Regional Security Officer (RSO) investigators, the HR specialist confirmed that you asked to review [REDACTED] personnel file, and that she gave it to you. She stated that you asked that she keep [your] request for information to herself.

You misused your official position to obtain sensitive information on a colleague for personal, rather than official, purposes.

Specification 3:

In your September 8 statement you admitted that on September 1, 2010, you visited [REDACTED] former employer, [REDACTED] to inquire about her employment with the company. You asked if there had been any issues

that the receptionist knew of which involved [REDACTED].⁸ When she learned of the grievant's action, she considered it intimidating.⁹

Specification 4:

In your September 8 statement, you admitted that on September 1, 2010, you visited [REDACTED] former employer, [REDACTED] [REDACTED] to inquire about her employment with the company. You attempted to elicit information of a personal nature about [REDACTED].

A second charge, Willful Misuse of a Government Vehicle, was not sustained in the final disciplinary letter¹⁰.

Despite the fact that the charge and specifications in this case are far from a model of clarity, all four specifications are plainly directed at whether grievant's attempt to personally obtain information from the Embassy's HR records and from [REDACTED] former employers was improper. The Department asserted that these inquiries were "personal" and not "official" and that, therefore, the grievant's actions were inappropriate.

While we agree that the inquiries were personal in that they did not pertain to grievant's official job duties, we disagree that he knew or should have known that his efforts to obtain the information in question were improper. An individual who is subjected to disciplinary action and who wishes to obtain information either to determine whether or not to challenge the action or to obtain support for a challenge to the action is not precluded from engaging in reasonable investigative efforts to obtain that

⁸ This sentence originally read as follows:

You asked specifically about whether or not [REDACTED] had filed an Equal Employment Opportunity (EEO) complaint while employed with that company. The wording was changed in an amended discipline letter issued as part of the agency's response to the agency-level grievance.

⁹ A slightly different version of this sentence was originally included in Specification 4. In the Department's Response to Supplemental Submission dated August 18, 2011, it acknowledged that there was nothing in the record to indicate that [REDACTED] knew of [REDACTED] visit to [REDACTED] and that the sentence belonged under Specification 3 instead. It stated that it was amending the charge accordingly.

¹⁰ We draw no conclusions in this case from the decision of the Deciding Official not to sustain that charge.

information. The Department has cited no authority that would suggest that an employee who has been issued discipline or who is pending a proposal for discipline is precluded from attempting to uncover information that might assist in supporting the employee's position that the discipline or proposed discipline is not valid or is based upon erroneous facts.

Focusing upon the efforts made by the grievant that were cited in the disciplinary letter in this case, the first such inquiry was made of the Human Resources specialist at the Embassy. There is nothing inherently improper about asking HR to disclose the identity of [REDACTED] former employers so that grievant might attempt to obtain information from them regarding whether she had made prior complaints of harassment. [REDACTED] herself identified a prior complaint as the reason why she tape recorded certain of her conversations with the grievant. Grievant advised [REDACTED] of the limited information that he was seeking and the reason for it. Nothing in the record explains why the Department concluded that he was not permitted to investigate [REDACTED] [REDACTED] representation that she had been previously harassed by a different supervisor at a prior job, particularly where requests by grievant that certain matters be investigated in connection with the events that led to the suspension were rejected by the Department.

[REDACTED] was not supervised by the grievant and there was no evidence that [REDACTED] felt compelled to comply with grievant's request or that she was pressured in any way to honor his request. Nor was there any evidence that grievant was aware of any legal or other restriction on being provided that information. The Department cites no authority to support its charge that grievant demonstrated poor judgment or a lack of discretion by contacting the Embassy HR professional, telling her truthfully why he

sought the information, and then receiving the information freely offered by the HR professional in response to the inquiry. Grievant was permitted to rely upon [REDACTED] [REDACTED] superior expertise with respect to personnel records and privacy issues.

Specifications 1 and 2 must be rejected in their entirety as factually unproven.

Specifications 3 and 4 must similarly be rejected due to a lack of proof. Labeling the inquiries to [REDACTED] former employers as “personal” and not “official” again fails to establish that the grievant acted improperly or exercised poor judgment or a lack of discretion. No authority was cited that would establish that grievant was banned from contacting former employers of a complainant to verify an assertion she made in connection with a disciplinary matter. Obviously he would not be permitted to misrepresent his role and suggest or represent that he was seeking the information as a representative of the Department or in some other official capacity. The Department, however, did not charge grievant with having done so. The somewhat vague specifications notably do not pertain to charges of misuse of his official position or improper use of his credentials. Specifications 3 and 4 say nothing about any misuse of grievant’s status as an Embassy employee and say nothing about having misrepresented (either directly or impliedly) the reasons for his inquiry as an official one. Although the Department makes arguments to this Board that grievant somehow misused his status to attempt to secure information, it may not expand or modify the charges and the basis for discipline to include matters that were never the subject of the initial proposal or decision. To do so would improperly deprive the grievant of due process. See, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Brook v. Corrado*, 999 F.2d 523 (Fed. Cir. 1993) (recognizing that, as an element of due process, a notice of

proposed discipline must apprise the employee of the nature of the charges in sufficient detail to allow the employee to make an informed reply).

For all of these reasons, we conclude that the suspension is unsupported by such cause as will promote the efficiency of the service and the suspension is ordered overturned and the appeal sustained.

V. DECISION

The Board does not sustain any of the specifications of the charge against [REDACTED] [REDACTED] of Improper Personal Conduct. The appeal is sustained and the disciplinary action overturned. All references to the disciplinary action are to be expunged from the charged employee's records and files.