

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

Department of State

Record of Proceedings
FSGB No. 2011-051

August 15, 2012

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Barbara C. Cummings
Nancy M. Serpa

Special Assistant:

Carol Gullion

Representative for the Grievant:

Pro se

Representative for the Department:

Kathryn N. Skipper
Attorney, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The 10-day suspension imposed on grievant for improper personal conduct and failure to follow regulations was reasonable. The grievance is denied in its entirety.

OVERVIEW

██████████ (grievant), a married FP-04 Information Management Specialist (IMS), received a 20-day suspension, subsequently reduced to 10 days, for improper personal conduct (four specifications) and failure to follow regulations (two specifications). The charges were based on grievant's conduct while assigned to two posts: ██████████ and a subsequent tour in a critical threat (counterintelligence) country. Grievant's wife and family did not accompany him to either post. While in ██████████ grievant engaged in an extramarital relationship with a local female. While serving in the critical threat post, grievant admitted having an extramarital relationship with a local embassy employee as well as engaging in sexual relations with two "massage techs." Grievant also developed recurring social relationships with six other local nationals. He did not file required reports of contact regarding either his close personal relationships or the recurring social ones until he was questioned about them during an interview with Regional Security.

While serving in the critical threat post, grievant made an unreported and unauthorized personal return trip to ██████████ a post under Ordered Departure, in violation of the rules regarding U.S. Government employee travel to such posts. Grievant argues that he should not be disciplined at all, but that if any discipline is warranted, the penalty should be reduced based upon the "Douglas Factors" and the treatment of other employees who committed similar offenses.

DECISION

I. THE GRIEVANCE

On January 25, 2011, following a Diplomatic Security investigation into grievant's personal conduct at two overseas posts, the Department of State (Department, agency) charged him with improper personal conduct (four specifications) and failure to follow regulations (two specifications). The Department ordered that grievant be suspended for 20 days and that a disciplinary letter be included in his Official Personnel File (OPF) until he is next recommended for promotion. After review of grievant's written and oral responses to the charges, the Undersecretary for Management sustained the charges, but mitigated the suspension to 10 days. Grievant filed the instant grievance on June 9, 2011, which the agency denied on October 4, 2011. Grievant appealed the agency decision to this Board on October 19, 2011 requesting Interim Relief, which was granted pending a final decision.

II. BACKGROUND

Grievant joined the Foreign Service in 2005 and began his first assignment as an FP-04 Information Management Specialist in [REDACTED] in 2007. Grievant's wife and two children did not accompany him to post. During that assignment, grievant engaged in an extramarital sexual relationship with a local national. He did not inform his wife about this affair.

In February 2008, the Department ordered the departure of U.S. non-essential personnel and family members from [REDACTED] due to security considerations. At that time, grievant was assigned to a critical threat (counterintelligence) country. His wife and children did not accompany him to this second assignment either. Grievant

received a security awareness briefing at the commencement of his second assignment. In February 2008, he signed an acknowledgement of his responsibility to report contacts with local nationals with whom he established a close or recurring relationship.

In April 2008, grievant requested leave, telling his supervisor that he intended to visit his family in the [REDACTED] area. Once this leave was approved, however, grievant made an unauthorized trip to his former post, which was still in Ordered Departure status. During that visit, he reestablished contact with the woman with whom he had the extramarital affair.

In August 2008, grievant used a local internet website in the critical threat country to arrange for massages. He admitted that over the next several months, in addition to receiving massages, he had sex on multiple occasions with two different massage technicians whom he paid after each visit. In January or February 2009, grievant began a sexual relationship with a married member of the locally engaged staff (LES) who was employed in the mission's Human Resources Office. Grievant did not inform his wife about his affairs with the massage technicians or with the LES.

In February 2009, the Regional Security Officer (RSO) at post interviewed grievant who admitted the relationship with the LES, as well as, having had sex with the two massage technicians. He also admitted having social relationships with other local nationals, including embassy cafeteria workers. As a result of the interview, grievant filed five Foreign Contact reports in February 2009, identifying his contacts with only one of the massage technicians, the LES and three other nationals of the critical threat country. Upon learning that grievant had failed to file contact reports in a timely manner, the RSO revoked his access to the chancery. Grievant was curtailed from and departed

post in March 2009. On April 14, 2009, he filed another contact report in which he disclosed his relationship with the second massage technician. Three days later, the agency suspended his security clearance.

Charge 1: Improper Personal Conduct

Grievant was charged with improper personal conduct with four specifications which the deciding official found demonstrated that he committed "notoriously disgraceful conduct" as defined in the list of disciplinary offenses in 3 FAM 4377.

Specification 1: The deciding official found that grievant's admission that he paid and had sex with the first "massage technician" six or seven times over a couple of months constituted notoriously disgraceful conduct and gave the appearance of impropriety.

Specification 2: The deciding official found that grievant's admission that he paid and had sex with the second "massage technician" also created the appearance that grievant paid her for sex. Later, after describing specifications 2 and 3, the deciding official stated:

You take issue with the characterization of your behavior as "notoriously disgraceful conduct." Given that you admitted to engaging in sexual relationships with four different women, two of whom you paid for their massage or other services (which gives at least the appearance of prostitution) during a one-to-two-year period while you were married, I believe your conduct does fall within the category of promiscuous sexual relations.

Specification 3: The deciding official found that grievant's extramarital undisclosed relationship with a married embassy local employee was a breach of the standard of conduct required of Foreign Service officers that left him vulnerable to potential blackmail.

Specification 4: The deciding official found that grievant's extramarital affair with the local female in his first post and his concealment of this affair from his wife, left him equally vulnerable to blackmail.

Charge 2: Failure to Follow Regulations

Specification 1: The deciding official found that despite grievant's signed acknowledgement regarding contact reporting requirements in a critical threat country, he failed to timely report his relationships with the two massage technicians, his affair with the LES or his ongoing social relationships with up to six other nationals, and did not report them until he was directed to do so by the RSO.

Specification 2: The deciding official found that grievant was dishonest with his superior when he sought permission to travel in April 2008. In addition, grievant's travel to his former post, while that post was in Ordered Departure status, without a waiver or country clearance was a violation of agency regulations.¹

The Department completed a case comparison worksheet in which it reviewed eleven cases of disciplinary action involving elements similar to this case. The agency conceded that there is no comparator case with the exact combination of charges as are present in this case. The Department also found the following aggravating factors:

- grievant's misconduct was "intentional, frequent and repeated;"
- grievant used his government-provided residence for many of the extramarital sexual encounters;
- grievant's behavior showed a pattern of poor judgment that occurred in more than one post of assignment;

¹ See, 3 FAM 3700, Appendix A.

- the appearance of payment for sex was inconsistent with the Department policy against prostitution;
- as an information management officer, grievant was entrusted with confidential information, including top secret cables;
- the suspension of grievant's security clearance rendered him unable to perform the full range of his duties;
- there was a monetary cost associated with grievant's curtailment from post;
- grievant's unanticipated and immediate departure had a negative impact upon post operations and other employees;
- grievant and at least one of his sexual partners were married and he did not inform his wife of his affairs, thereby rendering him susceptible to blackmail, coercion and undue influence; and
- grievant was dishonest with his supervisor when he sought permission to travel to the U.S. when, in fact, he was planning to travel to his former post.

Grievant appealed the deciding official's determination to this Board seeking the following relief:

- (1) Interim Relief,
- (2) overturning of Charge 1, Specifications 3 and 4,
- (3) mitigation of the penalty,
- (4) removal of untrue information, including aggravating factors, in the discipline letter, and
- (5) other appropriate relief.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

Charge 1:

Regarding the encounters with the massage technicians, the deciding official was not persuaded by grievant's argument that he paid only for the massages and not the sex that followed. The Department notes that according to a recent Human Rights Report for the country in which the acts occurred, twenty percent of massage parlors employed prostitutes, with an increased percentage in the cities. The agency cites the fact that grievant admitted not only that he paid two of the women with whom he had sex, but also that this gave the appearance of impropriety, regardless of the reasons why the payments were made. The Department concluded in its decision that despite grievant's protestations, some of his payments were likely for sex since he stated that he was dissatisfied with the massages from one of the technicians, yet he continued to have sex with her and to pay her.

The deciding official also found that grievant's admissions established that he engaged in promiscuous behavior, which is included in the definition of notoriously disgraceful conduct. Grievant admitted that, while married, he had sexual relationships with four different women during a one- to two-year period – including the two whom he paid. In addition, grievant admitted that he spoke openly to other mission employees about his sexual activities with the massage therapists. This ensured that his conduct was open and notorious.

The deciding official also cited the standard of conduct required of Foreign Service officers who are considered to be on duty 24-hours per day and the nexus

between that standard of conduct to the efficiency of the Service. The deciding official concluded that under the Suitability Guidelines for Appointment and Continued Employment, 3 FAM 4138, grievant knew or should have known that his actions were inappropriate. The agency cited several bases for this conclusion, including the fact that grievant paid for the cost of a trip with the LES in the critical threat country, that he met this woman through their mutual employment at the embassy and that both were married at the time of their affair.

In addition, the agency found that grievant was dishonest when he first responded to questions about his unauthorized trip to [REDACTED]. He initially stated that he only met with embassy staff, but later admitted that he met the woman with whom he had been intimate.

The deciding official noted that by not telling his spouse about his sexual relationships at both posts, grievant exposed himself to blackmail, coercion, and improper influence, particularly while he was serving in the critical threat (counterintelligence) country.

Charge 2:

The deciding official cited grievant's signature on a February 2008 security awareness briefing acknowledging that he was aware of his affirmative duty to report contacts he developed with local nationals in the critical threat country where he was serving. Grievant admitted that he failed to report several of his numerous contacts with local nationals. The agency contends, moreover, that grievant persisted in not reporting some of his contacts even after he was told to do so by the RSO.

Regarding grievant's travel to his previous post without proper authorization or country clearance, the deciding official found grievant's arguments irrelevant and

insufficient when he claimed that someone in the travel office at the embassy told him it was okay to travel to [REDACTED] and that the Ordered Departure status was lifted shortly after his visit.

Penalty:

In determining the appropriate penalty, the deciding official considered a number of mitigating factors including the fact that grievant's position was not prominent; he had no prior disciplinary record; his performance was satisfactory or better; there was no public notoriety [outside of the embassies]; his conduct was off-duty; and rehabilitation was considered possible. Notwithstanding these mitigating factors, the deciding official did not deem it relevant that grievant's spouse declined to accompany him to either post or that they reportedly intend to divorce. Similarly, the agency argues that it is irrelevant that grievant was "routinely called to work on weekends and after hours."

The deciding official also considered a number of aggravating factors.² In addition, the agency cited the fact that grievant was not truthful on occasions when he secured permission to travel to [REDACTED] and when he discussed whether he met with his former paramour during his unauthorized leave there. Finally, the agency found that grievant exposed himself to blackmail by failing to inform his spouse of his relationships.

The agency contends that there are no cases with a similar number of like offenses with which to compare penalties. It contends that the penalty imposed in this instance is justified by the penalties that have been imposed in prior similar cases.

² The aggravating factors considered in this case are described below in the "Penalty" subsection of the "Discussion and Findings."

B. THE GRIEVANT

Charge 1:

Grievant argues that he did not pay for sex but, rather, only for massages and personal shopping and cooking services. He argues that the massage technicians were not prostitutes, and the Department provided no evidence that they were.³

Grievant argues that his off-duty actions did not violate Department regulations concerning sexual behavior because the women with whom he had sex were consenting adults. He maintains that his relationships with the woman in [REDACTED] as well as the LES in the second post were consensual; he did not pay them for sex; he was forthright about these relationships; and neither was a subordinate or in his chain of command. He notes that the woman in [REDACTED] was not a Department employee, and he did not meet her through his work.

Grievant disagrees that his actions were "notoriously disgraceful" or improper personal conduct and maintains that the Department did not cite any definition of "promiscuity" to support its determination regarding his actions. Grievant notes the Department's concession that there is no written document in which the agency advised employees that a consensual extramarital sexual relationship with a consenting adult who is not in the employee's chain of command and who has no connection to the embassy could subject the employee to discipline, under 3 FAM 4139. Grievant also asserts that "hundreds if not thousands" of other Department employees have had "one or two affairs with consenting adults," and the Department has not considered their behavior notoriously disgraceful or disciplined them.

³ Grievant cites the Virginia and New York Penal Codes for their definitions of prostitution and the penalties imposed in those states for "patronizing a prostitute."

Grievant argues that even though he did not inform his wife of his relationships with other women, they had been separated for several years and plan to divorce.

Grievant further argues that the Department did not establish a nexus between his actions and the effectiveness of the Service.⁴ He claims that he received a Meritorious Honor award and “several other awards of recognition” during the time in question.

Charge 2:

Grievant admits that he should have reported his contacts with the two massage technicians but maintains that he did not have to report his social relationships with individuals who worked in the embassy cafeteria who had already been “vetted” by the RSO. He also claims that he was not required to report contact with one individual whom he met only once in a bar. Grievant claims that he did not discuss his work with any of the foreign nationals.

With regard to his travel to [REDACTED] while it was under Ordered Departure, grievant states that he told his supervisor that he was traveling to the U.S. to visit his family because he did not believe the leave would be approved otherwise. Grievant claims that, when he called the post in [REDACTED] someone in the embassy travel office told him it was safe to travel there. He also argues that Ordered Departure status was lifted a week-and-a-half after his visit. Even though grievant initially denied that on this return visit he met with the woman with whom he had had a sexual relationship, he eventually did admit to meeting with her, but denied having sex with her during this visit.

⁴ Grievant conceded that sex with the two massage therapists created a nexus with the efficiency of the Service.

Grievant argues that his review of the precedent cases indicates that he has been treated more harshly than others who committed the same or more egregious actions. Grievant maintains that his actions warrant less than a three-day suspension.

IV. DISCUSSION AND FINDINGS

In all cases involving discipline, the Department has the burden to show, by a preponderance of the evidence, that the disciplinary action is justified and that a nexus exists between the conduct at issue and the efficiency of the Service.⁵ The Department must show that grievant committed the acts charged; that there is a link between the charged conduct and the efficiency of the Service; and that the proposed penalty is proportionate to the offense(s) and consistent with what has been imposed for similar offenses. *See* FSGB Case No. 2006-037 (September 28, 2007); FSGB Case No. 2004-035 (January 28, 2005).

Grievant is charged with Improper Personal Conduct and Failure To Follow Regulations. The Department cites four specifications of Improper Conduct as follows: (1) While married, grievant had sex with a massage therapist whom he paid six or seven times over several months. (2) Grievant had sex on several occasions with a second massage therapist whom he paid and who also shopped, cooked and cleaned for him. (3) Grievant had an extramarital affair with a married embassy local employee in a critical threat country. (4) Grievant had an extramarital affair with a local female in [REDACTED]

The Department next cites two specifications of Failure To Follow Regulations, including: (1) Grievant knew he had affirmative contact reporting requirements in the critical threat country, but failed to report several contacts until he was directed to do so.

⁵ 22 C.F.R. 905.2.

(2) Grievant misrepresented his intentions and made a personal trip to a post under Ordered Departure status without authorization or country clearance.

Charge 1: Improper Personal Conduct

Department regulations state the applicable policies regarding employee conduct that may result in disciplinary action. Grievant was obliged to know these regulations and to conform his conduct accordingly. 3 FAM 4130, Standards for Appointment and Continued Employment, provides guidelines for when disciplinary action may be taken against an employee. 3 FAM 4138 provides that disciplinary action may be taken for:

criminal, dishonest or disgraceful conduct (see section 3 FAM 4139.14); . . . conduct which furnishes substantial reason to believe that the individual may be or is being subject to coercion, improper influence, or pressure which is reasonably likely to cause the individual to act contrary to the national security or foreign relations of the United States; . . . 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.

3 FAM 4139 is another regulation that specifically covers sexual activity. It reads:

The agencies recognize that, in our society there are considerable differences of opinion in matters of sexual conduct and that there are some matters which are of no concern to the U.S. Government. However, serious concerns are raised by sexual activity by an individual which reasonably may be expected to hamper the effective fulfillment by the agencies of any of their duties and responsibilities, or which may impede the individual's position performance by reason of, for example, the possibility of blackmail, coercion, or improper influence.

"Notoriously disgraceful conduct" is defined in Department regulations as:

that 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 . . . or making use of one's position . . . to profit or to provide favor to another (see also 5 CFR 2635) or to create the impression of gaining or giving improper favor.

See 3 FAM 4139.14.

Specifications 1 and 2 (Improper Personal Conduct):

Grievant does not dispute that he sought out and hired two massage therapists over several months during his assignment in a critical threat (counterintelligence) post. He admits that he had sex with these women in his government furnished housing and that he paid them money. He disputes that there is any clear proof that either woman was a prostitute or that he paid them for sex. However, whether the payments were exclusively for the massages, for sex, or both, it is clear to this Board, and he concedes, that his actions gave the appearance of impropriety.

The Human Rights Report cited by the Department confirms that a significant percentage of massage parlors in this particular country are known to be fronts for prostitution, which is illegal there. Grievant also admitted that he knew others who had engaged in sexual exploits with "massage technicians." Thus, he knew, when he hired massage technicians, that sex with them was more than a theoretical possibility.

In addition, we agree with the Department that grievant risked security breaches each time he permitted one of these massage technicians to have unaccompanied access to his government provided housing when she shopped, cooked and cleaned for him. We note that grievant held a position in which he had access to highly classified information in a counterintelligence country and that he received counterintelligence briefings at post. We therefore conclude that grievant knew or should have known that his behavior violated both conduct and security regulations which subjected him to the possibility of

blackmail or coercion. We sustain specifications 1 and 2 and find that the Department has established that grievant engaged in notoriously disgraceful conduct by his actions.

Specifications 3 and 4:

Grievant admits that he engaged in two extramarital sexual affairs: one with a married LES employee at his second post, and a previous one with a local national female (not an embassy employee) at his first post of assignment. He also admits that he did not inform his wife of either of these affairs.

As we concluded in a recent case of discipline based on sexual misconduct, the fact of the employee's undisclosed extramarital affairs alone can justify a finding that grievant subjected himself to the potential for blackmail and coercion.⁶ And as we found in this cited case, had these been grievant's only infractions without any aggravating factors, the affairs between consenting adults might not have warranted severe, if any, disciplinary action. This Board has recently held that suspension from duty without pay may not be warranted against a married employee who had multiple extramarital affairs at two different posts where, among other factors, the affairs were with consenting adult females who were not affiliated with the embassy, where the sexual encounters took place in private places, and where the conduct was not publicly known, but also not known to grievant's spouse. However, the instant case is distinguishable from the cited case for several reasons. First, grievant's affair with the married LES at his second post involved an embassy employee, though not one in his supervisory chain of command. Because of this, grievant's behavior was at the very least indiscrete and potentially embarrassing to the U.S. Government.

⁶See FSGB 2011-015 (June 30, 2012).

Also, the LES stated that she stayed overnight at grievant's embassy-provided housing "once or twice." This affair involved a local national in a critical threat (counterintelligence) post. Grievant should, at a minimum, have considered the risks involved with giving an LES access to his private residence. Moreover, because his position provided him with daily access to classified information, he could have been subjected to blackmail or coercion if any of the classified information had been compromised.

Grievant also claims that he should not be disciplined for his relationships because, in his words: "extramarital affairs are wide spread in the United States and much more acceptable than in previous decades." This, however, is no more than his opinion, unsupported by any empirical evidence, much less proof. More importantly, it misses the point entirely that as a Foreign Service officer representing the United States overseas, grievant was under a duty to conform his conduct to the highest standards, rather than those that he believes may have become "more acceptable" in the U.S. in more recent times.

In addition, although the woman in [REDACTED] was not an embassy employee, grievant initially denied this affair, thus, introducing dishonesty as an aggravating factor. Unlike the employee in the recent case decided by this Board, grievant was charged with notoriously disgraceful conduct, which includes promiscuity. By any definition of that term, we conclude that grievant's extramarital sexual relations with four different women, two of whom he paid, during a one- to two-year period, fits the definition of promiscuity and, therefore, constitutes notoriously disgraceful conduct.⁷

⁷ Although there does not appear to be a definition of the term "promiscuous" in the FAM, the Concise Oxford American Dictionary defines the term as "derogatory (of a person) having many sexual

The final question regarding Charge 1 is whether there is a nexus between grievant's actions and the efficiency of the Service. This Board has held that "the Department is not required to demonstrate a specific impact on an employee's job performance or a quantifiable effect on Service efficiency before it can impose discipline. Proof that an employee's off-duty misconduct conflicted with the agency's mission may be sufficient."⁸ Grievant's decision to permit unchaperoned access to his official residence by critical threat country nationals, including both the LES and the massage therapist who cooked and cleaned for him, along with his decision to engage in extramarital affairs with multiple partners in two posts within a relatively short period of time are inconsistent with the mission of the Service. 3 FAM 4111.1 provides:

The attainment of U.S. foreign policy objectives depends substantially on the confidence of both the American and foreign public in the individuals selected to serve in the Foreign Service. The agencies, therefore, require the maintenance of the highest standards of conduct by employees of the Foreign Service, including an especially high degree of integrity, reliability, and prudence. Given the representational nature of employment in the Service and the diplomatic privileges and immunities granted employees of the Service abroad, it is necessary that employees observe such standards during and after working hours or when the employee is on leave or in travel status.

We also find that grievant's claim that his wife refused to accompany him to either post and his claim that he was overworked at post are irrelevant. Neither fact excuses or justifies his extramarital conduct. The cause for concern was grievant's vulnerability to blackmail, which he could have eliminated by simply being forthright with his spouse.

relationships, especially transient ones." (2006 ed). See also, Dictionary.com (promiscuous means "characterized by or involving indiscriminate mingling or association, especially having sexual relations with a number of partners on a casual basis.)

⁸ See FSGB Case No. 2007-011 (November 5, 2007).

In a similar case of misconduct, this Board found a clear nexus between the employee's improper behavior and the efficiency of the Service. The Board found, "as a married officer who tried to conceal a relationship with {name} from his wife, grievant could have been blackmailed."⁹ In the present case, the Department found that grievant's concealment from his wife of the fact of his two affairs and his engaging in sex with two massage therapists left him vulnerable to blackmail, particularly in view of his position in a critical threat (counterintelligence) country.

We are also not persuaded by grievant's argument that his receipt of individual Meritorious Honor awards at both of his last two posts proves that there was no nexus between his charged behavior and the efficiency of the Service.¹⁰ As we stated in FSGB Case No. 2009-031, *supra*:

Grievant fails critically to recognize that Foreign Service officers are on duty 24 hours a day, seven days a week when serving overseas. It is not simply a matter of how well Grievant performs his job while in the workplace, but also how well Grievant represents himself and the United States while living and serving as a diplomat overseas, that complete the true and total assessment of work performance, leadership, and judgment.

Lastly, despite grievant's sweeping claim that hundreds, if not thousands, of employees at his critical threat post engaged in similar behavior and were not disciplined, the Department disputes this claim convincingly. The agency cites at least five cases of

⁹ See FSGB No. 2009-031 (July 8, 2010).

¹⁰ Grievant does not specify whether he received these awards during the times when he was engaged in the affairs at issue. He states merely that he received them at each of his last two posts. See, Original Grievance at p. 3.

employees at the same post who were disciplined for similar sexual or reporting misconduct.¹¹

We sustain the Department's finding on these specifications.

Charge 2: Failure to Follow Regulations

The Department regulation on contact reporting requirements in critical threat (counterintelligence) countries is provided in 12 FAM 262.1(b):

Employees must also report the initial contact with a national from a country with critical threat (counterintelligence) posts listed on the Department's Security Environment Threat List when that national attempts to establish recurring contact or seems to be actively seeking a close personal association, beyond professional or personal courtesies.¹²

In February 2008, at the beginning of his tour in the critical threat country, grievant received a security awareness briefing and signed a statement acknowledging that he was aware of, and understood, his contact reporting requirements. Grievant failed to file contact reports concerning between seven and nine local nationals with whom he had been in varying levels of contact until a February 2009 interview with the post RSO. He admitted that he failed to file the required reports on the two massage therapists with whom he had been sexually involved and on the LES employee with whom he was having an affair.

Grievant also argued that he was not required to file statements for those

¹¹ See, agency Case Nos. 2010-096 and 2010-446 and Exhibit 6 to the Department's Response to the Supplemental Submission.

¹² See also 12 FAM 262.3-2 that reads:

- a. Employees and contractors must familiarize themselves with posts listed as critical for HUMINT threat on the SETL at least annually.
- b. Employees and contractors must immediately report any contacts with individuals of any nationality under circumstances referred to in 12 FAM 262.1, paragraph b. In general, employee reporting should occur within one business day after such contact has occurred.

individuals from the cafeteria whom he met with socially because they had been "vetted" already by the RSO; nor was he required to file one with respect to the woman he met in a bar once and has not seen since. With the exception of the woman grievant met in the bar once, he offers no statutory or regulatory exception to the reporting requirements for his "platonic" contacts with the nationals who worked in the cafeteria. Nor does he explain what he means by "vetting." The regulation is plain. Grievant was obliged to report all recurring contacts with critical country nationals without exception. Whether he was intimate with them is not germane to the regulatory reporting requirements.

Grievant concedes this specification in part. He contends that he was not required to report his contact with the woman he met at the bar once and that he was obliged to report fewer contacts than what is stated in the specification.¹³ His argument that he was not obliged to report all of his contacts certainly fails with respect to the two massage technicians and the LES in light of his signed acknowledgement that he knew and understood the contact reporting requirements in his critical threat post. Moreover, his failure to file any contact reports at all, even for the individuals he clearly knew he was responsible for reporting, makes his position regarding the others less credible. Moreover, because of his failure to follow clear procedures, his access to the chancery in the second post was denied and he was curtailed.¹⁴

¹³ Grievant quibbles over whether the Department is correct when it asserts that he should have reported nine contacts while admitting that he should have, and did not, report seven contacts.

¹⁴ Under 12 FAM 262.3-2(d):

Failure to comply with 12 FAM 262.1, paragraph b, Policy, for any reason may initiate a DS review of the circumstances leading to the non-compliance. DS will determine whether, considering all facts available upon receipt of the initial information, it is in the interests of the national security to suspend the employee's access to classified information on an interim basis until sufficient information is available to determine whether access to classified information will be reinstated or the employee's clearance will be revoked.

The Board sustains the Department's determination that grievant failed to follow regulations with regard to timely filing of required contact reports.

The second specification included in the charge of failure to follow regulations concerns grievant's personal travel to his former post while that post was still in Ordered Departure status. Employees are prohibited from personal travel to posts in Ordered Departure status absent a waiver from the Undersecretary of Management.¹⁵ Grievant did not seek or obtain such a waiver. Nor is there any evidence that he sought or received country clearance before traveling to his previous post.¹⁶ Given that he had left [REDACTED] only two months earlier, after Ordered Departure was imposed, we find that he knew or should have known the rules governing travel to posts in Ordered Departure status. Likewise, as a U.S. Government employee, he knew or should have known that he needed to request country clearance from [REDACTED]

Grievant also admitted that he told his supervisor that he was requesting leave to visit his family in the U.S. because he knew that if he revealed his plans to travel back to

¹⁵ See 3 FAM 3700, Appendix A. In countries experiencing civil unrest, where a potential threat to official Americans exists, the Department may declare the Embassy to be under "Authorized Departure" when nonessential employees and family members may elect to leave the post at U.S. Government expense or "Ordered Departure" when they are required to leave the post. 3 FAM 3772.

¹⁶ See 3 FAM 3774.1a. that provides:

All official and personal travel (including travel by a family member for employment outside the U.S. mission) to a post or country where an authorized or ordered departure is in effect is prohibited without the formal approval of the Under Secretary for Management (M) following approval of a post policy that clearly describes appropriate restrictions and limits exceptions, in accordance with the procedures described under Waivers of Travel Prohibitions (3 FAM 3776).

b. The prohibition of travel to a post or country applies to the following people: . . .

(3) All U.S. Government employees of any Federal agency, including those not affiliated with the mission, and their family members, regardless of their travel point of origin, except for Department of Defense employees under the command of the area military commander.

See also, 3 FAM 3776.

his former post, the leave might not be approved. He therefore admits that he was dishonest with his supervisor in an effort to manipulate his request for leave. Grievant also knew or should have known that his former post was still under the Ordered Departure status that existed when he left there two months earlier. His argument that someone in the travel office at his current post told him that it was "okay" to travel is insufficient to absolve him of violating the provision of the regulations regarding employee travel. Similarly, his argument that the Ordered Departure status was canceled a week and a half after his personal visit is unpersuasive and irrelevant. The Board therefore sustains the Department's finding that grievant failed to follow regulations regarding his travel to a post in Ordered Departure status.

Penalty:

Grievant initially received a 20-day suspension and a decision that a disciplinary letter will remain in his OPF until he is next recommended for promotion. Following a written and oral appeal to the Undersecretary for Management, the penalty was reduced to 10 days. Grievant's instant request for relief seeks a further mitigation of the penalty. The Board has held that "deference is to be given to the agency's judgment unless the penalty is so harsh and unconsci[enti]ously disproportionate to the offense that it amounts to an abuse of discretion."¹⁷

At the same time:

"[T]he ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. . . . The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. . . . [W]hen the appellant challenges

¹⁷ FSGB Case No. 2007-011, citing FSGB Case No. 2002-034 (February 24, 2004).

the severity of the penalty ... the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official."¹⁸

In determining the appropriate discipline for grievant's actions, the Department conducted a case comparison in which it reviewed eleven cases involving employees who had engaged in activities similar to the charges in this case. The Department also reviewed both the mitigating and aggravating factors as required by the *Douglas* decision. The Department properly considered the following aggravating factors: the frequency of grievant's conduct; his misuse of a government provided residence, particularly in light of his access to top secret information; the fact that his behavior occurred at more than one post; his violations of Department policies regarding prostitution; the potential detrimental effect of his conduct on counterintelligence practices; his inability to do his job once he was denied access to the chancery; and the monetary cost and work disruption at post caused by his curtailment. Consideration of these factors, the case comparison worksheet and the deciding official's determination that grievant, by concealing his behavior from his spouse, left himself at least potentially vulnerable to blackmail in the critical threat (counterintelligence) country, demonstrate that the Department was thorough in its assessment of the appropriate penalty in this case. This Board has held that if misbehavior occurs in a criterion country, the agency has discretion to impose a more severe penalty for extramarital contacts that are not reported. FSGB Case No. 2009-031, *supra*.

In a previous case regarding the appropriate penalty to be assessed, this Board stated:

¹⁸ FSGB Case No. 2009-031, *supra*; FSGB Case No. 2000-042 (August 10, 2001); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

The Board's responsibility is to ensure that action taken by the agency was within a zone of reasonableness in relation to the charges upheld. The agency decision as to penalty must be consistent with a consideration of relevant factors that might tend to mitigate an employee's offense. These factors are commonly called the *Douglas* factors (*Douglas V. Veterans Administration*, 5 MSPR 280 (1981)) and have been incorporated, with some modification, in 3 FAM 4375. Absent a showing of an abuse of discretion we would not question the agency's selection of a penalty.¹⁹

Grievant interprets differently the precedential cases cited by the deciding official. He argues individual points from several similar cases, but cites no case with similar circumstances or as many violations as his own case. He admits most of the charged specifications, but argues that he should receive a significantly reduced penalty. He argues that the penalty should be no more than four days, (between an admonishment to two days for Charge 1, specifications 1 and 2; no discipline for Charge 1, specifications 3 and 4; and no more than two days for Charge 2). He arrives at this number by citing cases in which an employee was disciplined for similar conduct, but ignores the fact that none of the cases involves the number of charges, specifications, and aggravating factors present here. What distinguishes this case from the others are the combination of the number of extramarital affairs involved; the appearance of sex for money; that some of grievant's conduct occurred in a critical threat country with country nationals; the fact that he failed to report these contacts; his dishonesty both with a supervisor and during the DS investigation; and his curtailment.

¹⁹ FSGB Case No. 2003-004 (June 17, 2005).

We find no evidence that the Department abused its discretion in determining the penalty to be imposed. Therefore this Board sustains the Department's decision and will not mitigate the 10-day suspension or the inclusion of a disciplinary letter in grievant's OPF.

V. DECISION

The grievance appeal is denied.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



Barbara C. Cummings
Member



Nancy M. Serpa
Member