BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2011-054

May 30, 2014

ORDER: MOTION FOR RECONSIDERATION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:	John M. Vittone
Board Members:	William B. Nance Jeanne Schulz
Senior Advisor	Joseph Pastic
Representative for the Grievant:	Zlatana Badrich, AFSA
Representative for the Department:	Kathryn Skipper, HR/G
Employee Exclusive Representative:	American Foreign Service Association

ORDER: MOTION FOR RECONSIDERATION

I. BACKGROUND

This order addresses a motion filed on December 20, 2013 by the U.S. Department of State (Department, agency) seeking reconsideration of a decision by the Foreign Service Grievance Board (the Board) issued November 6, 2013, finding that the Department had met its burden to prove that grievant committed the act with which he was charged, Notoriously Disgraceful Conduct, but reducing the penalty from 30 days suspension without pay to five days, based on failures of proof in some instances and findings of mitigating factors enumerated in the decision, as well as the fact that lesser penalties have been meted out in other unrelated discipline appeals which the Board's majority viewed as involving conduct more serious than grievant's. One panel member dissented with respect to the reduction in penalty.

II. POSITIONS OF THE PARTIES

In its Request for Reconsideration, the Department asserts that reconsideration is necessary to correct clear error and prevent manifest injustice. The Department argues that the Board has substituted its judgment on the penalty determination, and has failed to defer to the agency's selection of penalty where the Board has sustained all of the charges against a grievant. The Department argues that the importance of Foreign Service discipline is undermined by the Board's displacement of the Director General's decision in this case as the Board did not find that an abuse of discretion had taken place. In addition, the Department does not believe that grievant had a reasonable expectation of privacy, and that the Board minimized the aggravating factor of the notoriety attained by grievant's emails. Finally, it is argued that lack of similar cases does not render the proposed penalty

outside the zone of reasonableness. As relief, the Department requests that the case be remanded for the Department to reconsider the issue of the penalty.

On January 31, 2014, the grievant, through AFSA, filed a response to the Department's request. Grievant objected to the request on the grounds that the Department has not provided any newly discovered evidence, or that there has been a change in the law, or a showing of clear error or manifest injustice. In grievant's view, the Department's argument rests on its difference of opinion on the reduced penalty which is not reason enough to grant reconsideration. He argues that Board was within its authority to modify a penalty that is not "within the zone of reasonableness." A five day penalty is not "minimal discipline" for an untenured officer where the suspension letter will be viewed by tenure boards, and "will most certainly result in either deferral and/or possible denial of tenure."[1] In essence, the Department's displeasure with the Board's decision is not sufficient to merit reconsideration.[2]

III. DISCUSSION

The Board may reconsider a decision based on 1) an intervening change in controlling law, 2) the availability of newly discovered or previously unavailable evidence, or 3) a need to correct clear error or prevent manifest injustice. The Department's Request for Reconsideration rests on its arguments that there is a need to correct clear error and prevent a manifest injustice. There has been no change in controlling law, and as discussed below there is no newly discovered evidence since the Board issued its decision.

In its Request for Reconsideration of December 20, 2013, the Department characterizes the grievant's misconduct as "unique and exceptional" and states that the

[1] Grievant states that he has already served the five day suspension.
[2] In a Reply to the Response, the Department restates its prior arguments in the Request for Reconsideration and its disagreement with grievant's responsive arguments to its request.

Board's decision "will have significant repercussions for the Foreign Service." Clearly the Department in its disciplinary process, and repeated in its Request for Reconsideration, placed great emphasis on the notoriety of the misconduct, i.e., the fact that there have been more than 160,000 hits on the website, and that the information remains available for those who have Internet access.[3] The concerns for the image and overall impact on the Foreign Service were expressed by the Department as follows in its Request:

> The decision in this case and the imposition of minimal discipline may well lead members of the Service, Congress, and the general public to assume that the Department must tolerate the kind of conduct at issue here, or at the very least not take it too seriously. This is not the image of the Foreign Service that management wants to foster. To the contrary, members of the Service must be vigilant in their electronic dissemination of information, particularly personal writings that on their face cannot escape fair portrayal as sexist and racist. *Request for Reconsideration at 12.*

The majority found in its decision that the grievant was entitled to a "reasonable expectation of privacy" in his transmission of personal emails, and that the Department had not adequately considered that factor in its selection of a penalty. The Board sustained the Department's charge of notoriously disgraceful conduct, but disagreed about the weight that should be given to the notoriety of the emails as an aggravating factor due to the uncontested statements in the ROP that grievant's emails had been hacked by a third party.

The question is whether the Board gave disproportionate weight to the grievant's expectation of privacy. We reaffirm that grievant was entitled to a reasonable expectation of privacy when he drafted the emails on his private email account. In a recent District Court case, the Court observed that the government conceded that "users of at least some kinds of on-line messaging services (the example the government used was the 'Gmail' email service offered by Google) are, as a general matter, entitled to a reasonable

[3] 160,000 "hits" in the website does not mean that 160,000 people viewed the site. There is no evidence of how many different people logged into the site.

expectation of privacy in their use of those services and thus are eligible for protection under the Fourth Amendment. This concession is in accord with precedent from the Fourth Circuit and elsewhere." *United States v. Bode*, 2013 WL 4501303 (D. Md. 2013) (unreported). The court cited *United States v. Hamilton*, 701 F3d 404, 408. (4th Cir. 2012), that supports the same principle and quoted a report from the American Bar Association which states "that email pose[s] no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy and so there is generally a reasonable expectation of privacy in its use." ABA Formal Op. 99-413 (1999). The Maryland District Court also cited *United States v. Warshak*, 631 F3d 266, 288 (6th Cir. 2010), which states that "a subscriber enjoys a reasonable expectation of privacy in the contents of emails that are stored or sent or received through, a commercial [Internet services provider]."

Upon reconsideration, the Board must query whether notwithstanding the reasonable expectation of privacy, the grievant remains responsible for unintended and perhaps unforeseen results of wide publication of the emails. The Department's concern for the image and integrity of the Foreign Service is legitimate and we share in that concern. However, in giving credence to the expectation of privacy, we disagreed that the dissemination or publication of the emails should be an "aggravating" factor under the *Douglas* standards and under 3 FAM 4375 since we could not find the grievant responsible for such dissemination. Unlike a situation where a defendant is seeking Fourth Amendment protection or where in a civil case a party seeks the guarantee of privacy of communications, however, the grievant, as a Foreign Service Officer, was on duty 24 hours a day, seven days a week in an overseas assignment when he authored the emails. In his

role as a diplomat abroad the protections that he might have expected regarding his privacy as a private citizen, even when allegedly a third party hacked into his private email account, necessarily gives way to the greater interests of the Foreign Service and the country it represents. This is the first time the Board has confronted such an issue involving electronic social media. Upon reconsideration, and taking into account the limited evidence in the record regarding the access and publication of the emails, the interests noted herein, and the entire context of the misconduct, the majority concludes that it erred in not having accorded sufficient weight to the dissemination of the emails as an aggravating factor.

The Department maintains that the aggravating factor of notoriety cannot be minimized, and that the possibility of notoriety in this case may increase after publication of the redacted decision in this case, if published on other websites that follow the Department's activities. While the majority agrees that notoriety is an aggravating factor, we note that the Department's forecast of further publication is based on speculation and not hard evidence. Such a prognosis of possible future consequences by the Department introduces a degree of arbitrariness into the process that calls into question the reasonableness or proportionality of the penalty that the Department ascribed to the misconduct. Moreover, while the public website posting will be available on the Internet for the foreseeable future, the Department's assertion that the eventual redacted version of the Board's final decision may lead readers to assume the Department must tolerate or does not take seriously the issue here ignores the clear language of the Board's findings about grievant's offensive misconduct. The discipline as modified by the Board would

assuredly have serious impact on grievant's career, and our decision should not be viewed as toleration of his misconduct.

As stated above, the Department places much emphasis on the dissemination of the emails and now questions whether the grievant's private email account was in fact hacked by a third party. During the course of this proceeding the Department did not question grievant's assertion that his private email account was hacked. Despite the fact that grievant had requested an inquiry into the alleged hacking, there is no evidence in the record indicating that Diplomatic Security, the Director General, or the Deputy Assistant Secretary questioned whether grievant's private email account had been hacked or took any affirmative action to confirm or deny grievant's assertion. If the Department is now suggesting that grievant had some role in disclosing the emails, it should have made that argument earlier in the process and provided support for it. There is no such evidence in the record, and the agency did not raise that possibility during the pendency of the appeal. This belated argument cannot be the basis for reconsideration of our decision. Clearly, evidence for the mode of dissemination is grounded only in grievant's assertion, but that assertion was not contested.

The Department asserts[4] that "the Board paid little attention to the most important *Douglas* Factor - the seriousness of the offense. That is the starting point in any penalty analysis." However, several pages later[5], the Department states:

> Given that the Board agreed with the Department regarding the seriousness of the offense . . . the first and foremost *Douglas* factor . . . and acknowledged that several of the aggravating factors should be accorded weight….

The Board agreed with the Department regarding the seriousness of the offense,

[4] Request for Reconsideration, Page 5, Footnote 4
[5] *Ibid.* at 13

which resulted in curtailment and disruption to post, but found no evidence that the monetary cost of curtailment would have surpassed grievant's departure costs for onward assignment eight months later. The Board majority also did not find sufficient direct evidence to support the Department's heavy reliance on the impact of publication on the women discussed in the emails. The Board majority did not minimize the potential or actual harm that the publication may have caused, but found the Department's arguments in this regard lacked evidentiary support.

The Department's assertion that the Board found grievant's commendable performance in [redacted] to be a mitigating factor is correct, and because the [redacted] tour occurred after the disciplinary process was concluded, it was cited inappropriately as a mitigating factor. However, we also cited the grievant's record in [redacted] as an example of the degree of success that grievant may be able to achieve in future postings.

We acknowledged in our decision that grievant's placement in future assignments may be problematic due to the distribution of the emails and the likely reluctance of some countries to accept a person who has evinced such negative and derogatory attitudes towards women. The circumstances of grievant's future postings while unknown at this time, may change over the course of time, and hopefully if given an opportunity, grievant may be able to overcome the clearly substantial obstacles caused by his conduct.

The Board found that the grievant had engaged in notoriously disgraceful conduct, and deserves to be disciplined. The Department's disagreement with the majority's decision is limited only to the severity of the discipline to be imposed. In finding that the penalty imposed was excessive, the Board is mindful that the appropriateness of a penalty must be based on factual evidence, and also involves "the application of administrative

judgment and discretion." *Douglas v. Veterans' Administration, 5 M.S.P.B. 313,1981 MSPB Lexis 886 (April 10, 1981)* , citing *Kulkin v. Bergland,* 626 F.2d 181, 185 (1st Cir. 1980). It has been stated that "… an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious . . . if there is no rational connection between the grounds charged and the interest assertedly served by the sanction." *Douglas, supra*. at 325. In the instant case the Board was unable to conclude that the penalty was sufficiently based on probative evidence or that it was imposed within the bounds of the judgment and discretion required, and therefore was further unable to conclude that the penalty proposed by the Department is proportionate to the offense.

The majority was not convinced that adequate consideration was given to whether a lesser penalty would achieve the same corrective goal. As stated in *Douglas,* "Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate." *Douglas, supra.* at 330. As stated in 3 FAM 4374, the penalty should be "no more severe than sound judgment indicates is required to correct the situation and maintain discipline." Likewise, one of the *Douglas* factors for consideration by the agency in assigning a penalty is "the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others." *Douglas, supra*. at 305. Again the majority did not believe that the record demonstrates that such a factor was carefully considered.

One of the troubling factors in this case is the lack of precedent in establishing the

penalty. 3 FAM 4374 states a general principle for consideration by deciding officials as follows:

> (1) The disciplinary action taken should be consistent with the precept of like penalties for similar offenses with mitigating or aggravating circumstances taken into consideration. . . . The action taken should be fair and equitable.

Neither the grievant nor the Department found true comparator cases that would provide information on whether the penalty assessed grievant was consistent with or similar to penalties given to other similarly situated grievants. As noted, the Board found this to be one of the first if not the first grievance to involve far reaching issues dealing with social media and the parameters of private electronic communications. The lack of comparator cases underscores the unique nature of this appeal as well as the lack of clear precedent or guidance for the determination of the maximum reasonable penalty.

The Department in its Request for Reconsideration expresses concern about the image of the Foreign Service and the impressions that may be left with outside interests if a less severe penalty were given to grievant. While such considerations are serious and relevant, their effect is unknown. Standing alone, they should not be determinative and should not tip the scales in favor of a punishment that is disproportionate to the offense. As stated in *Douglas, supra.* at 328, the Board must review the penalty to be satisfied that on the charges sustained, the penalty is within the range allowed by law, regulation and any applicable table of penalties, and . . . that the penalty 'was based on a consideration of the relevant factors and [that] . . . there has [not] been a clear error of judgment.'" (citing *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971) n. 56). The *Douglas* decision then interprets "clear error of judgment" as "clearly erroneous," i.e. when although there

is evidence to support the penalty, the Board is left with "the definite and firm conviction that a mistake has been committed." *Douglas, supra.* at 328-329. As pointed out above, the Department gave great weight to the dissemination or notoriety of the grievant's actions, but the evidence for such publication, including the extent of the publication, is limited in its probative value and in some cases highly speculative. Based on the evidence of record, the majority did not believe that it could affirm the imposition of such a severe penalty without additional proof and analysis.

The majority is aware that the Board is not free to substitute its judgment for that of the agency. Our function is not to manage the Foreign Service or maintain discipline among its members. We exercise our discretion in reviewing the penalty in this appeal with appropriate deference to the primary discretion entrusted to agency management, and our role is to assure that managerial discretion has been legitimately invoked and properly exercised. In many prior cases the Board has ordered a reduction of the penalty when it has found a lack of evidence that the agency has adequately considered both procedural and discretionary elements or matters of judgment. Some aspects of this appeal are without precedent, however, and given the unique nature of the facts and novelty of some of the management considerations, and that there are no comparator cases, the Board will remand to the Department for reconsideration of the penalty based on the Board's findings.

IV. ORDER

We reaffirm our holding that grievant engaged in notoriously disgraceful conduct. However, the Board exercises its discretion to grant the Request for Reconsideration because of the errors described in the Discussion section above, and remands this case to

afford the Department the opportunity to reconsider the appropriateness of the penalty in light of the Board's findings. The Department is directed to issue a revised final decision within 30 days of its receipt of this Order, setting forth the penalty chosen and rationale for its selection. If grievant contests the appropriateness of the Department's revised decision, he has 15 days from the date of receipt of the Department's submission to file any objections with the Board.

For the Foreign Service Grievance Board:

[redacted]

John M. Vittone
Presiding Member

[redacted]

Jeanne L. Schulz
Member

[redacted]

William B. Nance
Member