

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB No. 2012-032

And

January 8, 2013

Department of State

DECISION
EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Alfred O. Haynes
Harlan F. Rosacker

Special Assistant:

Carol Gullion

Representative for the Grievant:

Pro se

Representative for the Department:

Margaret E. McPartlin
Attorney, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Department has met its burden of proving by a preponderance of evidence the three specifications of poor judgment alleged against grievant, and further has demonstrated that the one-day suspension imposed on him for such conduct was reasonable under the circumstances.

OVERVIEW

Grievant, an FP-04 Information Management Specialist, was charged with three specifications of poor judgment: driving from one nightclub to another after having consumed two beers; driving from a third club to the Embassy after having consumed more beer; and driving through traffic lights and disobeying a traffic policeman's order to stop his vehicle on the way back to the Embassy, thereby creating an emergency situation. Although acknowledging having received written notice from his Embassy that the country where he was assigned had a "zero tolerance" policy against driving after drinking alcohol and that Embassy personnel should obey all local traffic laws and police directives regardless of their diplomatic status, grievant contended that he was not intoxicated on the night in question and that a zero tolerance policy was "impractical."

The Board sustained the Department's decision to impose a one-day suspension, concluding that such discipline was reasonable under the circumstances. Grievant admitted that he had been drinking before driving his vehicle that night; the Marine Guards at the gates of the Embassy reported that grievant's speech was slurred and his breath smelled of alcohol upon his return; the foreign country's Ministry of Foreign Affairs later filed a formal complaint about grievant's conduct; and the local police also suspended grievant's license to drive for six months based on that night's events. The Board rejected grievant's contention that the Department failed to prove that he was intoxicated on the night in question because no breathalyzer test had been performed.

DECISION

I. THE GRIEVANCE

██████████ (grievant), a member of the Foreign Service with the Department of State (Department/agency), filed a grievance with the Department on February 24, 2012. He claimed that the ██████ traffic law, which he was found to have violated for driving while under the influence of alcohol and failing to stop as directed by the traffic police and which was the basis for the one-day suspension imposed on him, was overly restrictive and impracticable. Grievant further asserted that, even under the restrictive ██████ law, he was not intoxicated while driving as a result of the several beers he consumed during the course of the evening in question. He asked that the one-day suspension be rescinded or mitigated to a reprimand. The Department denied the grievance in its decision dated May 22, 2012 and on June 6 grievant appealed that decision to the Foreign Service Grievance Board (FSGB).

II. BACKGROUND

Grievant, an FP-04 Information Management Specialist (IMS), joined the Foreign Service in 2008. In August 2010, he was assigned to the U.S. Embassy in ██████

██████████

On September 7, 2010, the U.S. Embassy Management published Management Notice 10-075 to all ██████ Mission Staff, including grievant, entitled “Compliance with Local Driving Laws.” The Notice stated in part:

The Ministry of Foreign Affairs sent a message reminding all diplomatic missions about the importance of complying with local driving laws, noting violations. Please remember that all Embassy

employees and family members who drive are required to comply with local laws. Primary violations were driving through red lights, speeding, drunk driving, ignoring traffic signs, and disobeying traffic police.

The Notice further provided the following information:

General reminders (the CLO has the full [REDACTED] Traffic Rules):

- The maximum speed limit in residential areas is 70 km/hour – about 43 miles/hour - unless otherwise posted;
- Turning on red light is prohibited;
- On a round-about, vehicles entering have the right of way;
- Driving while intoxicated is illegal; the limit is 0%;
- If the traffic police stop you, please stop, regardless of diplomatic status. Call the mobile patrol if the stop goes beyond a routine document check. A diplomat's person and car are inviolable, which is why the mobile patrol can be invaluable. Do not do anything that would make the police officer think you are offering a bribe.

On the evening of February 21, 2011, grievant drove to the [REDACTED] in [REDACTED] where he admits to having consumed two beers with dinner. Later that evening he left that club and stopped at the [REDACTED] club for a short time, but claims that he did not consume any alcohol there. Finally, he drove to the [REDACTED] Club, arriving there at about 11:30 p.m. While at the [REDACTED] Club, he states that he ordered two more beers and gave one to a female friend whom he met there. Grievant and his female friend departed the Club together at around 3:00 a.m. on February 22. Grievant then proceeded to drive, with his friend as a passenger, to the U.S. Embassy. On his way to the Embassy, grievant passed by a police checkpoint without stopping.¹ He was pursued beyond that checkpoint by an unmarked vehicle and was motioned by its passengers dressed in what appeared to be police uniforms to pull over but failed to do so. Instead, when cut off by

¹ Grievant claims that he was unaware of any requirement under the [REDACTED] traffic laws that he stop at the checkpoint.

the unmarked vehicle, grievant took evasive action and accelerated at high speed towards the Embassy, running through two streetlights en route.

When grievant arrived at the Embassy gate, he told the Marine Security Guard (MSG) that he was being chased by individuals in an unmarked vehicle, and he did not know why they were chasing him.² Shortly thereafter, numerous local [REDACTED] police officers arrived at the Embassy gate, charging that grievant had failed to stop at the police checkpoints.³ The MSG reported the incident to the Assistant Regional Security Officer (ARSO).

On April 5, 2011, the Embassy received an Official Diplomatic Note from the [REDACTED] Minister of Foreign Affairs regarding this matter. The Diplomatic Note contained the following:

According to information received from the Road Traffic Safety Department of the State Department of Internal Affairs of [REDACTED] BMW vehicle with registration number D 919113 drove through a restrictive traffic light signal at the intersection of [REDACTED] streets on February 22, 2011 at 3:30. Despite the attempts of a traffic policeman to stop the vehicle, the driver did not obey and continued to move directing his vehicle to the side of the traffic policeman.

At [REDACTED] street, again ignoring the actions of the traffic policeman, the driver of the specified vehicle continued to move directing his vehicle to the side of the traffic policeman. It should be noted that while moving towards the Embassy, the driver passed on a red light several times creating an emergency situation.

This vehicle is registered in the name of the U.S. Embassy Attaché, [REDACTED] who at that moment, was in the vehicle intoxicated.

² When subsequently interviewed, the MSG stated that he suspected grievant of having been under the influence of alcohol because his speech was slurred and slow. Local guards also reported smelling alcohol on his breath.

³ As these events occurred at or after 3:30 am, we infer but the record does not specifically indicate that there were no other witnesses. Further, there is no record evidence that grievant was detained or criminally charged at that time.

As a result of these violations, the Ministry decided to withdraw the license plates of grievant for six months.

On April 12, the Office of Diplomatic Security (DS/ICI/PR) assigned an investigator to the case; and on September 10, a Report of Investigation (ROI) into this matter was completed. A copy of the ROI was forwarded to the Bureau of Human Resources, Office of Employee Relations (HR/ER).

On November 10, 2011, the Department informed grievant that it was proposing to suspend him for three days without pay, based on the ROI it had received from DS concerning his conduct while serving in [REDACTED] [REDACTED]. That proposal was composed of one Charge: *Poor Judgment*, with the following three Specifications:

Specification 1:

According to your written memorandum submitted on March 9, 2011, to the Assistant Regional Security Officer (ARSO) [REDACTED] [REDACTED] who investigated the incident, on the evening of February 21, you went to the [REDACTED] Pub at approximately 8:45 pm where you consumed two beers and dinner. You left the [REDACTED] Pub around 11:00 pm and drove to the [REDACTED] arriving there about 10 minutes later.

Specification 2:

According to your written memorandum, you then proceeded to the [REDACTED] Club and arrived there slightly before midnight, and you consumed at least one more beer. You departed around 3:00 am on the morning of February 22, 2011 with a local [REDACTED] woman. According to the [REDACTED] Ministry of Foreign Affairs N03/10141 dated April 4, 2011, on the early morning of February 22, 2011, you were intoxicated while driving. When you arrived at the Embassy around 3:30 am on the morning of February 22, 2011, you spoke with the Marine Security Guard on duty who reported to the ARSO that he felt you may have been under the influence of alcohol because your “speech was slurred and slow.” Two local guards also reported smelling alcohol on your breath.

Specification 3:

The [REDACTED] Ministry of Foreign Affairs N03/10141 dated April 4, 2011, stated that you drove your vehicle through a traffic light... at 3:30 am on February 22, 2011. “Despite the attempts of a traffic policeman to stop the vehicle, the driver did not obey and continued to move directly his vehicle [sic] to the side of the traffic policeman ... It should be noted that while moving towards the Embassy, the driver passed on a red light several times creating an emergency situation.”

On January 13, 2012, grievant submitted his response to the Department’s disciplinary proposal, and on February 12, the Deciding Official issued his decision sustaining all three Specifications but reducing the penalty to a one-day suspension without pay.

On February 24, [REDACTED] filed his barebones grievance with the Department; on March 26, he supplemented his barebones grievance filing. On May 22, the Department issued its decision denying the grievance; on June 6, grievant appealed the Department’s decision to this Board and requested the continuation of temporary interim relief pending our resolution of the merits of his appeal.⁴

Following completion of the discovery process, on August 29, grievant filed his Supplemental Submission. On September 27, the Department responded to grievant’s Supplemental Submission, and on October 11 grievant filed a rebuttal to the Department’s October 11 response. The Record of Proceedings (ROP) thereafter was closed on November 6, 2012.

⁴ Without objection from the Department, this Board granted grievant’s request for such temporary interim relief.

III. POSITIONS OF THE PARTIES

A. The Department

In this disciplinary action, the Department charged grievant with “Poor Judgment.” This charge was composed of the three specifications, as cited above. The Department notes that, in both his written and oral presentations to the Deciding Official, grievant admitted that he had consumed alcohol on February 21 and 22, 2011, and that he in fact operated a motor vehicle soon thereafter. Grievant also admitted that he was familiar with the contents of the September 7, 2010 Management Notice and knew that [REDACTED] had a “zero tolerance” policy against those driving after having consumed alcohol.

The Department also points to the above-cited April 5, 2011 Diplomatic Communication it received from the [REDACTED] Minister of Foreign Affairs in which he stated that grievant was intoxicated at the time of this incident. In addition, the Embassy’s Marine Security Guard and the Local Security Guards who saw grievant upon his arrival at the Embassy reported that grievant appeared to be intoxicated when he entered the Embassy at 3:30 on the morning of February 22. Although no breathalyzer was used, witnesses confirmed that grievant seemed unstable and had the odor of alcohol on his breath.

B. The Grievant

Grievant denies that he was intoxicated while driving his car on the dates and times at issue. He argues that the one-day suspension is neither appropriate nor proportionate to the alleged misconduct and requests that it be mitigated or rescinded. He

admits that on February 21 and 22, 2011, he had consumed alcohol before driving around in his vehicle. He disagrees with the charge that he was intoxicated while doing so.

In his March 26, 2012 supplement to his agency-level grievance, grievant made it clear to the Department that he was familiar with the [REDACTED] Traffic Law and the Embassy's April 21, 2010 Management Notice which states that "the amount of alcohol in your system does not matter; the limit is 0 %." However, grievant notes that the [REDACTED] law, as written, fails to account for the variables of quantity and time of consumption and defines "intoxication" as a person having a blood alcohol level (BAC) of any amount over 0.0%. Thus, according to that law, anyone driving with a BAC in excess of 0 % would be considered intoxicated and in violation of the law. He takes issue with the [REDACTED] law as being unreasonable and inconsistent with the accepted medical definition of intoxication.

Finally, grievant challenges the validity of the statements made by the Marine Security Guard and the two local guards who provided information regarding their observation of grievant's condition when he arrived at the Embassy. The local guards stated that they smelled alcohol on his breath and that grievant's speech was "slow and slurred." Grievant expressed surprise that both guards used the terms "slow and slurred" and suggested that perhaps the A/RSO could have suggested that term during his interviews of the guards, preventing them from responding freely concerning their observations.

IV. DISCUSSION AND FINDINGS

In disciplinary cases such as this, the Department has the burden of establishing, by a preponderance of the evidence, that the discipline imposed was justified.⁵ That burden includes establishing the charges of misconduct; the nexus between the misconduct and the interests of the agency; the reasonableness of the penalty, taking into account the relevant mitigating and aggravating factors; and, if relevant, the precept of like penalties for similar offenses.⁶

A. The First Two Specifications

In this case, the Department has charged grievant with poor judgment based on three specifications, the first two directly involving grievant's decision to drive his vehicle after having consumed alcoholic beverages, and the third also including a claim that grievant drove through red lights while disobeying the directives of a traffic policeman to stop his vehicle.

There is no factual dispute that grievant drove his vehicle three times during the period in question after having consumed alcohol. He concedes that two beers were consumed with dinner, after which he drove to two other clubs where more alcohol was consumed at the third location. Grievant also admits that he drove from the third club to the Embassy with an [REDACTED] woman after having consumed more alcohol at that location.⁷ In addition, he acknowledges that he knew the contents of the [REDACTED] Traffic Rules which provide in part that "driving while *intoxicated* is illegal; the *limit is 0%*."

⁵ 22 C.F.R. § 905.2.

⁶ FSGB Case No. 2006-027 (April 24, 2008); FSGB Case No. 2002-052 (July 18, 2003).

⁷ Grievant claims that he drank only one more beer in over three hours at the third nightclub while socializing with his female friend. Such claim strains credulity, particularly in light of the record evidence from several objective guards concerning his behavior and appearance at the U.S. Embassy gate shortly after he left the third club.

(Emphasis added). The Management Notice published by the Embassy in 2010 that grievant received upon his arrival in [REDACTED] clearly warned him not to drink and drive, because there was a “zero tolerance” policy regarding such behavior in [REDACTED]. Nevertheless, grievant admittedly did so.

In his defense, grievant claims that the Department has failed to submit into the record the text of an [REDACTED] law stating that “intoxicated” means a blood alcohol level of more than 0% or a breathalyzer test proving that he exceeded that limit during the time period at issue in any event. He further argues that a rule effectively declaring intoxication to be anything above 0% is “impractical.”

We reject these claims. Thus, grievant was charged with poor judgment for admittedly driving his vehicle in [REDACTED] after having consumed alcoholic beverages despite being warned specifically by the Embassy against doing so because there was a “zero tolerance policy” towards such conduct in effect. In our judgment, the Department was not required to establish the legal standard for “intoxication” under [REDACTED] law or to prove that grievant exceeded it. Nor was it required to justify the wisdom or practicality of a zero tolerance policy. We find that the record supports a finding that grievant violated [REDACTED] traffic rules as they were explained to him and all Embassy personnel in a published Management Notice. We further find that he was intoxicated under the regularly accepted meaning of that term. A Marine Security Guard and two local guards on duty at the Embassy on the night in question all stated that grievant exhibited the commonly recognized signs of intoxication, including slurred and slow speech and the odor of alcohol on his breath.⁸ Moreover, as noted below in connection with the third

⁸ While grievant appears to challenge the credibility of the guards at the Embassy gate, he has offered no evidence to impeach the direct evidence they provided. We note that grievant has not even offered a reason

Specification of poor judgment, grievant's conduct while operating his vehicle before reaching the Embassy gate casts further doubt on his sobriety at the time.

B. The Third Specification

The third specification against grievant is even more troubling and most indicative of his poor judgment. Thus, we find that the Department has sustained its burden of proving that grievant's actions while driving back to the Embassy were totally unjustified, created hazardous situations, prompted local police officials to take sanctions against him in the form of suspending his license plates for six months, and precipitated an official complaint to be lodged with the Embassy by the [REDACTED] Ministry of Foreign Affairs. In this regard, grievant drove through an automobile checkpoint on his way back to the Embassy and then disobeyed an order from local police officials who were pursuing him to stop his vehicle.

While grievant claims that he believed the individuals in the unmarked pursuit vehicle were not police and were out to harm him, the record evidence refutes such claim. Not only did his [REDACTED] female passenger tell him that the occupants of the pursuit vehicle likely were local police, but grievant admitted that he observed through the window of his vehicle that the occupants of the other vehicle appeared to be wearing the same uniforms as the police who had been stationed at the automobile checkpoint at which he just had failed to stop. Instead of obeying the police command to stop his vehicle, the record shows that grievant swerved around both the pursuit vehicle and a police official in the roadway and accelerated through two red lights on his way back to the Embassy. These actions were accurately described by the [REDACTED] Ministry of Foreign

why they would provide a false rather than an objective account of what they observed on the night in question.

Affairs as “creating an emergency situation.” They also violated the reminders previously issued by the Embassy not to turn on red lights and to obey police directives regardless of diplomatic status. And once again, of course, alcohol consumption was involved.

C. The Reasonableness of the Penalty Imposed

Grievant next challenges his suspension, maintaining “a letter would serve as a deterrent for him and others, while also staying within the realm of reasonableness for proposed disciplinary actions.”

We reject grievant’s observation regarding this matter. We find that the imposition of a one-day suspension (reduced from three days by the Department during the grievance process) based upon the foregoing conduct was well within the bounds of reasonableness. In making this finding, the Board is mindful of agency management’s primary responsibility for the discipline of its workforce, and its entitlement to reasonable discretion in deciding what is the most appropriate penalty under the circumstances.⁹ Moreover, we recognize that the Board’s role is not to displace management’s responsibility, but rather to assure that management’s judgment has been reasonably exercised. We further note this Board’s previous rulings recognizing that “there is no precedent that holds the principle of ‘similar penalties for like offenses’ requires mathematical rigidity or perfect consistency . . .”¹⁰

Specifically, we reject grievant’s contention that the Deciding Official failed to consider or misapplied the *Douglas factors* in sustaining the suspension imposed by the Department. We note that among the aggravating factors cited, the Deciding Official

⁹ See FSGB Case Nos. 2011-007 (January 24, 2012); 2002-052 (July 18, 2003); and 2005-007 (July 14, 2005).

¹⁰ See FSGB Case No. 2002-034 (February 23, 2004).

stated that grievant's failure to comply with the [REDACTED] traffic rules and his disregard of local police orders resulted in a complaint from the [REDACTED] Ministry of Foreign Affairs and embarrassment to the Department. We further note that the Deciding Official reduced grievant's suspension from three days to one, specifically recognizing his prior good work performance and the absence of a prior formal disciplinary record.¹¹

We further reject grievant's contention that the Department failed to honor the precept of imposing similar penalties for like offenses. As previously stated, this Board has recognized that no two cases are identical. While grievant cites and relies upon previous cases where the Department either imposed a lesser penalty for conduct which he claims is equivalent to his own or the same penalty for conduct that he believes to be more reprehensible, we conclude that the Deciding Official adequately explained and justified the imposition of a one-day suspension herein.

Grievant had been notified in writing specifically of [REDACTED] zero tolerance policy with regard to driving after having consumed alcohol but did so anyway; disobeyed police directives to stop his vehicle; and took evasive action with his vehicle which created immediate danger to the police who pursued him and danger to others by ignoring red lights on his way back to the Embassy.

Finally, as noted by the Deciding Official, grievant's conduct not only resulted in a six-month suspension of his driving privileges but engendered a formal written complaint from [REDACTED] Ministry of Foreign Affairs and consequent embarrassment to the Department on behalf of the United States. Not all of these factors were present in

¹¹ In so ruling, we do not interpret the Deciding Official's discussion of the Douglas factors as embodying a reliance on grievant's failure to admit fault or vigorous self-defense as an aggravating factor in reaching the decision to sustain but mitigate the penalty imposed by the Department.

any of the comparator cases cited by grievant.¹² Accordingly, we conclude that the one-day suspension imposed by the Department is within the bounds of reasonableness and therefore should not be modified or rescinded.

V. DECISION

On the basis of the foregoing, we find that the Department has sustained the burden of establishing that its decision to issue a one-day suspension to grievant is reasonable, and that the instant grievance must be denied.

For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Alfred O. Haynes
Member



Harlan F. Rosacker
Member

¹² For example, in Case 2010-032, in which the Department issued only a letter of admonishment to an employee who drove a vehicle after having consumed alcohol, the host country did not have a zero tolerance policy against driving after drinking and the employee had not received written or other warnings to avoid such conduct. And in Case 2010-038, in which an employee was involved in an accident with a rental car after drinking at an embassy function, despite the host country's zero tolerance policy, the Department reduced a three-day suspension to one day, just as it did in this case.