BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[redacted]
Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2013-018

August 18, 2014

DECISION

For the Foreign Service Grievance Board:

Presiding Member:	Arthur A. Horowitz
Board Members:	James E. Blanford Nancy M. Serpa
Special Assistant:	Lisa K. Bucher
Representative for the Grievant:	*Pro se*
Representative for the Department:	Dorian S. Henderson Grievance Analyst, HR/G
Employee Exclusive Representative:	American Foreign Service Association

OVERVIEW

HELD: The Department proved by preponderant evidence four of five specifications against grievant, but failed to prove one of them. The grievance appeal is thus sustained in part and denied in part, and the case is remanded to the Department for consideration of an appropriate penalty.

SUMMARY

Grievant [redacted] appealed the Department's imposition of a three-day suspension for charges relating to his alleged interference in a then-ongoing investigation against him by the Department's Office of Civil Rights (OCR).

Subsequent to OCR's investigation of Grievant for having created an uncomfortable work environment for a female contractor whom he supervised, grievant is charged in the instant case with improper conduct in allegedly seeking to force key witnesses to change or modify their statements to OCR investigators. Specifically, he is charged with two counts of meeting with the female contractor employee, [redacted], and urging her to modify statements, clear a draft grievant wrote saying the whole episode was a misunderstanding, and write a statement of support on his behalf. Similarly, he is charged with asking another contractor, [redacted] to modify his statements to OCR. He is also charged with improperly contacting [redacted] via the Department's Instant Messaging system about six weeks after he had been curtailed from the office in which he supervised her, and in contravention of a directive from the Diplomatic Security (DS) Principal Deputy Assistant Secretary (PDAS) forbidding direct contact with her. Finally, he is charged with lack of candor when speaking to investigators about his meeting with [redacted].

The Board upheld the four specifications of the Improper Personal Conduct charge, with one member dissenting on the decision to uphold Specification 6, based on preponderant evidence. It also dismissed the Lack of Candor charge, based on the conclusion that grievant did not willfully or knowingly lie to investigators.

The case was remanded to the Department for reconsideration of an appropriate penalty in light of the Board's decision.

I. THE GRIEVANCE

Grievant [redacted], an FS-02 Security Engineering Officer (SEO), appeals the Department's denial of his grievance concerning a three-day suspension he received based on four counts of Improper Personal Conduct and one count of Lack of Candor during an Administrative Investigation. All of the charges are related to grievant's approaches to his colleagues in the aftermath of an investigation by the State Department's Office of Civil Rights (OCR). In that investigation, grievant was charged with inappropriate personal conduct in his relations with a female employee of a subcontractor, of whom he was the direct-hire supervisor. He denies the Department's charges that he inappropriately pressured colleagues to recant, or otherwise explain away, the statements they made to OCR investigators.

II. BACKGROUND

The grievant was hired by the U.S. Department of State (the Department, agency) in 1987, and has served since then in a variety of domestic and overseas positions and skill codes. From 2009 to 2011, he was assigned as a branch chief in [redacted], where he was also the Government Technical Monitor (GTM) for a contract with [redacted] which subcontracted some of its work to [redacted]. During that assignment, one of the contractor employees whom grievant supervised became uncomfortable with what she considered to be grievant's inappropriate behavior toward her. When her company brought her discomfort to the attention of OCR, an investigation was initiated. The results of that investigation were issued in March 2011, and grievant was informed by the Human Resources (HR) bureau of a proposal to take disciplinary action against him on August 5, 2011. He is now charged with five specifications of misconduct thereafter; four of them relate to his having approached colleagues

allegedly seeking revisions and/or the recantation of their statements to OCR, and one relates to Lack of Candor in an ensuing OCR investigation of his behavior. Grievant was removed from his position in [redacted] on September 19, 2011, and transferred to another office.

Grievant was originally informed of the disciplinary action involving his approaches to colleagues in a letter from HR/ER[1] dated July 27, 2012. That proposal was for a five-day suspension involving 10 specifications (eight for Improper Personal Conduct; two for Lack of Candor during an administrative investigation). Grievant submitted a reply to that notification, and provided an oral response in a meeting with HR Deputy Assistant Secretary Marcia Bernicat. Thereafter, the latter as deciding official for the agency issued a decision on October 2, 2012, sustaining seven of the original 10 specifications, and mitigating the penalty to a four-day suspension. Grievant then submitted an agency-level grievance on October 31, 2012 (and a Supplemental Submission dated January 4, 2013), as a result of which the agency mitigated the penalty to a three-day suspension, overturning two more specifications by letter dated March 29, 2013. Grievant appealed that decision to this Board on April 11, 2013, and supplemented his appeal on May 20, 2013. The Department responded to his appeal on June 19. After a consent tolling of the case pending the resolution of a previous grievance, grievant submitted a rebuttal of the Department's response on November 8, 2013. The Board then requested and received additional information from the parties, following which the Record of Proceedings (ROP) was closed on November 13, 2013.

The five specifications sustained by the agency in this case are as follows:

Improper Personal Conduct

Specification 1: On August 16, 2011, grievant approached the contractor employee, [redacted], and told her he needed to meet with her to discuss a "higher tasking." She

[1] The Office of Employee Relations in the HR bureau.

agreed to meet with grievant for lunch at a restaurant the following day (August 17). At that lunch, grievant read to [redacted] the list of 16 specifications from the August 16, 2011, letter of proposed discipline and wanted to discuss each one. He told her that the conduct alleged in the letter was all a misunderstanding and said that [redacted] needed to rescind the statements she had previously given to OCR investigators. She did not agree to do so.

Specification 2: The following day, August 18, grievant presented to [redacted] a short statement he had drafted to the effect that she was retracting her statement about one of the allegations in the OCR report. Grievant asked her to sign the statement as an acknowledgement that she "cleared" it, but [redacted] refused to do so.

Specification 4: On August 23, 2011, grievant went through [redacted] sworn statement to OCR with him, and [redacted] felt as though grievant were "cornering" him by forcing him to justify each of his statements. Grievant suggested that [redacted] revise his statements to indicate that he had "misunderstood" the situation. [redacted] refused to do so.

Specification 6: On October 26, 2011, grievant communicated with [redacted] via Instant Message in violation of an email directive from PDAS Bultrowicz[2] that "all official requests to and interaction with [redacted] should be made through [his supervisor] [redacted] or his designee."

<u>Lack of Candor in an Administrative Investigation</u>

Specification 1: In grievant's January 9, 2012, sworn statement, he stated that he "never asked [redacted] to change his statement or retract it." Despite grievant's claim that he only asked [redacted] for a statement of support, the deciding official found that it was

[2] Principal Deputy Assistant Secretary for Diplomatic Security and Director of the Diplomatic Security Service.

more likely than not that he "did more than ask for a statement of support," and thus concluded that he was dishonest in his response to OCR investigators.

III. POSITIONS OF THE PARTIES

THE AGENCY

Improper Personal Conduct

The agency contends that, with respect to Specification 1, the grievant's recollection of the events that transpired at his August 17, 2011, lunch with [redacted] is at odds with her sworn statements about them, and that, based on the similarities of grievant's behavior toward another colleague, her statements are more credible than grievant's. For example, grievant's denial that he asked [redacted] to retract or revise her sworn statement is contradicted by [redacted] sworn statement that grievant specifically said to her, "I need you to sign that you know that this isn't a big deal and rescind your statement." Also, [redacted] contacted her company's HR office based on her feelings of discomfort about what transpired at the lunch. Moreover, in a June 7, 2013, statement to HR/G, [redacted] denied that she ever said she wanted to provide grievant with a statement of support, as he alleges. Grievant's contention that [redacted] employer would not permit her to write a statement of support is also directly denied by the company's HR director.

On Specification 2, despite grievant's denial that he presented [redacted] a statement to "clear," the Department again credits [redacted] statement that he did so. Her statement to OCR investigators very clearly stated that the day after the lunch, when she walked into grievant's office, "he had a document where he had taken one of the allegations, typed up a few sentences underneath it to 'retract it' and then had a line saying 'cleared, [redacted].' He

asked me to sign it. I felt this was inappropriate. I told him I was uncomfortable about it and that I wouldn't sign it. He immediately put it away." Grievant's admission that he asked [redacted] to "clear" statements he had written is consistent with her statement. Finally, the Department contends that it was "improper" for grievant to ask [redacted] to clear statements he authored that in effect retracted her allegations of harassment against him. If [redacted] had truly wished to submit a letter of support retracting her allegations, "she should have been able to do so strictly on her own accord and not at the insistence of the subject of those allegations." And finally, the agency notes that grievant has not submitted any evidence, other than his statements, to support his repeated claims that [redacted] wanted to write a letter of support on his behalf.

With respect to Specification 4, the Department discredits grievant's statement that [redacted] did not say that he "felt cornered," but that he was instead "worried that being cornered would lead to repercussions for himself." Instead, the agency credits [redacted] statement that grievant "went through my statement page by page, allegation by allegation," and "I asked him several times at the beginning of the meeting if we should be having this conversation, and that I thought it could lead to more repercussions for him to corner me like this." Given [redacted] very specific recollection of the conversation, and the similarities between [redacted] recollection and those of [redacted], the Department credits his recall over that of grievant. The agency emphasized that [redacted] language made very clear that he indeed felt cornered by grievant.

On Specification 6, the Department maintains that grievant, by initiating contact with [redacted] via Instant Message (IM) on October 26, 2011, violated PDAS Bultrowicz's September 16, 2011, e-mail directive that he refrain from contacting her. The agency contends

that grievant's assertion that he was given permission to contact [redacted] by [redacted] in a December 15, 2011, e-mail cannot be credited, as [redacted] e-mail was drafted after grievant's IM conversation had taken place, and grievant has supplied no evidence that he sought anyone's permission before initiating the October 26, 2011, IM conversation with [redacted]. The Department concludes that a "reasonable person" would find that, based on his persistent efforts to renew contact with [redacted], grievant initiated the IM conversation without prior approval from his supervisors as mandated by the Bultrowicz directive. Moreover, grievant has not shown that there was any legitimate business or operational need for the IM conversation.

Lack of Candor in an Administrative Investigation

The Department contends that, based on grievant's responses to the charges contained in Specification 4, above, it is clear that grievant "did more than ask [redacted] for a statement of support" when the two met on August 23, 2011. Irrespective of whether grievant asked [redacted] to change one or more of his statements, to recant any, or to declare that his ([redacted] statements had resulted from a "misunderstanding," it is clear that [redacted] felt cornered by grievant during their meeting. Therefore, in the agency's view, grievant was disingenuous in denying that he made any request of [redacted], other than for a statement of support, in his response to OCR investigators when they asked him if he had requested that [redacted] change his statements.

THE GRIEVANT

Grievant argues in the first instance that this appeal should be remanded to the Department for penalty reconsideration, based on the Department's prior use of "progressive discipline" in this case. Given that this Board remanded grievant's previous discipline case to

the Department for penalty reconsideration, and given that the Department reduced the penalty in the prior case to a one-day suspension and that it cited use of the principle of "progressive discipline" in the determination of a penalty in this case, it, too, should properly be remanded to the Department for further consideration before the Board rules on it.

Improper Personal Conduct

With regard to specification 1, the grievant first complains that the agency provided no guidance whatsoever about how he was to obtain "statements of support" from his colleagues. He states that there is "no evidence" to support the allegation that he ever asked [redacted] to recant or change any of the statements she made to OCR investigators. He contends that [redacted] admission that he suggested she seek advice from AFSA on how to write a statement of support demonstrates that he did not ask her to retract anything, because "AFSA did not tell anyone to retract statements." Moreover, he claims that a statement by an official from [redacted] contracting company that she "let [AFSA legal counsel] know that the information (request for support statement) may have been misunderstood" proves that he never asked [redacted] or anyone else to retract or change their statements. He claims that because [redacted] never gave any statement to her company to "clear" he has demonstrated that he never drafted anything for [redacted] to sign. Finally, he claims that HR's use of the phrase "more likely than not" in its conclusion that he asked [redacted] to change her statement shows that there is a possibility or likelihood that he did not ask [redacted] to do so, which means that HR has no irrefragable proof that he did so. The lack of such proof, he claims, requires that this specification not be sustained.

On Specification 2, grievant contends that, in the absence of HR's having entered into the Record of Proceedings in this case any document that he allegedly asked [redacted] to clear,

the Department has failed to meet its burden of proving that he did so. He also argues that the agency's statement that [redacted] never expressed an interest in writing a statement of support for him is false and belied by the record.

With respect to Specification 4, grievant charges that [redacted] statement is "riddled with falsehoods and unfounded hearsay." The Department wrongly credits [redacted] statement about the location of his August 23, 2011, meeting with grievant, because HR was unable to produce any witnesses to confirm it. In grievant's view, it is clear that [redacted] gave false testimony.

As with Specifications 1 and 2 (which relate to [redacted]), grievant argues that Specification 4 is "a simple misunderstanding which HR refuses to acknowledge." He further claims that HR's conclusion that "it is more likely than not" that grievant asked [redacted] to change or modify his statement allows for the possibility that he did not ask [redacted] to change his statement.

On Specification 6, grievant maintains that he was in fact "under orders" from [redacted] his former supervisor in [redacted], to communicate with [redacted] and others about the work of his former office, and about important issues pending in the office. He states that the Department's reliance on an e-mail directive from PDAS Bultrowicz, in which grievant was told that all official requests to and interaction with [redacted] must be through grievant's former supervisor, is misplaced, because the Bultrowicz directive addressed only work-related matters and did not apply, he claims, to "personal off-hours 'IMing', and . . . did not mention personal interactions or communications." In any event, grievant argues, he had advance permission from [redacted] to communicate with [redacted], and [redacted]

[redacted] has never questioned the IM or noted any wrongdoing in his (grievant's) having had an IM conversation with [redacted].

Lack of Candor in an Administrative Investigation

Grievant argues that it was impermissible for the Department to sustain the charge of improper personal conduct in specification 4, above (pressuring [redacted] to change his prior statement to OCR) and then to charge him with lack of candor when he denied having done so upon questioning by OCR during the ensuing investigation. In grievant's view, such an approach amounts to "charging me twice for the same allegation, as this specification is the same as specification 4 above." Again grievant flatly denies having asked [redacted] to change his statement, but says that he did ask [redacted] for a statement of support.

In addition to the above refutations of the specific charges against him, grievant contends that, since it is illegal for contractors to file complaints under the EEO process available to direct-hire U.S. Government employees, this Board failed to review or enforce federal law in deciding his previous grievance.[3] He also argues that many if not all of the actions surrounding this grievance are the result of contractors retaliating against him. The relevant contractors, grievant claims, "created complaints" against him because he was assigned to investigate security violations and because he was assigned to convert several of the then-current contractor positions into Personal Services Contract positions, which meant the incumbents could have lost their positions. Finally, grievant notes that the Department failed to address his argument that, as a USG official, his actions were entitled to a judicial presumption of regularity. He seeks remand of this case to the Department for reconsideration of the penalty imposed upon him, but,

[3] FSGB Case No. 2012-040.

if the Board does not find that appropriate, he seeks reversal of the charges against him and cancellation of the Department's proposed penalty.

IV. DISCUSSION AND FINDINGS

In all grievances involving disciplinary action, the agency bears the burden of proving that the improper conduct occurred, that such conduct had a nexus to the efficiency of the Service, and that the penalty is reasonable.[4] In this case, as discussed below, we find that the Department has met that burden with respect to all but one specification.

A. <u>Improper Personal Conduct</u>

1. Specifications 1 and 2

As previously indicated, the first two specifications of improper personal conduct are directly related to each other and constitute a continuing course of events on successive days in mid-August 2011 involving direct encounters between grievant and contract employee [redacted] Grievant had received a letter earlier that month proposing that he be disciplined based on 16 specifications of his allegedly improper conduct towards [redacted]. It is undisputed that grievant wanted to speak with [redacted] about each of those specifications and to do so at a location away from their offices. In furtherance of that goal, he contacted [redacted] at work and told her that he needed to meet with her about a "higher tasking." When they met at a restaurant for lunch the next day, grievant sought to persuade [redacted] that the previous behavior she had complained about was all a misunderstanding and that she should retract the statements given to those investigating her complaints. Despite [redacted] resistance to the idea, grievant prepared a document to that effect and presented it to her at work the next day to sign, which she refused to do. We consider these related events below.

[4] 22 CFR § 905.2.

While grievant denies that he sought to have [redacted] retract her previous complaints to OCR about his behavior towards her, and maintains that he was merely attempting to explain why [redacted] had misunderstood his actions and asking for her statement in support of his grievance challenging the proposed discipline, we conclude that the Department has met the burden of proving that grievant's conduct in these respects was improper. In both cases, we find [redacted] detailed affidavits of the two encounters to be more credible than grievant's memory of the events involved. We note that [redacted] recollections of the events in Specification 1 (at the restaurant on August 17, 2011) and Specification 2 (in the office on August 18, 2011), set forth in her affidavit to OCR less than two months after the events occurred, were detailed and specific. She recalled the seating arrangement at lunch, the fact that grievant pulled out a list of 16 specifications against him and began reading each one, and even quoted him directly as saying, "I need you to sign that you know that his isn't a big deal and rescind your statement."

Grievant's recollections, by contrast, were vague and general. His affidavit, prepared four months after the events in question, uses phrases such as "I don't remember" and "I do not recall" many times. Moreover, his statements are internally inconsistent. On one hand, he denies having taken the list of 16 specifications against him to the lunch with [redacted]. On the other hand, he concedes that the reason he wanted to meet [redacted] at an offsite location was because "these stipulations from HR/ER/CSD were not for everyone's ears." We further note that grievant's use of the phrase "higher tasking" created the reasonable but erroneous impression that he wanted to meet with [redacted] on a high-priority work-related project rather than to discuss her factual assertions underlying the proposed discipline against him.

Whether intended or not, grievant was able to create a "captive audience" environment to pursue matters with [redacted] that she likely would not have agreed to meet and discuss.[5]

We therefore sustain Specifications 1 and 2.

2. Specification 4

We also sustain Specification 4, involving grievant's discussion with [redacted] about the content of the statement he had provided to OCR investigators. We agree with the Department that it is "more likely than not" that grievant asked [redacted] to change (or modify in some way) his statements to OCR investigators, and that [redacted] felt "cornered" by grievant during their meeting in the office wherein grievant sought [redacted] explanation for each of the comments in his statement. We note that [redacted] account of his conversation with grievant is very similar to the version of events we have credited with respect to Specifications 1 and 2, above, wherein grievant confronted [redacted] at lunch in the restaurant and the next day in the office about the content of her statements to OCR investigators and sought her retraction as a mere "misunderstanding." In this instance, we find that [redacted] would have had no reason to lie or embellish upon the nature of the interchange he had with grievant in the office regarding [redacted] statements to the OCR investigators. We reject grievant's argument that a conclusion that "it is more likely than not" that something happened suggests that grievant's recollection also is valid. In any "he said/he said" situation similar to this one, when only two participants were in a meeting, proving any point to 100% certainty is virtually impossible. We credit [redacted]

[5] Even if grievant truly believed that he merely wanted to gain [redacted] support against the proposed discipline rather than to coerce her into retracting her previous complaints against him, as far-fetched as that belief would be, we must view his conduct as a reasonable subordinate would view it: an improper attempt to force her retraction. By presenting [redacted] with a document for her signature at work the next day despite her refusal to retract any of her statements at lunch, grievant only compounded the reasonable impression that he was coercing her into such action.

statement that he felt that grievant was cornering him as more likely than grievant's contention that no such "cornering" or pressure to revise [redacted] statement took place. Such attempts to interfere with witnesses in a formal investigation are highly inappropriate, as grievant – a supervisor with 25 years of experience in the Department – certainly knew or should have known. Grievant's contention that the lack of "irrefragable" proof should render this specification (and others) invalid is misplaced: the Department need only provide "a preponderance of the evidence."

3. Specification 6

The record evidence with respect to Specification 6 indicates that on September 16, 2011, PDAS Bultrowicz sent grievant an e-mail directive confirming their previous day's conversation. In pertinent part, the e-mail referred to the sensitive ongoing OCR investigation into [redacted] complaints against grievant; removed grievant from [redacted] supervisory or oversight chain; and specifically directed that "all official requests to and interactions with [redacted] should be made through [redacted] or his designee." Grievant admits that he communicated with [redacted] via the Department's Instant Message (IM) system on October 26, 2011. In his IM to [redacted], grievant wrote in part: "Hi, [redacted] is ok to communicate again? . . . I xferred to cmp so any dstc directive now OBE. Technically, I can talk to anyone I want." The deciding official found that grievant initiated the IM conversation with [redacted] without prior approval from his supervisors as mandated by PDAS Bultrowicz's directive that was still in effect on October 26, 2011, and therefore sustained Specification 6. The Department denied grievant's challenge to that ruling. We find that the Department has met its burden of proving that grievant violated the directive to refrain from direct contact with [redacted] and thereby engaged in improper personal conduct.

We note at the outset that the main purpose behind the Bultrowicz directive removing grievant from [redacted] chain of command and setting up an intermediary between [redacted] and grievant when official communications were required was to minimize their direct contact with each other while OCR was investigating [redacted] sensitive complaints that grievant had engaged in improper personal conduct that made her uncomfortable. It is therefore ironic that grievant seeks to justify his direct IM to [redacted] on the basis that it was not work-related but rather a "personal interaction or communication" and thus not covered by the Bultrowicz directive. In our view, it must have been inconceivable to PDAS Bultrowicz that grievant would try to contact [redacted] for personal reasons while OCR was investigating [redacted] complaints about just such interactions, and therefore his directive specifically addressed how to keep them apart even when official business requiring their interaction had to be accomplished. The record supports the conclusion that grievant was under the same impression, since his IM to [redacted] starts off tentatively with the question, "is ok to communicate again?" and then self-consciously attempts to justify his departure from the no-contact edict by declaring that, due to his transfer, "[t]echnically, I can talk to anyone I want."

Grievant also argues inconsistently with the above that his IM to [redacted] was in reply to an IM from her, and therefore he was simply responding to a business communication. We reject such assertion, and find that his direct contact with [redacted] only a month after PDAS Bultrowicz specifically directed him not to do so constituted improper personal conduct if not insubordination. There is no record evidence to support a finding that, when [redacted] name "popped up" on grievant's monitor, she had "initiated" contact with him. Rather, the record reflects that [redacted] had been experiencing difficulties accessing the IM system for several weeks and was finally able to log on with assistance from the help desk, the "pop up"

merely signifying to everyone on her contact list that she was again able to communicate via IM. Even assuming that grievant thought [redacted] was trying to contact him, her statement early in the IM conversation that her communicator had just been put back online by the help desk should have alerted him that she had not initiated a conversation, but that her name had "popped up" only because her system access had been restored. Moreover, it should have been readily apparent to grievant at the outset of his IM "response" that [redacted] had no business, official and urgent or otherwise, to discuss with him. And, as indicated above, the content of grievant's IM "response" indicates that he appeared to know that he was violating the ban on direct communication with her rather than going through [redacted], even with regard to business matters.

Nevertheless, grievant argues that such communications had been authorized by [redacted] the individual specified by PDAS Bultrowicz as the intermediary for necessary business communications between grievant and [redacted]. In this regard, he submitted a note for the record from [redacted] dated October 15, 2012,[6] over a year after the Bultrowicz communication ban, claiming that such authorization had been given by [redacted] prior to grievant's October 26 IM to [redacted]. We view the timing and content of [redacted] statement with skepticism. Thus, if the latter had authorized grievant to contact [redacted] directly concerning "official business" prior to October 26, 2011, as now claimed, why would grievant not have mentioned [redacted] authorization in his IM conversation? Moreover, since [redacted] purported authorization was limited to "official business" communication, why did grievant's IM not ask [redacted] what official business she needed to discuss with him? And why does the record contain no evidence that [redacted]

[6] Grievant claims in his Rebuttal dated 11-08-13 that [redacted] had sent him a "statement of support" dated "10-15-11," but the email attached to his Rebuttal was in fact dated 10-15-12.

[redacted] contacted grievant to discuss "official business" or specify what such business might have been? All of these factors call into question whether [redacted] in fact authorized grievant to communicate directly with [redacted] even on official business matters sometime during the month between the date of the Bultrowicz e-mail directive (September 16, 2011) and the IM from grievant to [redacted] (October 26, 2011).[7] Finally, we note that [redacted] October 15, 2012, statement that he had authorized grievant to contact [redacted] for any official operational matter a year earlier is inconsistent with other statements made by [redacted] to OCR investigators in 2012 to the effect that he had admonished grievant early on to avoid direct contact with [redacted]. It is also inconsistent with [redacted] email dated July 6, 2012, in which [redacted] responded to grievant's request for confirmation that direct communication between grievant and [redacted] was permitted, by saying "I have no objections, but cannot speak for Scott [Bultrowicz]. . . . suggest you send this request to him." Accordingly, we accord little weight to [redacted] statements proffered by grievant after the fact to justify his earlier actions. And, as previously noted, any such authorization (for non-official communication) from [redacted] would have been beyond the latter's discretion to grant in any event.

Accordingly, we sustain Specification 6.

B. Lack of Candor in an Administrative Investigation

1. Specification 1

We reject grievant's argument that the Department acted improperly by charging him with improper personal conduct in Specification 4 and additionally with lack of candor about the

[7] Indeed, if [redacted] had done so, his actions would have been beyond the scope of his authority, since PDAS Bultrowicz merely empowered [redacted] to act as an intermediary rather than with discretion to waive the non-contact requirement altogether.

same event, namely his approaching and pressuring [redacted] to change the statements given to OCR investigators. Contrary to grievant's assertion, these two allegations are not duplicative, although they both involve the same subject matter.

As previously set forth with respect to Specification 4, we sustained the Department's finding, based on the deciding official's credibility determination, that [redacted] was approached by grievant at work and felt "cornered" by him when asked for an explanation of each statement that [redacted] made to OCR investigators and for a retraction based on grievant's assertion that [redacted] had misunderstood grievant's actions. In so concluding, we found that a reasonable employee in [redacted] position would have felt pressured to change the content of his sworn statement given to OCR investigators during an official inquiry into grievant's conduct, irrespective of whether grievant intended to force a retraction of [redacted] statement. In other words, even if grievant truly believed that he was merely seeking a statement of "support" from [redacted] rather than coercing him into a retraction, the objective effect of what he did was inappropriate.

By contrast, in charging grievant with a lack of candor for denying to OCR investigators, and thus answering untruthfully, that he had attempted to obtain [redacted] retraction of statements previously provided to them, the Department was required to prove by a preponderance of the evidence that grievant knowingly lied or intended to mislead OCR concerning the facts under investigation. In other words, the "lack of candor" charge implicates grievant's subjective state of mind when interacting with the OCR investigators, and thus is not duplicative of the charge concerning what transpired when grievant accosted [redacted] in the workplace.

Having rejected grievant's contention that the Department acted improperly by charging him with duplicative offenses, we nevertheless dismiss the "lack of candor" allegation on the basis that the Department has failed to prove that grievant lied or purposely misled the OCR investigators and thereby sought to prevent them from ascertaining the true facts under investigation. Grievant admitted that he approached [redacted] about the content of the latter's prior statements to OCR investigators, but denied that he intended to coerce [redacted] into changing or recanting those statements. Rather, grievant consistently asserted that his intent was to convince [redacted] that the latter had misconstrued and therefore had mischaracterized grievant's previous conduct towards [redacted]. Based on the entire record in this case, we find that the agency has failed to carry the burden of proving that grievant knowingly lied to OCR investigators about his motives in this regard. Rather, consistent with our previous findings, we conclude that grievant simply failed to grasp the effect that his conduct would have on those who had given statements to the OCR investigators. In this instance, we find that grievant's statements to OCR investigators were not the equivalent of lying because he believed that he was telling them the truth. Accordingly, we do not sustain the Department's lack of candor charge.[8]

C. The Appropriate Penalty

Having sustained all four specifications of improper personal conduct but reversed the Department's lack of candor allegation against grievant, we find that there is not sufficient evidence in the record to determine whether the Department would have found a three-day suspension reasonable and appropriate in the absence of the latter alleged offense. Our

[8] With regard to grievant's further contentions that it is illegal for contract personnel to file and process EEO complaints through the Department, and that contractors were retaliating against him for enforcing security rules, these matters were addressed in prior appeals filed by grievant and will not be considered again here. Further, we find inapt and unworthy of discussion grievant's assertion that, as a U.S. Government employee, his actions were entitled to the presumption of regularity.

uncertainty is further heightened by the fact that, as grievant has pointed out, the Department's imposition of the three-day suspension herein was based on the principle of "progressive discipline" inasmuch as grievant previously had received a two-day suspension for improper personal conduct. However, pursuant to this Board's remand of that prior case (FSGB Case No. 2012-040) for consideration of an appropriate penalty, the Department reduced the earlier suspension from two days to one. It is unclear to what extent, if any, the Department's penalty determination herein might have been affected by the knowledge that the previous suspension would be cut in half. Accordingly, we find it appropriate to remand this case to the Department for further consideration of the foregoing factors in deciding upon a reasonable penalty.[9]

V. CONCLUSION

Grievant's appeal is denied with respect to Improper Personal Conduct Specifications 1, 2, 4 and 6. It is sustained with respect to Lack of Candor Specification 1. The case is remanded to the Department for consideration of a reasonable penalty in light of this Decision. The Department shall report to the Board within thirty (30) days from receipt of this Decision concerning the status of the case.

For the Foreign Service Grievance Board:

Arthur A. Horowitz
Presiding Member

[9] In so concluding, we reject grievant's assertion that the Board should have remanded this case without considering the merits in order to allow the Department to determine an appropriate penalty in the first instance.

[redacted]

Nancy M. Serpa
Member

DISSENTING OPINION

I concur with the majority decision in all respects except as regards Specification 6. I would find that the agency failed to sustain this specification by a preponderance of the evidence. In discipline cases, the agency has the burden of proof. In reaching its decision, the Board weighs the arguments and evidence presented by the parties. In this instance. it seems to me, the majority has chosen to fill in gaps in the agency's presentation without support in the ROP, as in the following examples.

Personal vs. Official: The majority finds that grievant's IM communication with [redacted] was personal. Since Bultrowicz's September 16, 2011, email covered only official communications, the majority overcomes grievant's objection by explaining that the email would have contained a ban on personal communication if Bultrowicz had thought of it. This is unsupported by the ROP. The agency makes no such claim. A statement by Bultrowicz would easily clear matters up, but the agency did not produce a statement from him. Evidence that is in the ROP contradicts the majority's finding. Bultrowicz July 6, 2012, to grievant: "What you and [redacted] do in your personal time is your business. As far as official business, you are no longer in her chain of command and any communication you have with her I assume is personal." [redacted] June 12, 2012, to OCR: "I have no authority to mandate that anyone not talk to anyone else, that would have to come from a court authority or finding." To me, it seems clear that Bultrowicz and [redacted] understood the difference between "personal" and "official" and intended only to restrict grievant's official contacts with [redacted] If grievant's communication with [redacted] was personal, as the majority finds, then it did not conflict with Bultrowicz's directive.

Credibility: The majority finds that [redacted] statements exonerating grievant were false. This is unsupported by the ROP. The agency does not challenge [redacted] credibility, and there is no evidence in the ROP that would serve to discredit his statements. The agency's sole observation is that [redacted] December 15, 2011, testimony came after the IM occurred. [redacted] clarified his December statement on October 15, 2012, and the agency did not dispute his explanation.

Authority: The majority finds that [redacted] lacked authority to give grievant the instructions he describes in his statements. This is unsupported by the ROP. The agency could easily have made this claim and backed it with a statement from Bultrowicz but did not. Neither the agency nor Bultrowicz asserts that [redacted] exceeded his authority. At the point of Bultrowicz's September 16 email, [redacted] had supervised grievant for over a year. The email clearly placed him in charge of official communications between grievant and [redacted]

My dissent is based on the fact that the agency did not advance arguments and present preponderant evidence on these matters, raised instead by the majority, which are critical to the Board's decision. As a result, grievant did not have an opportunity to challenge and rebut these issues. It is the agency's burden -- not the Board's -- to demonstrate the merits of its decision to discipline grievant, and I would find that the agency failed to sustain Specification 6 by a preponderance of the evidence.

[redacted]

James E. Blanford
Member