

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

██████████  
Grievant

Record of Proceedings  
FSGB No. 2013-040

And  
Department of State

July 31, 2014  
**DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

Lois E. Hartman  
Harlan F. Rosacker

Special Assistant:

Joseph Pastic

Representative for the Grievant:

*Pro se*

Representative for the Department:

Dorian Henderson, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## OVERVIEW

**HELD:** The Agency's failure to propose grievant's suspension for three years after the underlying conduct rendered the suspension untimely and harmed the grievant, requiring reversal of the suspension.

**SUMMARY:** Grievant is an FP-04 Diplomatic Security (DS) agent in the United States Department of State. He grieved a proposed five-day suspension without pay on the charge of Improper Personal Conduct. The charge is based on an incident in a criterion country in which grievant (an unmarried person) engaged in consensual sex with a local woman and gave her \$60.00 after the sexual activity had concluded. There was no evidence that the woman was a prostitute and there were no witnesses to their encounter. Grievant self-reported the incident immediately to his supervisors, who took no disciplinary action. Eighteen months later, the Department opened an investigation and eventually suspended grievant.

The Board reversed the suspension, finding that the discipline was untimely and that it harmed grievant's ability to prepare a defense to the charge.

## DECISION

### I. THE GRIEVANCE

Grievant, a tenured FP 04 Diplomatic Security (DS) agent, appeals the denial of his grievance of a five-day suspension without pay, for engaging in conduct giving the appearance of prostitution. At the time of the incident, grievant was serving on the Secretary of State's Protective Detail (SD) advance team in a critical threat, counter-intelligence country (hereinafter "Country X").<sup>1</sup> The deciding official concluded that grievant's conduct had violated two regulations governing behavior subject to discipline: 3 FAM 4139.1 (Sexual Activity) and 3 FAM 4139.14 (Notoriously Disgraceful Conduct). As a threshold matter, grievant contends that the Department's failure to propose disciplinary action until three years after the incident on which it was based was not fair or timely. Grievant further asserts: (1) that the Department failed to prove the charge; (2) that the agency failed to establish a nexus between the misconduct and the performance of his duties; (3) that the penalty did not comport with the precept of "similar penalty for like offenses;" and (4) that the penalty was otherwise unreasonable. The 2012 Promotion Board recommended grievant's promotion to the grade of FP 03. His name was temporarily removed from the promotion list. As relief, he requests that the Board order interim relief from implementation of the penalty, overturn the disciplinary decision, release the hold placed on his promotion because of the pending disciplinary action, and order back pay with interest, attorney's fees and expenses, and all other appropriate relief.

Without objection from the Department, the Board granted interim relief from the discipline until August 14, 2014 or until the Board issues a decision, whichever comes first.

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<sup>1</sup> This particular nation was on the Department's Security Environment Threat List. Such countries are often called "criterion" countries, and this term appears often in the record of the instant case.

## II. BACKGROUND

After completing basic training in December 2006, grievant worked in a field office in the United States before being assigned to the SD in 2008. He served on that detail for the next three years. In [REDACTED] 2010, grievant was sent to Country X as an advance agent for a trip by the Secretary of State. After arriving and before checking into their hotels, grievant and all other members of his contingent were briefed by the Embassy on counter- intelligence (CI) activities and necessary precautions in the country.

Within the next few days and about a week before the Secretary arrived, grievant, an unmarried officer, reported on his own initiative to his team leader, and then to the head of the Embassy's Counter-Intelligence program, that he had contact the previous evening with a female citizen of that country. He informed them that after meeting the woman in a nearby bar, talking for an hour or so and having several drinks, he invited her to his hotel room, where they had sexual relations. Afterward, she spoke of hardships she was experiencing and showed him a picture of her son. As she was preparing to leave his room, he gave her the equivalent of \$60.00 (sixty dollars) in local currency so that she could take a taxi home to her son. He maintains, however, that there had been no previous discussion of money.

Grievant states that he provided a written account of the encounter when he reported his contact to the Embassy. However, such a document has not been found in the Embassy's files or the Department's files. Grievant was not removed from the SD and remained in country until the conclusion of the Secretary's visit. Grievant returned to the United States, and his assignment to the Secretary's Detail was extended until February 2012.

On September 12, 2011, the Diplomatic Security Service opened an investigation into grievant's [REDACTED] 2010 activities in Country X, prompted by information that had come to light

in another investigation.<sup>2</sup> Grievant asserts that when DS interviewed him on October 25, 2011, he repeated the account he had offered just after the incident. One agent who had interviewed grievant in 2011 told investigators that grievant had typed up a report at that time, and another agent told investigators that it would have been normal for grievant to do so. However, no one recalled reading it, and no one knew what happened to it.

During the DS investigation, other agents and security officials provided their recollections of what grievant had told them in ██████ 2010. They also answered interview questions about the ensuing discussions among DS officials when they first learned of the situation from grievant. A security official at the Embassy expressed concerns about grievant's vulnerability. However, she deferred to the agents in charge of the SD. Those agents discussed the matter with their superiors in Washington, D.C. and concluded that grievant could remain in the country and continue his duties. With so little time left before the Secretary's arrival, these DS supervisors found that it would have been difficult to replace grievant. In any event, after grievant's departure from Country X in 2010, no one in DS took any steps to forward the matter to HR for possible disciplinary action against grievant.

On August 14, 2012, DS sent its Report of Investigation (ROI) to the Bureau of Human Resources (HR), for whatever action was deemed appropriate. An HR official proposed on March 4, 2013 that grievant be suspended without pay for five days. Grievant submitted a written response. On April 22, 2013, the Deputy Assistant Secretary for Human Resources (hereinafter "deciding official") informed grievant that she had sustained the proposed suspension. Based on the pending disciplinary action, the 2012 Selection Board's recommendation that grievant be promoted was placed on hold.

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<sup>2</sup> The record on appeal discloses no information on the other investigation or its actual connection to grievant, if any.

The specifics of the charges and the rationale for the suspension are summarized as follows.

The Department's deciding official imposed a 5-day suspension without pay, based on a charge of Improper Personal Conduct -- violating provisions on Sexual Activity in 3 FAM 4139.1<sup>3</sup> and Notoriously Disgraceful Conduct in 3 FAM 4139.14.<sup>4</sup> The specification for the charge was:

In ██████████ 2010, you served on the Secretary of State's Protective Detail advance team in Country X, with specific duties related to advancing the hotel in which the Secretary would be staying.

In your October 25, 2011 interview with DS investigators, you stated that one night, a few days after you had arrived in Country X as part of the advance team, you went to a hotel employee at the valet stand and asked him where you could go to meet girls. He directed you to a drinking establishment. You stated that you went to the establishment he indicated and while there met a woman who was a citizen of Country X. You further stated that you had a few drinks with her, and then you both went back to your hotel room and had sexual intercourse. You stated that the woman stayed the night, and the next morning, you gave her \$60 for cab fare. You stated that she had shown you a picture of her son and expressed some kind of hardship, and that you were just doing the right thing by giving her cab fare home.

Highlighting one of the aggravating factors justifying the suspension, the proposing official stated:

Your misconduct gives the strong appearance of contravening the State Department's June 11, 2008 policy on the solicitation of people in prostitution, which was transmitted to all posts via cable 08 STATE 00628864.

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<sup>3</sup> 3 FAM 4139.1 (Sexual Activity): "...serious suitability 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 impair the individual's position performance by reason of, for example, the possibility of blackmail, coercion, or improper influence."

<sup>4</sup> 3 FAM 4139.14 (Notoriously Disgraceful Conduct): Notoriously disgraceful conduct is 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 [ ... ]"

The deciding official conceded that there was no evidence that grievant “had a *quid pro quo* arrangement with the woman or that she was a prostitute.” She found, however, that his “actions created the appearance of prostitution,” *i.e.*, that he was paying her for sex, regardless of whether that was his intention. She noted that the \$60.00 he gave the woman was roughly equal to ■■■ of the average per capita monthly income in the capital of that country. She implied that the sum was, by local standards, so exorbitant that it could not have represented actual taxi fare.<sup>5</sup> Thus, the deciding official concluded that grievant had violated the Department’s June 11, 2008 policy on the solicitation of people in prostitution, which is often connected to sex trafficking and prohibits engaging prostitutes while abroad. She cited the Board’s decision in FSGB Case No. 2011-009 (January 17, 2012), wherein the Board stated that “creating an appearance of violating the law or ethical standards is a violation subject to punishment just as the actual act would be.”

The deciding official reiterated the aggravating factors that had been presented in the proposal:

- a. grievant as a law enforcement officer is held to a higher standard of conduct, and his misconduct, especially while serving on the Secretary’s Protective Security Detail, raises concerns about his judgment;
- b. grievant had been thoroughly briefed on the active counter-intelligence threat for United States personnel in Country X and had been warned to assume that all of his public and private moments were subject to audio and video recording;
- c. grievant had asked a hotel employee where he might go to meet girls, and hotel employees would have known he was part of the Secretary’s security team;

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<sup>5</sup> She did not suggest that grievant would have known that.

- d. grievant's sexual contact had taken place in a hotel room which he had been told was likely to be bugged; and
- e. grievant's "actions could potentially have been used to pressure or coerce [him] to embarrass or discredit the U.S. government."

As mitigating factors, the deciding official noted that grievant had voluntarily reported the incident to the head of the advance team and the officials responsible for the Embassy's counter-intelligence program, had a follow-up counter-intelligence briefing and was allowed to resume his detail. She also recognized that the woman with whom grievant had sexual relations was a consenting adult, that the Department had no definitive evidence that she was a prostitute, that he was unmarried at the time, and that he had almost seven years of service with the Department without any other discipline issues. However, she found that these mitigating factors did not outweigh the seriousness of his misconduct or convince her that the proposed penalty should be lowered.

Grievant filed a grievance contesting the disciplinary action on May 7, 2013. The Department denied it in its entirety on July 31, 2013. He appealed to the Board on August 15, 2013. On August 20, 2013, the Board granted grievant interim relief for one year -- until August 14, 2014, or until the Board issues a decision, whichever comes first. Grievant filed a Supplemental Submission on November 18, 2013. The Department responded on December 20, 2013, and grievant filed his rebuttal on January 22, 2014. In response to a request from the Board, the Department provided additional information on February 19, 2014. This information consisted of the full ROI concerning grievant, as well as various attachments focusing on relevant counter-intelligence background. Although this material is classified because of the identity of Country X, it represents the core of the disciplinary case, and the Board has

considered it along with the information in the Record of Proceedings (ROP). The ROP was closed on February 28, 2014.

### **III. POSITIONS OF THE PARTIES**

#### **A. THE AGENCY**

Addressing grievant's contention that the disciplinary action was not carried out in a fair, timely and equitable manner, the deciding official noted that 3 FAM 4321 does not define "timely." In its Response to grievant's Supplemental Appeal Submission, the Department further asserts that:

Grievant's misconduct was brought to light during the investigation of another disciplinary matter. As soon as the matter was reported, an investigation ensued. The record was sufficiently developed and provided to HR/ER for consideration on August 14, 2012. Grievant was proposed for disciplinary action on March 4, 2013, and he received the deciding official's decision in this matter on April 22, 2013.

The deciding official concluded that grievant had not "demonstrated that the delay has negatively impacted [his] ability to respond to the proposed discipline, recollect events, or produce evidence and witnesses."

The Department does not dispute that grievant submitted a written report just after the incident. However, for two reasons, the agency contends that he was not harmed by its inability to find it. One, grievant was not disciplined for failure to file such a report. Two, the Deputy Assistant Secretary for Human Resources (DAS) stated in her letter denying the grievance that grievant had made -- under oath -- a statement that was incriminatory and which directly contradicted the alleged content of the lost report.<sup>6</sup> In denying the grievance, the DAS for Human Resources wrote in pertinent part:

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<sup>6</sup> This particular DAS was not the same individual who had been the deciding official, though each had the same title at different points in time.

Your sworn statement provided during your October 25, 2011 DS interview indicates the statement you made to an employee at the valet stand. You specifically told [the interviewing agent] that ‘one night, a few days after [you] had arrived, [you] went to the hotel employee at the valet stand and asked him where [you] could go to meet girls.’

Letter of July 31, 2013 at 9 (emphasis added).<sup>7</sup>

Finally, the Department rejects the notion that the delay caused grievant harm as to promotional opportunities. The agency has stated that grievant’s name was temporarily removed from the promotion list to FP-03 pursuant to 3 FAM 2328 (Temporary Removal of Names from Rank Ordered List). The Department avers that unlike cases in which the Board has found that the timing of disciplinary action disadvantaged officers in competing for critical promotions, grievant “has sufficient time to move through the ranks at a competitive level after implementation of the imposed discipline” -- approximately 22 years until he reaches his Control Time-in-Class date.

## **B. THE GRIEVANT**

Grievant contends that the Department’s disciplinary action is untimely and violates a requirement in 3 FAM 4321 that disciplinary procedures be carried out in a “fair, timely and equitable manner.” He asserts that the disciplinary action should be overturned for this reason alone, although he has based this appeal on numerous other arguments as well.

While the incident prompting the disciplinary action occurred in [REDACTED] 2010, “the Department did not propose discipline until three years later, in March 2013.” Grievant asserts that he has been harmed by the delay.

Grievant relies on a previous Board decision in which relief was granted because of a similar period of delay in proposing discipline. In FSGB Case No. 2012-064 (June 5, 2013), the Board overturned a disciplinary action proposed by the Department in 2012 based on the charged

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<sup>7</sup> ROP 001 at 64.

officer's affair with a locally-engaged staff member at a critical threat post which he had reported to a DS officer in 2009 but which had not come to the attention of HR/ER until three years later through another investigation. The Board found that the proposal had been untimely and that the officer had been prejudiced in his defense and otherwise harmed.

Grievant contends that he was palpably harmed by the delay because his contemporaneous, typed statement has been lost and memories of the participating officials have faded. Eroding memory, he argues, is reflected in the debate between himself and the Department as to whether he had asked a taxi driver where he might "find food and drink" or had asked a "bellman" where "to meet girls." To the best of his present recollection, he did not state the latter to DS/PR when he was interviewed in 2011, though that is what the Department asserts. If his [REDACTED] 2010 report were available, it would confirm what he told DS officials on the day after his encounter. Instead, the Department appears to be relying on 2011 summaries of DS investigators who interviewed the original DS supervisors and Embassy personnel concerning what they heard in [REDACTED] 2010.

Secondly, grievant asserts that the Department's lengthy delay may harm him by causing him to lose his 2012 promotion to FP-03. He argues that "[h]ad disciplinary action been taken in a timely manner, it is likely that any discipline letter would have been removed from my file by the time the 2012 promotion board met."

#### **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 was justified and that a nexus exists between the conduct and the efficiency of the service.<sup>8</sup> The Department must show that the grievant committed the acts charged, that there is a link between the charged conduct and the

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<sup>8</sup> 22 CFR §905.2.

efficiency of the service, that the relevant mitigating and aggravating factors have been considered, and that the proposed penalty is proportionate to the offense and consistent with penalties imposed for similar offenses. *See* FSGB Case No. 2006-037 (September 28, 2007); FSGB Case No. 2004-035 (January 28, 2005). Where, as here, the timeliness issue is a sufficient basis to grant relief to an appellant, there is no need for the Board to explore the underlying merits of the disciplinary action. It is useful, then, to recapitulate the legal framework for adjudicating an appeal based upon allegedly untimely discipline.

The burden of proof is upon the grievant, as far as the timeliness issue is concerned, and this allocation of the burden of proof is well established. This Board has relied on precedents of the Merits Systems Protection Board (MSPB) concluding that a grievant seeking relief from allegedly untimely discipline bears the burden of proving a nexus between the delay in proposing discipline and demonstrable prejudice or harm to the employee in presenting his or her defense.” FSGB Case No. 2006-057 (September 9, 2008) at 14.

There is no statute or regulation that defines precisely how much delay constitutes undue delay or unreasonable delay. The Board has recognized that “the resolution of issues concerning allegedly untimely disciplinary action and resultant prejudice to an employee must be based upon the particular facts and circumstances of each case.” *Id.* at 13 (citing FSGB Case No. 2006-012 (June 6, 2007) at 21. Indeed, this Board has found the proposal of discipline to be untimely where the period in question was either longer or shorter than the three-year period herein. *See, e.g.* FSGB Case No. 1991-071 (April 22, 1992) (delay of 19 months); FSGB Case No. 1998-011 (January 5, 1999) (four-year delay); FSGB Case No. 2000-006 (February 6, 2002) (11-month delay).

The method of calculating the delay period is not disputable. We have noted that in determining whether discipline procedures were taken in a timely manner both the FSGB and the Merit Systems Protection Board have “started the ‘timeliness clock’ with the date that the alleged misconduct occurred, and stopped the clock at the time the agency adverse action was rendered.” FSGB Case No. 2000-006 (February 6, 2002) at 18 (citing FSGB Case No. 1991-071, *supra*, at 7; *Mauro v. Dep’t of the Navy*, 35 M.S.P.R. 86, 94 (1987)).

We have followed rulings of the MSPB that “the length of the agency’s delay, *per se*, is not a sufficient reason to dismiss charges against employees.” FSGB Case No. 2000-006, *supra*, at 33-34. Thus, we employ a two-step analysis for determining whether to reverse a disciplinary decision: (1) whether there was unreasonable and unexcused delay and (2) if so, whether prejudice or harm to the grievant resulted from it. To show that he or she was prejudiced by the delay, a grievant “should do so through some specific suggestions as to what he [or she] might have been able to show, or how his [or her] defense would have been improved had the adverse action (i.e. the disciplinary proposal in this grievance) been proposed earlier.” *Id.* (citation omitted).

#### **A. TIMELINESS ANALYSIS**

Grievant asserts that the Department did not propose discipline in a timely fashion and thus violated the requirement in 3 FAM 4321 that “[d]isciplinary procedures will be carried out in a fair, timely, and equitable manner.” If the Board concludes that the discipline is not timely and that grievant has been prejudiced by the delay, the proposed discipline may not be imposed.

DS did not open a formal investigation of the Country X incident until September 12, 2011 – [REDACTED] months after DS officials originally had decided to do nothing about it.

There was further delay; DS did not send a report to HR until August 14, 2012, and HR did not propose discipline until [REDACTED] 2013 -- three years after the incident.

In parsing the question of whether the alleged untimeliness of the discipline justifies reversal of the imposition of discipline, we examine separately the issues of whether the delay is undue and unexcused and, if so, whether the grievant suffered any harm because of the delay.

The Undue and Unexcused Delay. We conclude that the delay in imposing the discipline was unduly long and that the agency has not produced a specific, credible excuse for such a delay.

*Undue Length of the Delay.* The record shows that the senior DS officials in the Embassy and in Washington were informed of the contact on the day following the incident and that they were familiar with not only the high standards of conduct expected of DS agents, especially in a criterion country, but also the steps they should take if, in their judgment, an agent's conduct did not meet those standards. They did not pursue any disciplinary action against the grievant. Under these circumstances, grievant had no reason to think that the matter would go any farther.

The merits of their decision not to remove grievant from the detail or not to suggest a more extensive investigation are not at issue in this appeal. However, the [REDACTED] months between the reported incident and the opening of an investigation is a delay solely within the control of the Department as a whole. DS and HR are part of the same Department.

Institutionally, the Department was on notice of the incident in [REDACTED] 2010. That is the appropriate time from which any alleged delay should be calculated. The record reflects no facts revealing why DS required eleven months to complete the investigation, as there were no identifiable witnesses to the incident other than the grievant himself. The instant case involves

more than one layer of delay: the lag between the incident and the commencement of an investigation, as well as the lengthy time that elapsed between the referral of the ROI and the proposal of discipline. Further, the agency fails to explain why seven months of time was necessary in order to decide whether to propose any discipline of any kind.

The Department herein has made an oblique suggestion that the lapse between the incident and September 12, 2011 should not even be counted. The official who denied the grievance wrote: “In your case, your misconduct was brought to light during the investigation of another disciplinary matter. As soon as the matter was reported, an investigation ensued.”<sup>9</sup> This statement flies in the face of undisputed history; the incident was reported by grievant to his DS superiors in ██████ 2010, and no disciplinary investigation ensued.

As the Board has observed previously, “Unwarranted delay on the part of one office (DS) responsible for one part of the discipline process may cause a violation of the timeliness regulation, even if another office (HR/ER) acted with alacrity.” FSGB Case No. 2012-064, page 11. Thus, we hold the Department responsible for all of the delay, not merely part of it.

*Lack of Justification for the Delay.* The Department’s broad claim that commencement of the disciplinary process was triggered by some other investigation is too elliptical to suffice as an excuse for the delay. The Department has set forth the dates on which the formal investigation progressed, from one point to the next. However, the agency has never articulated why the agency did not propose discipline of the grievant until after the “other investigation” commenced, nor given any information as to the relationship between it and this case.<sup>10</sup>

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<sup>9</sup> Letter of July 31, 2013 at 8.

<sup>10</sup> The Department has not revealed (even in its classified submissions to the Board) the nature of the “other investigation” or how it led to the grievant. The Department also has never asserted a privilege or any other legal barrier to discussing those facts in this litigation.

In its briefing of this case, the agency has never confronted why it should be excused for resuscitating an accusation that was brushed aside by those who could have initiated the disciplinary process much earlier. For example, the Department has never asserted that the incident was so complex that much time was needed in order to figure out whether to discipline this employee. Most of the key facts in the ROI came from one Embassy official and various DS agents, all of whom were still employed by the Department throughout the time of the investigation. The issues were not unique and grievant did nothing to delay the process.

Moreover, when there is a clear and credible explanation for delay of discipline, the Department typically couches it in terms of revealing the “necessity” for the delay. Here, there is no hint of “necessity” at all. The Board concludes that the proposal of discipline was untimely.

*Harm to the Grievant Caused by the Delay.* The Board’s finding that the proposal of discipline was untimely does not preclude imposing the discipline unless grievant also shows that the delay has resulted in actual prejudice or harm. The Board elaborated on this well-established principle in FSGB Case No. 2000-006, *supra*.

Harm caused by delay of discipline can arise in various ways. Here, the grievant has alleged two types of harm: harm to his promotional opportunities, as well as harm to his ability to prepare a defense to the charge. Either one is sufficient to support granting relief in this appeal. Based upon the following analysis, the Board finds that grievant has established one form of harm, *i.e.* that the delay stymied his ability to defend against the charge.

As to inability to prepare a defense to the charge, the grievant focuses on the delay as causing the permanent loss of his typed statement, prepared by him on the day he reported the incident. There were no witnesses to the incident with the woman in the hotel room. Grievant posits that a typed, contemporaneous statement is the best evidence of what he actually reported

in █████ 2010. Its loss leaves grievant unable to conclusively refute a central element in the denial of his grievance, *i.e.* a purported admission.

The agency's disciplinary decision is based in large measure upon an alleged admission attributed to the grievant in a Memorandum of Interview (MOI), made by DS investigators in 2011. DS interviewed grievant on October 25, 2011. In their MOI, the investigators wrote that grievant told them that he went to "the hotel employee at the valet stand and asked him where he could go to meet girls." Furthermore, the deciding official and the DAS who denied the grievance highlighted this quotation, as an admission or "sworn statement." The Department used this as a basis for totally dismissing grievant's claim that he had approached a taxi driver. Grievant denies making this statement and argues that the incorrect quotation would be refuted by his written statement.

There was an additional layer of harm to the grievant. The loss of his contemporaneous statement adversely affected the fairness of the disciplinary process in the following respect. If the statement had been preserved for all parties, any conscientious official would have compared it to the MOI and might have recognized, as we do, that no sworn admission actually existed. The agency has never suggested that grievant's lost statement was made under oath or, more importantly, that it contained any admission of wrongdoing. Thus, the reference to a "sworn" statement or admission could only have meant the MOI.

We looked closely at the MOI resulting from grievant's interview. This document is not sworn at all. It bears no indication that it was even presented to grievant for his review. Among the papers in the ROI, the only one signed by grievant is a purely routine document that is secondary to the substantive report of interview. This document is known as the "Warning and Assurance to Employee Requested to Provide Information on a Voluntary Basis." " This is a

Form DS-7619.<sup>11</sup> The purpose of the Form is to provide warnings and information to a person who is about to be interviewed by DS.

The Form states that the person does not have to answer questions; the person may stop answering at any time; no discipline will be imposed for declining to answer questions; the interviewee has a right to have a representative present; any statement could be used as evidence against the interviewee; and any information solicited may be used to determine suitability for assignment to certain places or positions, continued employment or access to classified information. Obviously, the Form is presented to an interviewee and signed by that person prior to the commencement of the DS interview. To this extent, the Form is akin to a *Miranda* warning.<sup>12</sup> Grievant signed it, with his legal counsel present. That Form contains no oath of any kind and does not contain language by which the interviewee warrants that his or her answers in the interview will be made under penalty of perjury.

Grievant never adopted the statement attributed to him in the MOI. Yet, the Department used it against him unfairly in two respects. One, the deciding official interpreted the MOI as containing an admission, and she did so as part of her analysis of why she sustained the proposed suspension. In her summary of the *Douglas* factors (appended to her letter of April 22, 2013), she determined that grievant's conduct had been "intentional." In support of this conclusion, she wrote, "He admitted that he went to a hotel employee at the valet stand asking him where he could meet girls." (Emphasis added).<sup>13</sup> Two, the DAS who denied the grievance explicitly referred to grievant's "sworn statement" that he provided in his interview with investigators.

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<sup>11</sup> Other persons interviewed in the 2012 investigation also signed the same form.

<sup>12</sup> See *Miranda v. Arizona*, 384 U.S. 436(1966) (mandating pre-interrogation warnings of constitutional rights to criminal suspects).

<sup>13</sup> ROP 001, page 30.

The Department has improperly magnified this phantom admission or “sworn statement” as a proverbial smoking gun.<sup>14</sup>

The missing, contemporaneous statement may have been pivotal to the grievant’s defense, because the agency’s finding of “appearance of prostitution” hinges on its assumption that the grievant admitted the all-important conversation with a hotel bellman, not a random taxi driver.

The briefing provided to the DS agents on the SD included a specific warning that local security agents of Country X often co-opted hotel employees. The implication is that a bellman would have tipped off local security agents to bug or otherwise monitor grievant, possibly inside his hotel room. Accordingly, if the reference to a “bellman” or other hotel employee is not contained in grievant’s written statement, the keystone of the disciplinary charge is demonstrably damaged. We draw this conclusion because of the Board’s precedential ruling in another DS disciplinary case, FSGB Case No. 2012-068 (October 10, 2013). There, the Board overturned the Department’s finding that an agent on a protective detail had created the appearance of prostitution when he gave a woman \$100 in his hotel lobby after a sexual encounter. The Board found that the Department had not met its burden of proof in that the only reason it knew of that incident was that the agent himself had disclosed it to DS in its investigation of another incident. The Board reversed the agency’s decision to impose discipline on the charge of “notoriously disgraceful conduct” based on creating the appearance of prostitution. Like the situation herein,

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<sup>14</sup> On appeal, grievant has identified the problem of the so-called “sworn statement,” but the Department still fails to grapple with it. In footnote three of his Appeal Submission, grievant states in pertinent part, “I did not provide a written sworn statement to DS and do not believe I told DS that I asked the valet where I could go to meet girls.” In its Response to the Grievance Submission, the agency ignores the real issue. Inexplicably, the agency states therein, “Contrary to grievant’s allegations stated in his grievance appeal submission, the sworn statement grievant provided during his October 25, 2011 DS interview contains the statement grievant made to the hotel employee located at the valet stand.” ROP 005, page 124 (emphasis added).

the Board found that there was no evidence that anyone had actually seen the agent give the woman money. It stated:

The Board holds that a broad-brush application of the “appearance is enough” principle is not applicable when the only source of information is from the grievant whose statement contradicts the finding and there is no other evidence.

*Id.* at 26 (emphasis added).<sup>15</sup>

Candidly, we have considered whether grievant’s contention about the taxi driver is merely a self-serving, belated story. We are satisfied that grievant’s version of events cannot be dismissed out of hand. Upon reviewing the classified ROI, we noticed a corroborating statement by a first-hand witness, *i.e.* the supervising agent to whom grievant first revealed his contact with the woman. This supervising agent on the SD was another SA (hereinafter ██████████). The MOI reveals that he was asked by the investigation’s Reporting Agent (RA) on January 26, 2012 to provide his recollection of the event. In response, he sent the RA a personal email. In pertinent part, he wrote in the email that grievant told him he had asked a “taxi driver” where he could “find girls.”

Despite the email, the RA and another investigator interviewed ██████████ by telephone a few days later, on February 1, 2012. In their MOI, they attribute to him a statement that is sharply at odds with the email. They wrote that grievant told ██████████ that he had asked “the bellman at the hotel where he could go to buy a meal and meet some girls.” There is no indication that ██████████ was ever asked to adopt this MOI as his own statement and no indication that anyone asked him to reconcile the interview report with his email.

While the passage of time could have rendered anyone’s memory unclear or faulty, the email from ██████████ at least facially corroborates grievant’s mention of the taxi driver. Indeed,

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<sup>15</sup> The Board therein remanded the case to the Department, for determination of the appropriate penalty for the remaining charge of Poor Judgment, which was based on other conduct that occurred inside the United States.

grievant pinpointed this fact in his grievance submission to the Board.<sup>16</sup> We note that neither the proposing official nor the deciding official ever mentioned the email in their respective letters to grievant. The same is true of the official who denied the grievance. The MOI was treated at every stage as the sole, extant statement of [REDACTED], even though all decision-makers within the Department had access to the ROI and relied on its content. Because the Department, at every level, categorically ignored the email in favor of a different statement, the loss of the grievant's written statement, which may have indicated whether he spoke to the bellman or a taxi driver and the specific question he posed, is significant.

We have also considered the practical significance of the phrase “find girls” or “meet girls” and whether either phrase should give us pause. We recognize that the words “find girls” or “meet girls” are more suspicious than “find food and drinks.” However, even if grievant had spoken either phrase, such words have no evidentiary impact if grievant used them when speaking with a random taxi driver. Here, a taxi driver (unlike a hotel employee) would not be a presumptive local security agent and would not have had a reason to spot grievant as a DS agent – a surveillance target. Furthermore, we conclude that these phrases are too ambiguous to support a presumption that the speaker is shopping for sex and is willing to pay for it. These phrases are commonly used by men of all ages, in many types of situations.

There is a second way in which the loss of grievant's contemporaneous written statement has robbed him of important defense material. It relates to the Department's inference that the amount of money given to the woman somehow was an indicator of payment for services of a prostitute. During discovery as part of this appeal, the agency posed interrogatories to grievant.<sup>17</sup>

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<sup>16</sup> Grievance Submission, footnote 2. The agency's Response to grievant's Supplement Submission is silent as to this email.

<sup>17</sup> The interrogatories and answers are in the ROP as part of grievant's Supplemental Submission.

Interrogatory No. 4 asked: “In your grievance, you admit that you gave the woman 60 USD for cab fare home. How did you determine how much money to give her? Were you aware of the distance from the hotel to her residence?” Grievant answered:

After the passage of so much time, I do not recall the exact amount of money although I believe it was approximately 60 US dollars. I do not think the woman told me where she lived and do not recall why I gave her the amount of money I did. This information may have been contained in the report I wrote at the time.

The agency seized upon the sum of \$60.00 as being a conspicuously large amount of money, in the economy of Country X, and this was, in the agency’s view, a circumstantial indicator of the appearance of prostitution. Leaving aside the lack of any witness to this monetary gift, we at least see the grievant’s typed statement as a potential source of explaining this detail.

For all of the reasons set forth above, the Board concludes that the untimely disciplinary action did harm grievant, insofar as it obliterated his access to highly important evidence.

As to harm to promotional opportunity, grievant cites the impact of the delay to his current quest for promotion. He focuses on the suspension letter that ostensibly would have been removed from his OPF if the suspension had been imposed sooner. In support of his argument, he cites the previous Board decision in FSGB Case No. 1991-071, *supra*. In that case, the Board granted relief to a grievant whose delayed discipline posed a palpable threat to his competitiveness. However, the agency has pointed out why this case can be distinguished from grievant’s circumstances. The Board therein noted the grievant’s “outstanding performance record” and applied the following analysis:

In light of the limited opportunities for officers in his specialty to be promoted into the SFS, his promotion chances are likely to be seriously prejudiced by a letter of suspension remaining in his official personnel folder during the last two years of his eligibility. Under all these circumstances, we find

merit in grievant's position that the letter of suspension should not be placed in his OPF.

*Id.* at 8-9.

The agency states on page 14 of its Response to grievant's Supplemental Submission that grievant's "Control Time-in-Class (TIC) Date does not expire until July 9, 2036. Grievant therefore has approximately 22 years of promotion opportunity left." Grievant has not challenged these facts in his Rebuttal. We find that he has not shown any palpable harm to his chances for promotion and retention in the service. *Id.* at 8.

## **B. CONCLUSION AND APPROPRIATE RELIEF**

The Board reverses the denial of the grievance, without remand, for the reasons set forth herein above. As relief, the Department is hereby ordered to withdraw grievant's suspension letter from his OPF, to lift the hold on grievant's promotion, and to pay grievant back pay with interest, retroactive to the date on which his promotion would have been implemented, but for the suspension. The Board notes that grievant has proceeded without legal counsel in this appeal. Thus, an award of attorney's fees is not appropriate.

The Board's directives to the agency shall be implemented within 30 days of the date of this decision.

**For the Foreign Service Grievance Board:**



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Cheryl M. Long  
Presiding Member



Lois E. Hartman  
Member



Harlan F. Rosacker  
Member