

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

██████████

And

Department of State

Record of Proceedings  
FSGB Case No. 2013-042

November 20, 2014

**DECISION**  
EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Gregory D. Loose  
Harlan F. Rosacker

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

Zlatana Badrich, AFSA

Representative for the Department:

Kathryn Skipper, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** The Department has met its burden of proof that grievant submitted false claims for reimbursement of expenses in connection with his wife's medevac for maternity reasons, and later displayed a lack of candor when interviewed by OIG investigators regarding the vouchers he had submitted. Accordingly, the Board sustained the 10-day suspension imposed and denied the grievance appeal in its entirety.

## OVERVIEW

██████████, a Special Agent with the Bureau of Diplomatic Security, is charged with Submission of False Claims in connection with vouchers and certain supporting documents he submitted seeking reimbursement for expenses his family incurred during his wife's evacuation for childbirth and related medical care from ██████████

██████████ The Department contends that grievant persuaded hotel employees to provide him with inaccurate receipts and supporting letters that resulted in his being overpaid \$11,792.33. Misrepresentations included the number of rooms his family occupied, the rates which the hotel actually charged him, and the claim that he paid state and local taxes when the rooms were in fact tax-exempt under ██████████ law. Grievant is also charged with Lack of Candor for statements he made to OIG investigators concerning the vouchers and supporting documents mentioned above.

Grievant claims that he submitted receipts and supporting documents given to him and signed by hotel officials which he believed to be accurate. He further states that his responses to investigators were true to the best of his knowledge at the time. He denies that he requested hotel employees to produce false documents and speculates (without presenting evidence) that if there was any fraud in this matter, it was carried out by the hotel employees.

The Board was persuaded that the preponderance of the record evidence supports the Department's charges and that the penalty imposed was reasonable, and therefore denied grievant's appeal.

## DECISION

### I. THE GRIEVANCE

██████████ (grievant) appeals the decision by the Department of State (Department, agency) to suspend him without pay for ten days arising from charges of Submission of False Claims and Lack of Candor. The Department charges that grievant persuaded employees of the ██████████ in ██████████ (the hotel) to produce and provide him with false receipts and supporting documents which grievant then filed with his travel voucher for reimbursement. The Department claims that these documents misrepresented the number of rooms which grievant's family occupied and paid for; overstated the room rates actually charged to grievant by the hotel; and falsely listed local and state taxes from which the rooms were in fact exempt. The Comptroller's Office of the Department calculates that these misrepresentations resulted in an overpayment to grievant of \$11,792.33. The Department further charges that grievant made untrue statements to investigators from the Office of the Inspector General (OIG) regarding the foregoing matters.

Grievant argues that the Department has failed to meet its burden of proof with respect to the Submission of False Claims charge inasmuch as he submitted receipts and supporting letters signed by officials of the hotel. He maintains that the Department has failed to produce any alternative official hotel record that the hotel had presented to him at any time. He asserts that the Department relies on statements by hotel officials which contradict emails, letters, and signed receipts which those same employees earlier provided to him, and that the hotel employees' statements to OIG therefore lack credibility. Grievant also notes that the hotel's internal Hotel House Account Record

(HHAR; alternatively called the House Account Bill in the record) -- on which the Department relies as the official record of his family's stay -- is acknowledged by hotel officials to be inaccurate with respect to dates. The hotel confirms that it did not provide the HHAR to grievant as it is never given to guests. Grievant maintains that he relied on the records that the hotel provided to him and that he submitted his vouchers in the belief that they were accurate and properly reimbursable.

Grievant further argues that the Department has failed to meet its burden of proof with respect to the Lack of Candor charge. He maintains that he did not lie during his interviews with OIG investigators. He states that he voluntarily travelled to Washington to meet with investigators, that he provided copies of his email correspondence with hotel staff when asked, and that he himself had suggested that the Embassy [REDACTED] budget staff (who processed and first questioned his voucher) contact hotel staff directly to seek answers to questions regarding the charges for his family's stay.

Lastly, grievant contends that even if the charges against him are sustained, when aggravating/mitigating factors, *Douglas* factors, and comparable cases are considered, the proposed discipline is unreasonably and disproportionately harsh for the offenses that the Department alleges he committed.

## **II. BACKGROUND**

Grievant is an FP-03 Special Agent in the Bureau of Diplomatic Security (DS). At the time when events giving rise to this grievance occurred (March through May, 2009), grievant was concluding his assignment as an Assistant Regional Security Officer (ARSO) at the U.S. Consulate General in [REDACTED]. Grievant's wife was pregnant, and received authorization for medical evacuation travel (medevac) to [REDACTED]

for delivery of the baby and related care. The medevac was authorized to begin on or about March 3, 2009, and to end upon her return to post or 45 days after delivery of the baby, whichever occurred first. The travel authorization also covered travel of the couple's three young children (all under the age of five at the time) to accompany grievant's wife.

On May 11, 2009, grievant submitted a travel voucher covering the period from March 3 through May 5 which claimed that he had paid lodging charges of \$30,159.70, including state and local taxes, at the hotel. Supporting the claim was a detail of room charges in Excel format printed on the hotel's letterhead and signed by the hotel's Director of Catering, [REDACTED]. Grievant subsequently explained that, due to a system error, the hotel had been unable to provide him with a computer-generated lodging receipt at the time he paid. The Financial Management Officer (FMO) in [REDACTED] declined to approve the full amount of the claim. When grievant subsequently inquired about the difference between his claim and the amount actually reimbursed, the FMO informed him that the Excel statement was not a proper official receipt. Furthermore, the claim for reimbursement of state and local taxes was denied because the FMO's staff had contacted the hotel and been told that the rooms were tax-exempt under [REDACTED] law since the stay had exceeded thirty days. Thus, the hotel had not charged the taxes for which grievant had requested reimbursement.

On July 27, 2009, grievant submitted a second voucher covering the period from May 6 through May 27, 2009, which included claims of \$9,891.00 for lodging and \$1,285.83 in taxes. This claim was paid in full to grievant without question.

On December 27, 2010, grievant submitted an agency-level grievance (2010 grievance) to the Department seeking full reimbursement for the May 11, 2009 voucher claim. The Department's denial of the 2010 grievance was not appealed to this Board, and it is wholly separate from the instant grievance. In the course of responding to the 2010 grievance, however, the Department's Grievance Staff (HR/G) contacted the hotel and discovered what they considered to be discrepancies between the hotel's stated room rates and the higher claims submitted by the grievant. The hotel again indicated that the rooms had been tax-exempt. Further, in the course of their research, HR/G requested certain documents from the Department's Office of Medical Services (MED), which has responsibility for approving medevac travel authorizations. MED stated that there was evidence that grievant's family may have rented three rooms rather than one (as claimed on grievant's vouchers). Grievant had stated that the hotel provided his family with one room to use as a baggage room free-of-charge by virtue of his status as a Diamond Level member of the hotel chain, and that the two rooms his family did occupy were actually a single suite of two rooms. MED stated that it had already raised concerns about the voucher with the OIG in May 2010.

HR/G thereupon requested that OIG conduct an investigation and provide its findings to the Department to aid with decision of the agency-level grievance aforementioned. The OIG investigation was conducted from June through November 2011. The Report of Investigation (ROI) was dated March 6, 2012, and found, in part, the following:

- "Investigation established that [REDACTED] committed the offenses of False Claims, Theft, and False Statements when he submitted two vouchers related to his wife's Medevac he knew to contain false and inaccurate information, and

subsequently received \$14,630.83 of U.S. Government funds he was not entitled. [sic]”<sup>1</sup>

- Grievant rented three rooms throughout the stay, but requested hotel staff to issue receipts indicating that he was billed for one room. The ROI stated: “██████ was authorized/entitled to rent two rooms for his family. However, the third room was not allowable, nor was it authorized.”<sup>2</sup>
- Grievant’s mother-in-law (who was not included in the official travel orders) had occupied the third room for some period of time during the stay.
- ██████ of the hotel staff was interviewed by OIG and stated that:
  - there had been no computer error that precluded generating a receipt for grievant when he paid his charges;
  - rather, grievant had requested hotel staff to produce a receipt showing that he had rented a single room rather than the three for which he actually paid;
  - grievant was not charged state or local occupancy taxes, but grievant requested the hotel to produce a receipt showing that such taxes were paid;
  - grievant paid for the third room, which was not provided as a complimentary baggage room.

OIG provided a copy of the ROI to the Department’s Office of the Comptroller, which sent grievant a Notice of Dunning dated May 7, 2012, notifying him that he was indebted to the Department due to overpayment of travel vouchers. By letter dated June 27, 2012, grievant requested review of the alleged debt, and by letter dated February 22,

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<sup>1</sup> ROP 006, p. 190

<sup>2</sup> ROP 006, p. 191

2013, the Comptroller notified grievant that the review had been completed and that he owed the Department the sum of \$11,792.33.

The Comptroller's calculations were explained in the letter as follows:

- Adjustment for state and local taxes claimed and reimbursed to grievant, but not in fact paid by grievant as the hotel confirmed that the stay had been tax-exempt under [REDACTED] law;<sup>3</sup>
- Various reductions to lodging and per diem during the time grievant's wife was in the hospital (and thus not in residence at the hotel);
- Downward adjustment of the daily room charges claimed by and reimbursed to grievant. The Comptroller's office used actual rates provided by the hotel to OIG and noted that [REDACTED] had stated that the charges listed on the receipts that grievant submitted had been provided at grievant's request and were not accurate. The Comptroller recalculated the lodging charges on the basis of costs provided by the hotel for two rooms, which resulted in consistently lower reimbursable costs than those listed on grievant's vouchers. Grievant entered into a repayment plan for the \$11,792.33 debt on August 2, 2013.

The OIG provided a copy of the ROI to the Office of Employee Relations (HR/ER) for consideration of disciplinary action. By letter dated December 6, 2012, the Director of HR/ER proposed a twenty-day suspension, stipulating two charges:

1. Submission of False Claims (eight specifications); and
2. Lack of Candor (four specifications).

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<sup>3</sup> "Per 35 ILCS 145, occupancy in the same hotel for 30 consecutive nights or more qualifies an occupant for exemption from the [REDACTED] Hotel Occupancy Tax." ROP 006, p. 470.

Grievant submitted a written response contesting the proposed discipline on January 17, 2013, and presented an oral response to Deputy Assistant Secretary (DAS) Marcia Bernicat on March 29. By a Decision Letter dated April 23, 2013, DAS Bernicat decided not to sustain three of the eight specifications of Submission of False Claims and two of the four specifications of Lack of Candor. All other specifications were sustained. She mitigated the proposed suspension from twenty days to ten days, and stated that her Decision Letter would be placed in grievant's Official Performance Folder (OPF) until his next promotion in accordance with provisions of 3 FAM 4355(e).

On May 23, 2013, grievant filed an agency-level grievance challenging the proposed discipline. On August 22, the agency-level grievance was denied in full, and grievant filed an appeal to this Board on September 15, 2013.

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

#### **A. THE DEPARTMENT**

The Department's deciding official sustained charges against grievant of Submission of False Claims (five specifications) and Lack of Candor (two specifications). The Department claims that the nexus of the alleged misconduct to the efficiency of the Service is "self-evident" and notes that grievant does not contend otherwise.<sup>4</sup> The Department further asserts that the penalty proposed was determined carefully after taking into account grievant's written and oral replies as well as the *Douglas* factors, and that it is appropriate to the circumstances, reasonable, and not an abuse of discretion. The Department notes that the deciding official did not sustain all specifications originally proposed, and that she mitigated the proposed discipline by half.

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<sup>4</sup> ROP 006, p. 180.

The Department disputes that the comparator cases cited by grievant are substantially similar to the instant case, and details the differences it finds.

The charges and specifications sustained are as follows:

Submission of False Claims. The Department cites as authority for this charge 3

FAM 4139.2:

Any intentional false statement or misrepresentation concerning a material fact on an official form, such as payor leave records, travel vouchers, reimbursement of expenses, eligibility for allowances, etc., may result in disciplinary action or separation . . . . In addition, any other activity or conduct, such as theft, forgery, lying, misuse of Government property, and the like, which clearly indicates that the individual is dishonest or unreliable may result in non-selection, disciplinary action, or separation.<sup>5</sup>

The Department further states:

Employees may submit vouchers only for actual lodging costs incurred and paid, and not for fictional costs calculated by determining the maximum amount of lodging per diem available.

Department regulations at 14 FAM 513 state that:

Foreign Service employees and the members of their families are entitled only to actual and necessary expenses incurred in the performance of official travel. Travelers are expected to make a conscientious effort to minimize costs of official travel and to assume costs of a personal nature and any additional expenses incurred for personal convenience.<sup>6</sup>

Submission of False Claims, Specification 3. The Department asserts that grievant reached an agreement with ██████████ whereby the hotel issued documents showing that grievant's family occupied a single room, and that the charge listed for that room would equal the maximum allowable lodging rate for three rooms. Grievant then submitted vouchers on May 11 and July 27, 2009, claiming this amount. This was tantamount to claiming reimbursement for Room 321, which was not authorized under

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<sup>5</sup> ROP 006, p. 168.

<sup>6</sup> *Ibid.*

grievant's travel orders. The Department finds grievant's assertion that the hotel provided him Room 321 on a complimentary basis not to be credible in light of the fact that this would amount to over \$10,000 in lost revenue to the hotel. It also cites statements by ██████ to OIG inspectors that grievant was in fact charged for Room 321 throughout his family's stay. The Department contends that grievant falsely inflated the claim he submitted for a single room (or, as grievant contends, a single two-room suite) to cover or partially cover the cost of the third room (Room 321).

Submission of False Claims, Specification 4. The Department contends that grievant's May 11, 2009 voucher (covering the period from March 3 through May 5 of that year) was supported by a receipt which: misrepresented the number of rooms for which grievant paid (claiming one rather than the three actually occupied); misrepresented the costs of each room; and claimed reimbursement for state and local taxes which grievant did not in fact pay since his room was tax-exempt under ██████ law. ██████ stated to OIG investigators that she created the receipt based on information that grievant provided to her, including grievant's calculation of his lodging per diem. She stated that grievant asked her to reflect the charge as covering one room rather than three.<sup>7</sup> The receipt which grievant submitted with his voucher was neither an official hotel receipt, nor did it accurately reflect the number of rooms occupied and their actual costs.

Submission of False Claims, Specification 5. This specification covers a second receipt which grievant submitted to support the voucher mentioned in Specification 4.

██████ stated to the OIG that grievant asked her to create this document as a "normal

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<sup>7</sup> ROP 006, p.173.

looking” receipt. The arguments made by the Department with respect to this specification are substantially the same as in Specification 4.

Submission of False Claims, Specification 6. The Department contends that grievant drafted a letter for ██████████ to sign which misrepresented the number of rooms occupied, misrepresented the rates charged, and falsely claimed that grievant paid state and local taxes. ██████████ printed the letter on hotel letterhead and signed it, and grievant submitted it with his May 11, 2009 voucher.

Submission of False Claims, Specification 7. This specification concerns a second voucher, which grievant filed on July 27, 2009, covering the period from May 6 through May 26, 2009. The Department contends that the receipt accompanying this voucher misrepresented the number of rooms for which grievant paid (claiming one rather than the three actually occupied), misrepresented the costs of each room, and claimed reimbursement of state and local taxes which grievant did not in fact pay since his room was tax-exempt under ██████████ law. ██████████ stated to OIG investigators that she created this receipt at grievant’s request. This receipt was neither an official hotel receipt, nor was it accurate.

Lack of Candor, Specification 3. The Department contends that grievant made untruthful statements to OIG investigators when he asserted that his family occupied rooms 322 and 324, but that room 321 had been a complimentary baggage room in which no one stayed. Grievant’s mother-in-law told OIG investigators that she did in fact sleep in room 321 when she visited grievant’s family at the hotel. ██████████ also stated to OIG investigators that a woman stayed in room 321, but she did not know the identity of the woman. Grievant states that he was not continuously in residence at the hotel throughout

his wife's medevac and was unaware that his mother-in-law had stayed in the room until his wife so informed him after his initial OIG interview. The Department contends that he did stay at the hotel for a sufficient period to be aware that his statement that no one had stayed in Room 321 was false.

Lack of Candor, Specification 4. The Department contends that grievant's assertions to OIG investigators that room 321 was provided to him on a complimentary basis as a luggage room were false. ██████ stated to OIG investigators that grievant was charged for room 321 as the cost of that room was included in the total amount billed. She said that there is no such thing as a complimentary baggage room at the hotel, and that while she had the authority to waive charges for room 321 at the time in question, she did not do so. The Department further states that ██████ said that the room was occupied by grievant's mother-in-law, who was looking after grievant's children. ██████ told OIG that the letter she signed stating that the room was complimentary was drafted by grievant, who asked her to sign it. ██████ (hereinafter, "██████" the General Manager of the hotel and thus ██████ superior, stated that it was not typical to provide a baggage room for free to Diamond Club members, that receipts would indicate if a room were complimentary, and that they did not do so in this case. Finally, the Department points out that the HHAR provided to OIG investigators by hotel officials as the hotel's definitive record, indicates that room 321 was charged to grievant, and was tax-exempt.

## **B. GRIEVANT**

Grievant denies all specifications of the charges of 1) Submission of False Claims, and 2) Lack of Candor that the deciding official sustained by her memorandum

of April 23, 2013. He asserts: “I believed that I was properly and justifiably submitting a claim for reimbursement based on the charges and receipts that I received. . . . I did not lie or otherwise act with any deliberate, willful or malicious lack of candor during this investigation.”<sup>8</sup>

With respect to Submission of False Claims, Specification 1, grievant denies that he requested reimbursement for a third room (Room 321). He states that the hotel’s Director of Catering, ██████████ agreed to provide that room free of charge for the storage of luggage in consideration of grievant’s status as a Diamond member of the hotel chain. Grievant states that he made it clear to ██████████ that he would not be able to pay for a third room and that she confirmed that it would be provided without charge. Grievant points out that the signed receipts which the hotel provided to him did not list any charge for a third room, and that ██████████ explicitly confirmed in writing that the grievant was provided with “a complimentary baggage room.”<sup>9</sup> When subsequently interviewed by the OIG, ██████████ stated that grievant’s family occupied and paid for three rooms from March 3 through May 26, 2009, but grievant notes that this flatly contradicts the signed receipts and letters she had previously provided to him and the Department. He asserts that the Department has failed to produce any evidence that he or his wife knowingly paid any charges for this room.

Grievant acknowledges the accuracy of the Department’s contention that his mother-in-law slept in Room 321, and asserts that she did so for “the majority of her approximate 2 week stay due to a broken window in either room 322 or 324...”<sup>10</sup>

Grievant asserts that he was unaware of this fact when first questioned by the OIG, and

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<sup>8</sup> ROP 001, p. 4. Emphasis in the original.

<sup>9</sup> ROP 006, p. 288.

<sup>10</sup> ROP 001, p. 10.

that he “answered truthfully and to the best of my knowledge” at the time,<sup>11</sup> although his wife subsequently informed him that her mother had in fact stayed in Room 321.

Grievant denies that charges he paid for his family’s stay at the hotel were exempt from the state and local taxes for which he sought reimbursement on his vouchers.

Although [REDACTED] and [REDACTED] stated to the OIG that the rooms charged to the grievant were tax-exempt under [REDACTED] law since the stay exceeded thirty days, grievant points out that the hotel provided him with signed receipts and letters indicating that state and local taxes were paid, and [REDACTED] had also confirmed this verbally to FMO staff of Embassy [REDACTED]. Grievant asserts that while the Department relies on statements by [REDACTED] and [REDACTED] to OIG which contradict receipts and letters they issued earlier, it has failed to produce any evidence that he or his wife knew the receipts provided to them by the hotel which listed state and local taxes were false.

Grievant maintains that the Department is incorrect when it alleges that he submitted a receipt for one room when, in fact, his family occupied and paid for three rooms. Grievant maintains that his family occupied and was charged for one room (counting Rooms 322 and 324 as a “two-room suite”). As previously noted, grievant asserts that Room 321 was provided at no charge for the purpose of storing luggage.

Grievant addresses Submission of False Claims, Specifications 4 and 5, jointly. In response to the Department’s contention that Rooms 322 and 324 were charged separately, grievant asserts that that these two rooms were in fact charged to him as a single two-room suite, and that his voucher was accurate in seeking reimbursement for one room charge.

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<sup>11</sup> *Ibid.*

Grievant acknowledges that he did help [REDACTED] produce a receipt in the format required by FMO [REDACTED], but states that this help was limited to assisting her with formatting in Excel (which he claims she did not know how to use). He denies telling her what specific information to enter into the receipt, and specifically denies directing her as to what room rates to use, how much tax to charge, whether to reduce the number of rooms billed from three to one, or to include any state or local tax charges which he did not pay.

With respect to the internal HHAR that [REDACTED] furnished to OIG investigators as the definitive record of charges, grievant notes that [REDACTED] explicitly told OIG that this document is “never provided to the guests” and thus was not provided to him.

Grievant addresses Submission of False Claims, Specifications 6 and 7, jointly. With respect to the letters from [REDACTED] and [REDACTED] grievant notes that he did acknowledge to OIG investigators that he drafted the letters in question. However, he states that: he believed the contents of the letters to be true; he instructed [REDACTED] to be sure to review the contents for accuracy before signing; and neither [REDACTED] nor [REDACTED] has offered an explanation for why they signed statements containing facts which they knew to be false (as they subsequently stated to OIG investigators). Grievant asserts that the Department has offered no evidence of his guilt on these specifications beyond the statements of [REDACTED] and [REDACTED] which contradict their prior signed letters and receipts. He argues that the Department has failed to meet its burden of proof for these specifications.

With respect to Lack of Candor, Specification 3, as previously noted, grievant maintains that he told the OIG what he believed to be true at the time of his interview

(i.e., that no one had stayed in Room 321). He was subsequently informed by his wife that her mother had in fact stayed in Room 321 for a certain number of nights due to the fact that a window was broken in one of their other rooms.<sup>12</sup>

With regard to Lack of Candor, Specification 4, grievant asserts that [REDACTED] and [REDACTED] have failed to provide any evidence to prove that room 321 was charged to him with his knowledge. He asserts that he was assured orally by [REDACTED] that the room was complimentary on multiple occasions, and notes that his vouchers did not (explicitly) request reimbursement for Room 321.

Arguing against the Aggravating Factors cited by the Department,<sup>13</sup> grievant denies that he committed any attempt to defraud the U.S. Government. He cites his record with Diplomatic Security, in particular assignments in which he was entrusted with large sums of money and/or which offered opportunities for corruption. He states that he has never been under suspicion, and has been recommended for “numerous awards.”<sup>14</sup>

Grievant challenges the Department’s analysis of comparator cases, and argues that the proposed discipline is not in line with discipline imposed in recent cases, and is unreasonably harsh.

#### **IV. DISCUSSION AND FINDINGS**

In cases involving discipline, the Department has the burden to show, by a preponderance of the evidence, that the disciplinary action is justified and that a nexus exists between the conduct at issue and the efficiency of the Service. 22 C.F.R. § 905.2.

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<sup>12</sup> Grievant does not state clearly how many nights his mother-in-law slept in Room 321, but after consulting his wife and mother-in-law subsequent to his OIG interview he seems to believe that it was between five and nine nights. ROP Item #001 p. 19

<sup>13</sup> ROP 001, pp 42-3.

<sup>14</sup> ROP 001, p. 20.

Preponderant evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support the conclusion that the matter asserted is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2) (2012). The Board has held that the Department must show that grievant committed the acts charged; that there is a link between the charged conduct and the efficiency of the Service; and that the penalty is proportionate to the offense(s) and consistent with what has been imposed for similar offenses. *See* FSGB Case No. 2011-051 (August 15, 2012), *citing* FSGB Case No. 2006-037 (Sept. 28, 2007) and FSGB Case No. 2004-035 (Jan. 28, 2005).

One characteristic of the instant case is the fact that there appear not to be any official receipts that are normally provided by a hotel to a guest listing the details of rooms and services provided, and how much was paid for each item. The Department alleges that grievant requested that hotel staff devise alternate, inaccurate receipts in lieu of the official receipt generated by the hotel's billing system. Grievant contends that no official receipt exists because of a computer problem at the times he made payments for his stay. Given the absence of the official receipts,<sup>15</sup> each party presents what are in effect proxies for official receipts. Grievant relies on receipts, statements, and letters provided to him by ██████████ and ██████████. The Department relies on statements made by ██████████ and Ripp to OIG investigators, and on the HHAR, which is the hotel's archival record of grievant's stay.<sup>16</sup> Although the HHAR is an imperfect record

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<sup>15</sup> As noted supra (at p.7), grievant claims that a computer error precluded the generation of standard official receipts when he paid the hotel; hotel official ██████████ denies (ROP#006, p. 254) that there was such a computer error and asserts that grievant asked her to produce alternate receipts listing all charges under a single room, and that she did so manually.

<sup>16</sup> The ROI states that General Manager, ██████████ provided the following information: "...once individual room folios have been transferred to the House Account, these individual room folios cannot be recreated, adding that the Hotel would not be able to produce separate receipts for each of the rooms rented by the

inasmuch as date information is acknowledged by the hotel to be inaccurate, it nevertheless appears to support the Department's contention that grievant's family occupied and paid for three rooms; that the room rates were different from the amount which grievant claimed on his vouchers; and that the rooms were exempt from state and local taxes. ██████ stated to OIG investigators that she and ██████ provided the receipts, statements, and letters aforementioned to grievant at the latter's request; that grievant assisted in their creation; and that they are false inasmuch as grievant occupied and paid for three rooms, that the rates he actually paid were different from those stated in the receipts he requested, and that the room charges were tax-exempt. Grievant suggests that ██████ and ██████ falsified records of his family's stay in order to defraud the U.S. Government, but he presents no evidence for this speculation. Given that grievant relies on documents whose author (i.e., ██████ has declared to be false and created solely at grievant's request, and that the accounting records which do exist (i.e., the HHAR) are consistent with ██████ and ██████ statements to OIG, the Board is persuaded that the statements of ██████ and ██████ to OIG are more credible than the receipts and letters that they previously produced and signed. In so concluding, we reject grievant's assertion as unsupported by any record evidence that the hotel's staff had any incentive to create false billing records. Rather, it is far more likely that grievant, who had a significant incentive to submit receipts that would cover all of his out-of-pocket expenses, whether authorized by applicable Department regulations or not, and who admitted assisting the hotel's staff in preparing the documents he later submitted in support of his claim for reimbursement, would create a false narrative in support of his

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██████ [sic]." ROP#006, p. 371. Therefore, the hotel claimed that it could not recreate the original official receipts.

claims and rely on the goodwill of the hotel to accommodate a valued long-term resident and his family. Our specific findings and conclusions are set forth below.

Submission of False Claims, Specification 3. Based on the statements of ██████ and ██████ to OIG, and the HHAR, the Board is persuaded that grievant was charged for three rooms and that he knowingly misrepresented details of the charges in the vouchers he submitted on May 11 and July 27, 2009. The Board agrees with the Department that this misrepresentation resulted in grievant's being improperly reimbursed for the cost of the third room. For reasons stated above, the Board's view is that receipts, letters, or statements provided to grievant by ██████ and ██████ prior to their interviews with OIG are inaccurate reflections of grievant's reimbursable expenses and known to be such by grievant who procured them from the hotel for submission to and payment by the Department.

Submission of False Claims, Specification 4. Based on the statements of ██████ and ██████ to OIG, and the HHAR, the Board is persuaded that the receipts that grievant submitted with his May 11 and July 27 vouchers were false inasmuch as they misrepresented the number of rooms for which grievant was charged, misrepresented the per-room costs, and claimed that he paid state and local taxes from which the rooms were exempt. The preponderance of the evidence indicates that grievant requested and participated in the creation of these false receipts.

Submission of False Claims, Specification 6. Based on statements of ██████ to OIG, the Board is persuaded that grievant requested and contributed to the creation of a letter signed by ██████ containing false statements to support the false claims detailed in Specifications 3 and 4 of this charge.

Submission of False Claims, Specification 7. Based on statements of [REDACTED] to OIG, the Board is persuaded that the receipt which grievant submitted with his July 27, 2009, voucher was materially false, and that he requested it and contributed to its creation.

Lack of Candor, Specification 3. Regarding the question of whether grievant's mother-in-law spent some nights sleeping in Room 321, the record clearly establishes and grievant concedes that she did. It is also undisputed that grievant made an inaccurate statement to OIG when he was questioned about Room 321, stating that it was used solely for storing baggage. While grievant later explained that he was not at the hotel throughout his wife's stay and claimed that he was unaware of the fact that his mother-in-law had slept in Room 321 some nights until his wife so informed him after his OIG interview, we are persuaded that grievant failed to exercise the care and caution regarding thoroughness or accuracy normally expected of a Diplomatic Security agent in responding to OIG questions regarding this point. The record indicates that the hotel stays of grievant and of his mother-in-law did overlap to some extent. Their respective statements to OIG indicate that they both were in residence at the hotel in the period immediately prior to the birth of the baby. The Board finds that this undermines grievant's credibility when he claims complete ignorance of his mother-in-law's sleeping arrangements (and those of his children who stayed with her) in what he characterizes as the two-room suite they all occupied. In our judgment, even if grievant had been taken by surprise when questioned by the OIG concerning his family's use of Room 321, and we do not believe that he should have been surprised in light of the time lapse between the submission of his voucher and his OIG interview, he could have indicated some

uncertainty due to his periods of absence from the hotel. Instead, he categorically denied that anyone had occupied that room during his family's extended stay at the hotel. Since grievant was claiming that Room 321 was being used free-of-charge as storage space, it was in his interest to claim that nobody had used it for any other purpose. As the Department asserts, "he had every motive to be deceptive" regarding the "baggage room."<sup>17</sup> The Board finds that the Department has met its burden of proof with regard to this specification.

Lack of Candor, Specification 4. Based on statements by [REDACTED] and [REDACTED] to OIG, and the HHAR, the Board is persuaded that grievant did act with lack of candor in his September 23, 2011, interview with OIG that the hotel had provided Room 321 to him on a complimentary basis in consideration of his Diamond Level status. The evidence before the Board shows that grievant was charged for three rooms, including Room 321, and that no baggage room was provided to him free-of-charge.

The Board finds that there is a clear nexus between the misconduct alleged in this case and the efficiency of the service. Neither party disputes this in the record.

Further, contrary to grievant's assertion, the Board is persuaded that the deciding official undertook full and proper consideration of the *Douglas* factors, including aggravating and mitigating factors, in reaching her decision to reduce the proposed punishment from twenty to ten days' suspension. In particular, we note her statement that she weighed the facts that he had had no prior discipline in his six years with DS and that he had positive performance evaluations as factors in mitigating the penalty. We further find no merit in grievant's other arguments regarding the alleged misapplication of the *Douglas* factors to his case. With respect to the nature and seriousness of his

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<sup>17</sup> ROP 006, p. 179.

offense, grievant argues that he did not submit false claims, and that he believed the charges he submitted to be accurate and reimbursable. The Board finds that the preponderance of evidence indicates that he did in fact submit false claims. Grievant states that he submitted receipts freely given to him by hotel officials which he believed to be true, and that the hotel officials (rather than he) defrauded the U.S. Government. The Board agrees with the Department that the fact that grievant created, and/or assisted in the creation, of the documents signed by the hotel officials makes his argument unpersuasive. His allegation that hotel officials were engaged in defrauding the U.S. Government is not supported by any evidence or plausible motive, and is therefore purely speculative. The Board finds grievant's statement that he did not compound the offense by lying to OIG investigators to be contradicted by the preponderance of evidence in the record. Regarding intent, the Board finds that the preponderance of evidence contradicts grievant's assertion that he did not intend to violate any law or make any misrepresentations. With respect to state and local taxes, the issue is not (as grievant states) understanding of tax laws, but rather the filing of a claim for taxes which he did not in fact pay. Nor is the issue whether or not he filed a claim for a charge which was not reimbursable under the applicable regulations; rather, it is that preponderant evidence shows that he filed false claims. Regarding grievant's record of cooperativeness, while it is true that grievant voluntarily submitted to interviews with OIG investigators and provided documents which they requested, preponderant evidence indicates that he made numerous untrue statements to them. Thus, his "cooperation" cannot be a significant mitigating factor in the instant case. Finally, grievant claims as "Other Mitigating or Extenuating Circumstances" that the Department's proposed discipline is especially harsh

inasmuch as it is based upon unspecified “distortions and mischaracterizations of facts.” Given the record of evidence before the Board, we have found no such distortions or mischaracterizations in the Department’s case. On the contrary, several of grievant’s assertions have been contradicted by the preponderant evidence in the record. Lastly, we note that seriousness of offense weighs heavily among the *Douglas* factors, and consider that the charges proved against grievant in the instant case are serious, especially given his status as a Special Agent. In sum, we find that the Department considered the *Douglas* factors adequately and applied them appropriately.

With respect to determination of penalty, “the Board recognizes that agency management has primary responsibility for the discipline of its work force. It is entitled to reasonable discretion in deciding what is the most appropriate action in any particular case. (FSGB Case No. 2000-037, (August 2, 2001); FSGB Case No. 1998-084, (February 23, 2000)).”<sup>18</sup> This Board’s decision in FSGB Case No. 2002-034 (February 24, 2004) further elaborates, referencing *Parker v. USPS*, 819 F. 2d 1113 (Fed. Cir. 1987), “that deference is to be given to the agency’s judgment unless the penalty is so harsh and unconsciously disproportionate to the offense that it amounts to an abuse of discretion.” In the instant case, the Board finds the Department’s rationales for selecting its comparator cases reasonable. In particular, the presented facts of Case No. 2009-035<sup>19</sup> (10-day suspension) appear to be more similar to the instant case than others presented by the parties. In challenging the relevance of that case, grievant notes that the employee there created false receipts and admitted the fact when caught. As the preponderance of evidence in the instant case shows that grievant created and/or participated in the creation

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<sup>18</sup> FSGB Case No. 2002-052 (July 18, 2003).

<sup>19</sup> This is apparently an agency-level grievance; it does not refer to an FSGB case.

of false receipts and related documents, the cases are not distinguishable from each other on this basis. Indeed, as the employee in Case No.2009-035 admitted wrongdoing, whereas grievant in the instant case has failed to do so, the imposition of identical penalties in both cases would appear to favor grievant herein. The other cases cited by grievant for the purpose of comparison are clearly distinguishable from the instant case, and therefore do not represent instances of like offenses and thus are not relevant for determining the appropriate penalty to impose in the instant case.

## V. DECISION

The Board finds that the Department has met its burden of proof by a clear preponderance of the evidence with respect to all specifications; that a nexus exists between grievant's misconduct and the efficiency of the service; that the deciding official properly considered mitigating factors and *Douglas* factors; and that the proposed discipline is reasonable and consistent with other cases involving like offenses. Accordingly, the grievance is denied in its entirety.

For the Foreign Service Grievance Board:



Arthur A. Horowitz  
Presiding Member



Gregory D. Loose  
Member



Harlan F. Rosacker  
Member