

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

[REDACTED]

Grievant

and

Department of State

Record of Proceeding

FSGB Nos. 2013-044

July 16, 2014

DECISION

EXCISION

For the Foreign Service Grievance
Board:

Presiding Member:

Warren R. King

Board Members:

Bernadette M. Allen
William B. Nance

Special Assistant:

Joseph J. Pastic

Representative for the Grievant:

Raeka Safai, AFSA

Representative for the Department:

Robert E. Polistena
HR/G

Employee Exclusive
Representative:

American Foreign Service
Association

CASE SUMMARY

DENIED: The Department demonstrated by a preponderance of the evidence, that grievant violated agency policy as charged, and that the one-day penalty imposed on grievant falls within the zone of reasonableness or is not an abuse of discretion. The appeal is denied in its entirety.

OVERVIEW

Grievant is a Diplomatic Security Special Agent with the Department of State who injured himself in the groin, when his weapon accidentally discharged while he was attempting to re-holster the firearm. Grievant, assigned to a domestic office in the U.S., was off-duty at the time, carrying a Department-approved firearm that he was using as his back-up weapon in a newly-purchased holster that was not on the Department's list of approved equipment. The Department charged grievant with violation of the Department's deadly firearms policy for using an unapproved holster that resulted in injury and loss of time at work, and relegated him to light duty for a time after he returned to duty. The Department also argued that grievant's use of an unapproved holster does not reflect the good judgment and reliability to perform at the level of trust and confidence expected of a law enforcement official. The Department upheld the charge and the proposed one-day suspension at the conclusion of grievant's agency-level grievance.

Grievant appealed to the Board, claiming that the penalty is too harsh, given the circumstances, and that the Deciding Officer abused her authority in sustaining the penalty. Grievant acknowledged he used an unapproved holster, but argues that any loss of work or productivity as a result of his injury was minor. He contends that the cases identified in the Department's Case Comparison Worksheet support his claim that the penalty proposed in his case is unreasonable. Grievant also claims that [REDACTED] state statutes permit residents to carry a personal firearm on private property, and that he was not carrying his weapon at the time of the incident solely under DS authority, but also as a resident of [REDACTED]. He argues that the Board should take this factor into account, claiming that it supports his contention that a one-day penalty in his case is unreasonable. The Board did not find these arguments persuasive.

DECISION

I. THE GRIEVANCE

Grievant is a Diplomatic Service (DS) Special Agent of the State Department (Department, agency) who was carrying his personal weapon at his private residence when it accidentally discharged as he was trying to re-holster the weapon, causing him injury that resulted in loss of work and productivity. Department policy requires that holsters for all firearms used by DS agents, even when they are off-duty, either be on the Department's approved equipment list, or that the agent seek approval before using it. The holster was not on the Department's approved list, and had not been approved for use by grievant. Grievant claims that the policy was not so clearly stated that he was in violation under these particular circumstances, and that the list of approved holsters was not up-to-date. He challenges the nexus between the accidental injury, which he claims was a major factor in the discipline imposed, and his alleged violation of the holster policy. He also contests the Department's conclusion that his injury placed a substantial burden on his office, claiming that he performed most of the duties previously assigned, and that he took comp time for most of the time he was away from duty. Finally, grievant challenges the Department's analysis of mitigating and aggravating factors, and the harshness of the penalty compared to similar cases. He requests that the one-day suspension be rescinded, or in the alternative, that the penalty be mitigated, and that he be afforded all other relief deemed appropriate. He requested, and was granted, interim relief while the grievance is being adjudicated.

II. BACKGROUND

██████████ (grievant), a Diplomatic Security Special Agent of the Department of State, was assigned to the ██████████ from April 2011 until July 2013. Grievant was an FP-05 grade level at the time of the incident, but was later promoted to FP-04.

The incident occurred on September 14, 2012 when grievant was off-duty moving boxes and other personal belongings at his private residence in ██████████, while carrying his personally-owned agency-authorized and approved back-up weapon, a Glock 26 9 mm semiautomatic pistol. At the time of the incident, grievant was carrying the weapon in an inside-the-waistband concealment holster – a Raven Vanguard 2. The holster was a model not listed on the DS approved list of holsters, and grievant had neither sought nor been given approval to use the holster. Grievant had received the holster only a day prior to the incident, and claims he was testing it to determine if he liked it before requesting formal approval from DS. The weapon fell out of his new holster and accidentally discharged as he was attempting to re-holster it.¹ Grievant was injured as a result of the discharge. The Department charged grievant with Failure to Follow Policy in accordance with 12 FAM Exhibit 023 Department of State Deadly Force and Firearms Policy, and advised him that he would be suspended for one day without pay. After his written reply to the charge and an oral presentation to the Department failed to convince the agency to change the proposed penalty, grievant filed an agency-level grievance, which was denied in a decision letter dated October 1, 2013.

Grievant appealed to this Board on October 16, 2013, seeking to rescind the one-day suspension, or in the alternative, to mitigate it and to receive all other appropriate relief. After

¹ Grievant insisted in his Rebuttal that the weapon fell out of the holster only once, although grievant's neighbor, ██████████ stated that grievant told him the firearm had fallen out of the holster a few times, and ██████████ advised DS agents present at the scene of the incident that "the weapon kept coming out of the holster."

engaging in discovery, grievant submitted his Supplemental Submission on February 3, 2014. The Department filed its Response to the Supplemental on March 19, 2014; and grievant filed his Rebuttal on April 18, 2014. A week later, on April 25, the Department moved to file a Sur-reply to a defense raised by grievant for the first time in his Rebuttal, i.e., that he was not carrying a firearm at the time of the incident only in his capacity as a DS agent, but also as a resident of the state of ██████████ in accordance with state statutes. The Board on April 29 accepted the Sur-reply into the record and permitted grievant to file a response, which he did on the same day. The ROP was closed May 2, 2014.

III. POSITIONS OF THE PARTIES

A. The Department

The Department contends that grievant violated 12 FAH-9 H-022 Standards of Conduct for armed DSS Special Agents: Activities Specifically Prohibited, which states that:

The following activities are specifically prohibited for DSS special agents while armed:

- (7) Carrying or using any firearm, ammunition, or related equipment not specifically issued or approved by the Department of State.

Quoting “Off-Duty and Secondary Firearms Policy for DS Special Agents on Domestic Assignment”, dated August 4, 2010, the Department avers that grievant was authorized to carry one personally-owned secondary firearm, but that the holster he was using at the time – the Raven Vanguard 2 model – was not “issued or approved by the Department of State.” The Department also determined (by a DS Certified Armorer following a full technical inspection of grievant’s personally-owned back-up firearm) that the weapon grievant carried at the time of the incident was not defective in any way, and therefore was not the cause of the discharge. The Department contends that grievant violated agency policy by carrying his weapon in an unauthorized holster and that his failure to follow the firearms policy resulted in lost time from

work and an extended period of light/sedentary work. Further, the Department claims that grievant's behavior with respect to firearm policy does not reflect the good judgment and reliability to perform at the level of trust and confidence expected of a law enforcement official.

B. The Grievant

Grievant does not dispute that he accidentally shot himself in the groin while attempting to re-holster his firearm. However, he claims that during more than a decade and a half of law enforcement experience, including previous service as a police officer, he never before had a negligent discharge of any firearm for which he was responsible. He contends that the penalty, given his past clean record, and the fact that he was the only person hurt, is unreasonably harsh. Grievant argues that over the course of his law enforcement career, he has an unblemished record, there was no intentional or willful conduct, and the incident has neither diminished his judgment nor called into question his reliability as a law enforcement officer.

Grievant claims that he suffered both physical and emotional damage, of a very personal nature, in a small community in which he was well-known.² He argues that a one-day suspension, if any penalty is warranted at all, seems to be more severe than sound judgment indicates is required to correct the situation and maintain discipline. He argues he will retain the stigma for the rest of his career for having shot himself in the groin, and that no penalty – other than the injury he sustained – is necessary to correct his behavior or maintain discipline to prevent similar behavior in the future. He argues that the comparator cases cited in the Department's Case Comparison Worksheet support his contention that a one-day suspension in this case is "unreasonable and disproportional" when compared to other cases.

² He was taken to a hospital in the community where he had served as police chief for 8 years, and where he was known because of the firearms, SWAT, and K9 instruction he had conducted throughout the state. He had worked with the hospital for an even longer period of time.

In his Rebuttal, grievant claims that in addition to being authorized to carry a weapon as a DS agent, he is also entitled to carry a personally owned firearm on his own property under state statutes as a resident of [REDACTED]. He claims, therefore, that he was “not necessarily carrying a firearm under DS authority” at the time of the incident, and that this should further support his claim that a one-day suspension is unreasonable.

IV. DISCUSSION AND FINDINGS

In grievances in which disciplinary actions are challenged, 22 C.F.R. §905.2 places the burden on the Department to prove, by a preponderance of the evidence, that grievant committed the offense as charged and that a nexus exists between that conduct and the efficiency of the Service. The Department also must show that the penalty imposed is reasonable in light of aggravating and mitigating factors, that it is consistent with the precept of similar penalties for like offenses, and that its imposition is not an abuse of agency discretion.

Grievant is an experienced law enforcement officer, with more than 16 years of experience in law enforcement. As a police officer he served as lead firearms instructor for his police department, providing instruction in various types of firearms. Since joining the DS, grievant successfully completed DS-sponsored firearms training and training at the Federal Law Enforcement Training Center. In compliance with agency regulations, he sought and secured approval to carry his Department-approved back-up weapon, which he was carrying while off-duty at the time of the incident; and he had also re-qualified in the use of the weapon less than a month and a half prior to the incident.

Moreover, less than a year prior to the incident grievant had successfully navigated through the DS process to gain approval for another non-issue holster – a Mitch Rosen model – so his claim that the process for approving such equipment was unclear or in any way unfamiliar

to him, is simply not persuasive. Also, as the Department argued, and we agree, grievant had many opportunities – either in person or by telephone – to seek clarification of any aspect of the approval process about which he might still have had questions, but he sought no such clarification. The fact that he had used the process successfully previously and the absence of any record that grievant sought clarification of any aspect of the approval process weakens his claims in his pleadings that the policies were unclear or confusing to him.

Grievant does not dispute that he is responsible for the accidental discharge of his weapon, nor does he dispute the fact that he had neither sought nor received approval for the holster he was using at the time. He initially attempted to explain that he was trying out the new holster to determine if he liked it well enough to go through the process of getting formal approval, and sought to differentiate between “testing” the holster, as opposed to “using” or “carrying” it. He claimed further in his Supplemental Submission that “as a police officer” he frequently tested different firearms, holsters and other equipment prior to recommending product purchases by the local police and/or the regional SWAT team.³ However, even if his argument about testing equipment were persuasive, which the Board does not find to be the case, as an experienced law enforcement officer, grievant should have known better than to “test” a new holster with a loaded firearm. As the record shows, and the Department argued, had grievant consulted the instructions of the Raven Vanguard 2 holster, he would have been reminded of the following precaution contained in the materials: “When setting up the VG2, always use an unloaded weapon to test the system”. We note that grievant also argued⁴ that there is a distinction between “testing any holster for drawing and holstering purposes, which is always done with an unloaded weapon,” and “testing a holster for comfort” with the latter requiring, by

³ Grievant’s Supplemental Submission, p. 2.

⁴ Grievant Rebuttal, April 18, 2014, p. 3 (see particularly footnote 4).

his description, that the firearm be loaded. While we agree that carrying a loaded weapon would provide one with a more realistic “feel” for carrying a particular weapon over a long period of time, grievant does not identify any Department regulation that makes any distinction with respect to gaining approval of either a weapon or associated equipment such as holsters for different purposes. On the contrary, we agree that Department regulations governing authorization for carrying firearms and associated equipment are unambiguous that agents should always obtain approval before carrying a loaded weapon. While grievant may regard the requirement to seek approval for a holster to be “on the lower end of the spectrum of disciplinary matters that the Department has seen,”⁵ one could argue that the point of the FAM and FAH with respect to non-issue holsters is to establish safeguards to ensure that accidents such as grievant’s do not occur.

The agency argues, moreover, that if grievant had made a simple telephone call to discuss his intention of using the Raven Vanguard 2 model holster – or if he had first read the instructions that accompanied the holster, he could have learned that it was unsafe to attempt holstering his weapon while the holster was attached inside his waistband. According to the manufacturer’s instructions, and confirmed by a DS instructor familiar with the holster, the Raven Vanguard 2 requires both hands to operate it properly. One hand must hold the weapon while the other is used to attach the trigger cover in order to re-holster. Again, the instructions for using the holster address this point clearly:

NEVER attempt to install or re-holster the Vanguard 2 while the holster is inside the waistband of your clothing. Attempting to re-holster while the holster is inside your clothing can result in serious injury or death.”

⁵ Grievant’s Supplemental Submission, p. 4.

Grievant admitted during his interview with DS that he was not familiar with the holster or the safety precautions associated with carrying it,⁶ although he used the holster with a loaded weapon with a round in the chamber. The Department clearly has met its burden of proving that grievant committed the policy violation as charged.

The Department established a nexus between grievant's conduct and the efficiency of the Service as grievant was forced to miss two full weeks of work, and was placed on light duty status for an additional 10 days⁷. Grievant claims that the incident had minimal effect on his work, but admitted to concerns about long hours associated with working protective detail following his injury, and stated that he worked with another agent on site advance duty. He also admits that he was not assigned to criminal work for a period after his return to duty, although he claims that he would not have done such work at that time even if the incident had not occurred. Despite grievant's assessment that his work was not restricted in any way as a result of his injury, by his own account the injury required two surgeries, with the possibility of more in the future, and it left him with "significant" nerve issues that cause "discomfort at times." The Department concluded that the injury rendered him unable to perform the full range of his potential duties as a law enforcement officer over a sufficient enough period for the agency to take notice and to have questions about his readiness to perform. The Department also noted in its Response to Grievant's Appeal,⁸ citing FSGB Case No. 2006-028 (December 20, 2007), that this Board has ruled that the agency "is not required to demonstrate actual impairment of duties based on grievant's off-duty misconduct in order to establish a nexus" to the efficiency of the

⁶ Attachment D to the ROI, as attachment B, page 3 of memorandum of interview with grievant.

⁷ The incident occurred on September 14, 2012. Grievant admits he was away from work for "approximately two weeks." The Department reports that after his return to duty, he was placed on "light duty status" until October 9, 2012. Agency Response to Grievant Appeal, 3/19/2014, p. 7.

⁸ March 19, 2014, p. 7.

Service.⁹ Whether he was actually called to perform a specific task while he was in limited duty status is not at issue. Both parties agree that grievant was away from his job completely for a time, and on limited capacity duty for an additional time. This is sufficient to establish nexus even though grievant performed various tasks during much of the period in question.

Grievant argues that he did not set out to intentionally or maliciously violate agency policy, and that the permanent nature of his injuries is sufficient to correct behavior and deter similar behavior in the future. While the Board agrees with grievant that he paid a heavy penalty for failing to follow Department regulations, whether his intentions were intentional or malicious is not at issue here. At issue is whether he failed to follow regulations – and he admits that he did; and whether his disregard for those regulations led to loss of his services for a significant period. Even though he regards his inability to fully carry out his duties as a result of his injuries as minor, or even non-existent, the Department clearly does not.

Grievant argues that a one-day suspension is overly harsh. He claims that the penalty fails to take into account the precept of similar penalties for like offenses. While acknowledging that the Case Comparison Worksheet (CCW) prepared and used by the Department in reaching its agency-level decision, was used only to provide context, and that none of the cases cited therein were factually similar, he turns to it nevertheless. He claims that Department Administrative Case No. 2012-09 is a case in which the penalty proposed and subsequently issued was a one-day suspension – the same as his – demonstrates that his penalty is unreasonable. Grievant contends that the actions taken by the employee in the cited case – that resulted in an accidental discharge of a weapon when the employee failed to fully clear it of ammunition – were overt and intentional (believing the weapon was unloaded, the employee

⁹ See p. 21.

intentionally pulled the trigger inside a government vehicle); whereas his action was accidental. The Department found the argument unpersuasive. The Board finds it both unpersuasive and disingenuous. In the instant case, grievant knew the procedure required to gain approval for a non-issue holster, previously having gone through the very same process less than a year prior to his own accidental discharge incident. Therefore, his failure to follow a procedure with which he was well familiar was in fact “overt and intentional” just as he assesses the actions of the employee in the cited case. In fact, since the employee in the cited case was a temporary Department employee, not a DS Special Agent, and had not received the extensive training given to DS agents, such as grievant, by his own logic, we find that grievant’s disregard of agency policy is more egregious and arguably deserving of a penalty greater than that received by the employee in Case No. 2012-19.

The remaining three cases in the CCW were all cases involving weapons violations, in which the Department proposed and issued harsher penalties than that proposed for and issued to grievant in the instant appeal. While the facts in each case are dissimilar to those in grievant’s case, the negligent disregard for the Department’s Deadly Force and Firearms Policy is the underlying misconduct present in all the cases cited in the CCW, and in the instant case. In Case No. 2011-436, a DS agent improperly stored his service weapon in violation of 12 FAM 023 weapons policy, and the gun was stolen. A three-day suspension was proposed, mitigated to two days. In Case 2011-433 another DS agent failed to follow his supervisor’s instructions to properly secure his weapon upon leaving post. Instead, he left his weapon in the custody of the Local Guard Force Program Manager. The agent was charged with insubordination and violation of firearms policy and proposed for a three-day suspension, which was issued. Finally, in Case No. 2011-308, a DS agent left his weapon, credentials, and duty officer book in an

unattended vehicle in violation of 12 FAM 023, and they were all stolen. The agent was proposed for a five-day suspension, mitigated to three days.

Grievant argues that 3 FAM 4377 does not cite an appropriate range of penalties for “failure to follow proper instructions” and that it is “thus unclear how the deciding official determined a one-day suspension is consistent with the penalty imposed on other similarly situated employees and with the table of penalties.”¹⁰ However, 3 FAM 4377 establishes a range of penalties, and provides that “Penalties will generally fall within the range of a Letter of Reprimand to Removal except where indicated.” The one-day suspension proposed for grievant clearly fits within that range.

Grievant also contends that the proposed one-day suspension is unreasonable. In support of his contention, he cites 3 FAM 4374(1), which states that any disciplinary action taken is to “be **fair** and **equitable**; and if a penalty is warranted, it should be **no more severe than sound judgment indicates is required to correct the situation** and maintain discipline.” [emphasis added by grievant]. In FSGB Case No. 2002-034 (February 24, 2004) the Board found that “[i]n the final analysis, it is hornbook law that the selection of an appropriate penalty by an agency involves a responsible balancing of the relevant facts in the individual case.” 3 FAM 4373 and 4374 provide that agency officials considering formal disciplinary action must keep the principles of the constructive purpose of discipline and similar penalties for like offenses in mind, as grievant himself argues. 3 FAM 4374 also states that:

Whether or not offenses are alike will be based on the similarity of the underlying conduct rather than how the charge is worded.

The underlying conduct in the instant case, and in the four cases cited in the CCW, is the negligent handling of firearms. Only in grievant’s case do we know with certainty that injuries

¹⁰ Grievant Supplemental Submission, p. 4.

were sustained as a result of the conduct, and they were significant¹¹. However, in all these cases, the negligent conduct regarding the use of weapons carried potentially detrimental consequences.

In his Rebuttal, grievant raises a new defense – that as a resident of the state of [REDACTED] [REDACTED] he is entitled to carry a personally-owned weapon on his own property. Grievant rebutted a previous claim by the Department that he was on the property of his estranged wife at the time of the incident; rather he claims that he owns the property in question and continues to pay the mortgage on the property. Putting aside the question of ownership of the property, and accepting, *arguendo*, that the incident occurred on his private property, the fact that [REDACTED] [REDACTED] statutes permit its residents to carry a personally-owned firearm on private property does not alter the fact that grievant, a DS Special Agent, was still subject to DS regulations. Specifically, both the FAM and FAH are applicable here. 12 FAM Exhibit 023 Department of State Deadly Force and Firearms Policy provides the authority (under Section 2709 of Title 22 of the US Code) for DS Special Agents of the Department to carry and use firearms in the performance of their duties, and for such agents stationed in the U.S. to carry approved firearms on and off duty in accordance with this policy. 12 FAH-9 H-022 contains the provision that “The following activities are specifically prohibited for DSS special agents while armed: (7) (SBU) Carrying or using any firearm, ammunition, or related equipment not specifically issued or approved by the Department of State, FPRB.” At the time of the incident, grievant was carrying a personally-owned weapon that had been approved by DS as his personal back-up weapon, but the “related equipment” – the holster, had not been issued or approved by the

¹¹ Since a weapon and credentials were stolen in Case No. 2011-308, we cannot know whether the agent’s negligent actions may have led to additional injuries and/or other negative outcomes.

Department, even if [REDACTED] statutes also permitted him, as a resident, to carry a weapon under the circumstances.

In his reply to the Department's Sur-reply, grievant argues that even if he was subject to DS regulations under 12 FAH-9 H-022 when the incident occurred, the fact that he is permitted to carry a weapon under [REDACTED] statutes "may affect the Board's analysis on the reasonableness of the suspension." He re-emphasizes in his response to the Sur-reply, as he does throughout his grievance appeal, that he believes the one-day suspension to be unreasonable. We are not persuaded by grievant's arguments concerning the applicability of [REDACTED] statutes to his circumstances for the reasons set forth below.

Grievant is correct in his contention¹² that both the FAM and FAH "specifically require that any weapons or equipment to be used by DS agents be either issued by or authorized by DS...." Grievant is also correct that Department regulations apply to him as a DS agent as we discussed above, notwithstanding that a [REDACTED] statute may allow him to carry a weapon under certain circumstances. We need not decide whether, in these circumstances, the state statute applies to him, because his conduct is still governed by the FAM and FAH provisions cited.

This Board will not normally disturb an agency penalty determination in discipline matters, "unless the penalty is so harsh and unconsciously [sic] disproportionate to the offense that it amounts to an abuse of discretion."¹³ In the instant case, we find that the Department took into account grievant's written and oral arguments, and developed and reviewed case comparisons. The Deciding Official also considered the Douglas factors, taking into account both aggravating and mitigating factors. The Department concluded that grievant's failure to

¹² Grievant's Rebuttal, dated April 18, 2014, p. 2

¹³ See FSGB Case No. 2000-037 (November 3, 2000), FSGB Case No. 2002-029 (December 2, 2002), and FSGB Case No. 2002-034 (February 24, 2004).

follow the Department's firearms policy resulted in loss of time from work and reduced productivity, and did not reflect the good judgment and reliability to perform at the level of trust and confidence expected of law enforcement officials. With respect to the mitigating factors, the Deciding Official considered grievant's law enforcement record, his expression of genuine remorse for his actions, and the nature and extent of his injuries. After taking all of these factors into account, she sustained the charge and the penalty, concluding that the mitigating factors – one in particular that impacted him both professionally and personally – did not outweigh the seriousness of the offense to the point that she was willing to mitigate the one-day suspension. Grievant has presented no evidence that the penalty imposed is outside the zone of reasonableness, that it is inconsistent with the precept of "similar penalties for like offenses," or that the Deciding Official abused her discretion in sustaining the penalty.

V. DECISION

The grievance appeal is denied.

For the Foreign Service Grievance Board:



Warren R. King
Presiding Member



Bernadette M. Allen
Member



William B. Nance
Member