

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

████████████████████

and

Record of Proceeding
FSGB No. 2013-052

September 4, 2014

Department of State

DECISION
EXCISED

For the Foreign Service Grievance
Board:

Presiding Member

Susan R. Winfield

Board Members:

Lois E. Hartman
William J. Hudson

Special Assistant:

Joseph Pastic

Representative for the
Employee:

Zlatana Badrich, AFSA

Representative for the Agency:

Akia Roane, HR/G

Employee Exclusive
Representative:

American Foreign Service
Association

CASE SUMMARY

HELD: The Board found that a two year delay in proposed discipline was not shown to be prejudicial, but that the Department of State failed to meet its burden of proof in justifying a three-day suspension in a case involving failure to maintain control of a classified pouch.

OVERVIEW

Grievant appeals from a decision of the Department of State (Department, agency) to suspend her for three days for failure to maintain control of a classified pouch. Grievant was serving on an excursion tour as a Diplomatic Courier at an overseas post. In July 2010, she returned from a pouch run on a chartered aircraft. At the airport, she visually counted 42 pouches (the number of pouches she was to receive) being off-loaded from the plane's cargo hold on a conveyor belt. The pouches were then loaded into a car by the driver. When the pouches were delivered to the Logistics Center (LOC), grievant discovered that one of the 42 pouches was an empty pouch that had been added to her batch without her knowledge and that a pouch containing classified material that should have been among the 42 was missing. Grievant immediately notified the appropriate officials. The missing pouch was located in the cargo hold of the chartered plane at another airport five hours later.

Twenty-five months later, the agency proposed to suspend grievant for 10 days on three charges, including failure to retain control of a classified pouch. After grievant responded orally and in writing to the agency's allegations, two charges were dismissed and the Department reduced grievant's suspension from 10 days to 3. She grieved the decision, arguing that the proposal to suspend her based on her failure to retain control of the pouch was untimely; that her failure to maintain control of a classified pouch was due to a systemic procedural problem; and that the penalty was excessive in view of the precept of like penalties for similar offenses.

On appeal from the denial of her grievance, the Foreign Service Grievance Board (the Board) found that the proposed discipline was delayed, but grievant did not prove that she was prejudiced by the delay. On the merits, the Board held that the Department failed to meet its burden of proof. The agency held grievant responsible for the loss of pouch control, but did not address the questions how the empty pouch was included with the classified pouches on the aircraft without notice to grievant, or why one of the pouches in the batch (the KT pouch) was so small that it could be caught in the cargo hold net without anyone noticing. The Department also failed to explain whether the empty pouch was distinguishable from the sealed pouches such that grievant should have noticed that it was not one of the ones she was expecting to receive. The Department was ordered to vacate the discipline.

DECISION

I. GRIEVANCE

Grievant is appealing the Department's decision to suspend her for 3 days for failing to retain control of a diplomatic pouch containing classified material.

II. BACKGROUND

Grievant is an employee with the Department of State (Department, agency) Passport Office who had an opportunity to serve on an excursion tour as a Diplomatic Courier in one of the Courier Services' overseas Regional Offices. On July 15, 2010, she was sent on a diplomatic pouch run on a chartered airplane to pick up 42 sealed pouches. Upon landing, she personally observed and counted 42 pouches as they were off-loaded from the plane's cargo hold on a conveyor belt. A driver loaded the pouches into a car and drove them to the Logistics Center (LOC). When grievant went to the LOC to examine the pouches, she discovered that one of the 42 pouches was empty and one of the pouches she should have received was missing. She immediately notified appropriate officials and the missing pouch was recovered from the airplane's cargo hold at another airport five hours later. There was no evidence that the missing pouch had been opened or its contents compromised.

In August 2012, the agency proposed to suspend grievant for ten calendar days based on two Reports of Investigation from the Bureau of Diplomatic Security (DS) that was investigating alleged misconduct during grievant's excursion tour in 2010. The suspension proposal originally contained three charges, one of which was the loss of control of the pouch in July 2010.

Grievant responded orally and in writing to the allegations and, in a decision letter dated August 29, 2013, the Department dismissed two charges; sustained the charge of loss of control of a pouch; and reduced the ten-day suspension to three days. Grievant grieved this decision with the

Department which denied the grievance on December 12, 2013. She appealed to this Board on December 23, 2013. For relief, she requests continued interim relief from disciplinary action; rescission or mitigation of the three-day suspension; and any other relief deemed just and proper. The Record of Proceedings is closed with this decision.

III. POSITIONS OF THE PARTIES

GRIEVANT

Grievant argues that the proposed discipline is untimely because the Department delayed in bringing the charge more than two years after the incident. She also contends that she has been prejudiced by the delay because the Director of Courier Services, who could have supported her defense, died in January 2011. Grievant asserts that she received two emails from the Director of Courier Services immediately after the incident, in which the Director stated:

... [T]here is a systemic, procedural problem at the root of this It seems that work bags cause the problem with counting ... there have been three or four other incidents just like this – this appears to be systemic and the good news is that [the] corrective action report should come up with a new process or procedure that is improved and will preclude incidents from happening again. We absolutely will not be going after the courier – it is the process!

Grievant admits that control of the pouches was her responsibility, but asserts that her failure to maintain control of one pouch was not her fault; it was the result of a systemic failure of the process that was approved by the Agency for control of classified pouches. She also contends that the size of the missing pouch (the KT pouch) was so small that it was easily caught in the net at the back of the cargo hold. She asserts that the small pouch should have been placed in a larger diplomatic bag for a better view and a decreased risk of being lost, especially in a mission that had one courier to serve seven countries in one day.

Grievant claims that the proposed penalty is inconsistent with the precept of like penalties for similar offenses. She refers to three pouch control cases on the Case Comparison Worksheet

(CCW). One case (2008-031) involved a courier who lost control of a pouch for four hours after it was off-loaded from an airplane prior to departure. In response to the Department's claim that a third party was responsible for off-loading the lost pouch, which mitigated the penalty to a reprimand, grievant argues that there is no indication on the *Douglas* Factor worksheet that this was in fact considered as a mitigating factor. Yet, she argues, this individual received a reprimand for four hours of lost pouch control while she received a three-day suspension for five hours of lost pouch control.

In another case (2008-139), an employee failed to remove a pouch from an airplane and the pouch was later returned by an un-cleared courier. The employee did not respond to the proposed three-day suspension, so there was no mitigating evidence. Grievant argues that she presented mitigating factors, including statements of exoneration made by the then Director of Courier Services. Thus, she argues, she should not have received the same suspension as the employee who offered no mitigation.

In the third case on the CCW (2009-0597), a courier was admonished for miscounting pouches and leaving one in the back of a government vehicle. Grievant argues that her proposed 3-day suspension is out of proportion to the admonishment in this cited case.

Lastly, grievant cites a case that was not included in the CCW (2011-0280), where an employee received a letter of reprimand after he locked a pouch in an unsecured, non-U.S. government container and subsequently lacked candor when questioned about it. Grievant contends that in her case, she immediately reported the lost pouch to appropriate officials. She argues, therefore, that she should not receive greater discipline than the employee who was dishonest, but received no more than a reprimand.

THE DEPARTMENT

With regard to the timeliness issue, the Department states there is no statute of limitations for disciplinary actions and that grievant raises the timeliness issue for the first time on appeal. The agency contends that it was appropriate to wait until investigations into two other charges of purported misconduct were completed before proposing discipline. The Department also claims that even if there was undue delay in proposing discipline in this case, grievant does not establish that she was harmed by the delay. The Department argues that grievant's reliance on comments in emails from the former Director of Courier Services is misplaced. The Director said that the lost pouch was the result of a systemic problem and that they would not be "going after [grievant]." The Department argues that while the Director was entitled to her opinion, she lacked authority to decide whether discipline should, or would, be imposed in this case.

The Department contends further that whether or not there was a systemic procedural problem involving the pouches, this would not have mitigated grievant's responsibility to maintain control of them. Lastly, the Department asserts that the Director died in January 2011, only six months after the incident and a month before the completion of the investigation of the other misconduct allegations. Therefore, grievant's inability to produce the Director as a witness in her defense was not the fault of the Department or the result of unreasonable delay.

The Department maintains that a three-day suspension is appropriate for grievant's conduct. The deciding official noted that grievant's actions "were a serious breach of security" and a lesser penalty would not be a sufficient deterrent. The Department also claims that the three-day suspension is consistent with its past practices in such matters. In referring to the cases on the Case Comparison Worksheet (CCW), the agency compares grievant's case with case 2008-139 where it imposed a three-day suspension. In that case, a pouch was left on an airplane

by a courier and was subsequently returned by an un-cleared plane crew member. As in grievant's case, the courier "took responsibility" for the lost pouch.

The agency faults grievant's attempt to compare her case to Case 2011-0280 (which is not on the CCW) in support of her contention that the three-day suspension is unduly harsh. The Department distinguished Case 2011-0280 by stating:

Although the courier clearly violated Department policy, unlike in the instant appeal, the courier placed the pouch in a locked container, knew the pouch's location, and lost control of the pouch for 1.5 hours as compared with grievant's five hours.

The Department also states that in the instant case, the missing pouch was unsecured and grievant was unaware of its location.

IV. DISCUSSION AND FINDINGS

In grievances challenging disciplinary actions, the Department has the burden of establishing by a preponderance of the evidence that the discipline is justified (22 CFR 905.2). In this regard, the Department must demonstrate that grievant violated established policies or procedures; that there is a nexus between the violation and the efficiency of the service and that the level of discipline is reasonable and consistent with penalties imposed in similar cases. In reviewing the record in this case, we find that the Department has not met its burden.

The grievant has challenged the timeliness of the proposed disciplinary action as well as the charge and the proposed penalty. We will address each of these issues in turn.

TIMELINESS

3 FAM 4321 states that disciplinary actions should be carried out in a "...fair, timely and equitable manner." In this case, the incident resulting in the charge occurred on July 15, 2010. The proposal to discipline grievant was issued on August 30, 2012, more than 25 months after the incident.

The question for the Board is whether the proposed discipline was timely presented to the employee, and, if not, whether the employee can establish that she has been harmed or prejudiced by the delay. In FSGB Case No. 2012-064 (June 5, 2013), the Board stated that in a case of delayed discipline, it would “weigh the staleness of the discipline ... against the necessity of the delay and the prejudice to the grievant” to decide if there was a violation of 3 FAM 4321. If we conclude that there is a significant unexplained delay and prejudice shown to the grievant, then the proposed discipline may not be sustained. *Id.* This would then obviate the need to decide whether there is sufficient proof that the conduct occurred, that there was a nexus between the conduct and the efficiency of the Service or that the proposed discipline is proportionate.

In FSGB Case No. 1991-071 (May 19, 1992), DS completed its investigation in nine months; however, the Bureau of Human Resources (HR) did not notify the employee of the proposed discipline until 10 months later. The Board held that the discipline was untimely; attributing the entire 19-month delay to the agency as a whole, without distinguishing how much was contributed by DS versus HR.

In FSGB Case No. 1998-011 (January 5, 1999), the allegations of wrongdoing were made after July 1992. The Office of the Inspector General (OIG) conducted an investigation in November 1992; however, the OIG report was not forwarded for disciplinary action until January 1996, more than three years later. Another nine months elapsed before the employee was given notice of the agency’s proposal to discipline him. The Board considered the more than four-year delay and concluded that the Department failed to act with the speed required by agency regulations. Accordingly, the FSGB dismissed one charge entirely and weighed the delay heavily as a mitigating factor in a second charge. The Board stated: “While ‘timely’ is not

defined in the regulation, we find it difficult to reconcile [the timeliness] requirement with an unexplained delay of some four years in bringing a disciplinary action.”

Lastly, in FSGB Case No. 2012-064, *supra*, the Board found that a three-year delay resulting in the loss to the grievant of testimony from a critical witness whose memory had faded was sufficient grounds to find a violation of the FAM regulation.

In looking at the issue of timeliness in the instant case, the Board notes that the Department first argues that grievant raises the issue of timeliness for the first time on appeal; however, it appears that the agency has waived a regulatory exhaustion defense, under 3 FAM 4452.

On the merits, the agency offers a partial explanation for the greater than two-year delay between grievant’s conduct and the proposed discipline. It asserts that its investigations involved three different charges, one of which was “complex,” and that the investigations were completed in February 2011, within seven months of the incident. The agency, however, does not explain, the 18-month delay, between the completion of the investigation and when the discipline was first proposed in August 2012.

We conclude that although the delay to complete the investigation of the three charges was not unreasonable, the subsequent 18-month delay until grievant was given notice of the charges was unreasonable. *See*, FSGB Case No. 1991-071, *supra* (19-month delay). However, on the issue of prejudice, we are not persuaded that grievant has established that she was prejudiced by the unreasonable delay. Grievant relies on statements by Ms. Deborah Glass, Director of Courier Services, who testified that there had been 3-4 other similar incidents (of loss of pouch control) caused by a “systemic, procedural problem at the root of this.” Ms. Glass stated:

[T]hese things have happened many times in the past and I'm sure they will happen again due to our lack of control over so many facets of the operation ... It seems that work bags cause the problem with counting.

I believe this is an opportunity to take some corrective action on our processes and procedures. ... [T]here have been 3 or 4 other incidents just like this – this appears to be systemic and the good news is that corrective action report should come up with a new process or procedure that is improved and will preclude incidents from happening again. We absolutely will not be going after the courier – it is the process!

Unfortunately, Ms. Glass died in January 2011, one month *before* the investigations were completed. Therefore, the earliest grievant could reasonably have been notified of the agency's intent to discipline her was after completion of the investigations, which was one month *after* Ms. Glass died and was no longer available as a witness. Grievant was therefore not able to ask Ms. Glass to explain what she meant when she referred to the “systemic problems” or the “other 3 or 4 incidents just like this.” Grievant does not argue that had she been notified of the charges immediately after February 2011, when the investigations were completed, she would have been able to identify anyone in the Diplomatic Courier Service who was aware of the problems mentioned in Glass' emails or that any such witness was unavailable in August 2012 when she first learned of the charges.¹ We note that neither grievant nor the Department inquired of anyone in Diplomatic Courier Services about former Director Glass' assertions in an effort to determine if any other employee was aware of systemic problems. We conclude that grievant does not prove that she was prejudiced by the portion of the delay that we conclude was unreasonable.

¹ The Department limited its inquiries regarding similar incidents of loss of pouch control to the Bureau of Diplomatic Security and the Diplomatic Security Service.

THE CHARGE – LOSS OF POUCH CONTROL

The Department identifies 12 FAM 125 as the regulation governing the charge of Loss of Pouch Control. The regulation provides:

- a. Diplomatic couriers must maintain visual contact of their classified diplomatic pouches until delivered or custody is properly relinquished.

A related regulation, 12 FAM 127.1 addresses the transport of diplomatic pouches in an aircraft.

It provides:

- a. When diplomatic pouches are loaded into the hold of an aircraft, the diplomatic courier must personally supervise the placing of the diplomatic pouches into the hold and must remain outside the aircraft observing the hatch until it is closed and departure is imminent. When the diplomatic courier must go through airport security, the diplomatic courier is still responsible for maintaining physical control of the classified diplomatic pouches. When regulations or procedures prohibit the diplomatic courier's presence after the diplomatic pouches are already loaded, the diplomatic courier leaves the security watch of the aircraft hold in the care of the diplomatic courier escort (see 12 FAM 155), and they may temporarily delegate classified diplomatic pouch control responsibility to the diplomatic courier escort. To the maximum extent possible, the diplomatic courier must return to the tarmac and resume control of the classified diplomatic pouches. The diplomatic courier should try to be the last passenger to board and the first passenger to deplane.
- b. Sometimes security conditions at certain locations dictate that the diplomatic courier escort loads the classified diplomatic pouches into the aircraft. The diplomatic courier escort must inform the diplomatic courier that the classified diplomatic pouches are onboard, and the diplomatic courier must maintain communication with the diplomatic courier escort to ensure the classified diplomatic pouch load remains securely onboard the aircraft.

The charge reads:

You began serving an excursion tour as a Diplomatic Courier assigned to the [REDACTED] in December, 2009. On July 15, 2010, you returned to [named] airport from a pouch run aboard a chartered aircraft. During the pouch run, you took control of 42 pieces. Upon arrival at the Logistics Operations Center (LOC) in [named city], you discovered that a small KT pouch from [named location] containing classified (Secret) material was missing. By the time the pouch was located and recovered by U.S. Embassy personnel in [different named city], it had been out of control for approximately five hours.

In the written statement you provided to the Regional Security Office in [named city] on July 21, 2010, you stated that you had visually counted 42 pouches as they were removed from the aircraft; however, you discovered at the LOC that one of the 42 pouches you had counted was actually an empty work bag returned by one of the posts serviced.

In support of the charge, the Department argues in its response to grievant's Supplemental Submission:

... While Grievant blames the empty work bag for her mistake, its presence did not change the number of pouches for which she was responsible. During her pouch run, she received 42 pouches and an empty work bag. Had she confirmed that all 42 pouches were accounted for before leaving the airport, she could have avoided this entire incident...

The Department has the burden of proof in this case. There is no dispute that grievant had been on a pouch run during which she took control of 42 pouches. There is also no dispute that she visually counted 42 pouches as they were off-loaded from the plane when it landed. What is unclear to this Board, and unexplained by the Department, is how the 43rd pouch (the empty "work bag"), got into the plane cargo hold and whether anyone notified grievant of its presence on the plane.

The Department has provided no evidence as to how the 43rd pouch got mixed in with the 42 classified sealed pouches in the airplane's cargo hold. The Department does not prove who was the source from whom grievant acquired the 42 pouches; who observed the transfer of those pouches to the plane; and, most importantly, where the 43rd pouch came from and whether grievant was informed that the extra empty pouch was on board. The Department's statement that grievant "received" 42 pouches and a work bag does not establish that she was aware that the empty work bag was added to the batch. If she "received" the work bag, in the sense that it was loaded onto the plane along with the other items, but without her knowledge, then she cannot be expected to account for it. The Department fails to explain the process by which

grievant “received” the work bag in order for the Board to determine whether she should have known that she was responsible for 43 items instead of 42.

The Board notes that grievant reports (and the Department does not dispute) that the bags were off-loaded on a conveyor belt from the airplane’s cargo hold; that she visually counted 42 pouches as they descended the belt; and that the bags were put into the car by the “driver.” The Department does not argue that grievant was obligated to physically examine the cargo holding area of the plane or the individual pouches before they were driven to a secure location (the LOC). The Department states, without explaining, that had grievant “confirmed that all 42 pouches were accounted for before leaving the airport, she could have avoided this entire incident.” However, this ignores the fact that grievant did “confirm” and account for 42 pouches before she left the airport. The Department does not state or prove that grievant was obligated to do more, such as inspecting each item after it was off-loaded.

The Department also does not establish whether there was a visual difference between the sealed pouches and the empty work bag, or whether the work bag also appeared to be sealed. Grievant states “the size of the [missing] (KT) pouch was considered so small that it was able to easily get stuck in the safety net at the back of the cargo holding area of the aircraft.” The Department does not address whether there was a notable visual difference between the lost, small KT pouch and the recovered pouches, including the empty work bag. We have no information whether there were multiple small KT pouches or just one; whether all pouches were similar to the KT pouch and whether the empty pouch was also a KT pouch.

The Board finds that the Department has failed to meet its burden of proof that grievant is responsible for the loss of pouch control for 5 hours, in violation of 12 FAM 125. The Department has not addressed the procedural issues, including notice to grievant of the inclusion

of an empty pouch in the shipment and notice of the pouch sizes. Again, although the Department contacted the Bureau of Diplomatic Security and Diplomatic Security Services, it did not communicate with the Diplomatic Courier Services to ascertain whether there were systemic problems with the transportation of diplomatic pouches, empty work bags, or undersized pouches.

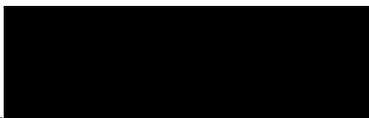
REASONABLENESS OF THE PENALTY

Because we conclude that the Department failed to meet its burden of proving the charge, it is not necessary to address the level of penalty.

V. DECISION

The proposed discipline is not sustained. The Department shall remove all documents related to the proposed suspension from all of grievant's official files.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



Lois E. Hartman
Member



William J. Hudson
Member