

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


GRIEVANT

Record of Proceedings
FSGB Case No. 2014-006

And

January 8, 2015

Department of State

DECISION

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Bernadette M. Allen
Gregory D. Loose

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Elizabeth Whitaker, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Department has met its burden of proving by a preponderance of the evidence that grievant engaged in the charged Improper Personal Conduct, that there was a nexus between the misconduct and the efficiency of the service, and that the penalty of a one-day suspension without pay was reasonable and broadly consistent with penalties imposed by the Department for similar offenses. The appeal was denied.

OVERVIEW

The instant case is an appeal of disciplinary action. On December 11, 2013, the Department charged grievant with one specification of Improper Personal Conduct in connection with an incident that occurred on September 6, 2012, in which grievant allegedly struck a non-USG guest with a water bottle at a social function at her duty post, the U.S. Embassy in [REDACTED]. Grievant contends that it is inaccurate to characterize her action as striking the guest since the water bottle was nearly empty when she swung it to separate two persons whom she believed to be engaging in improper conduct, and the contact with the guest's face was unintentional and resulted in no injury. Grievant further claims that she was provoked and that the guest shared responsibility for the incident. Finally, grievant contends that even if the charge is sustained, the proposed penalty is unreasonably harsh. She cites a number of prior Departmental discipline cases to support her claim that the proposed penalty violates the principle of like penalty for similar offense. As relief, she requests that the charge be dismissed, or if it is sustained, that the penalty be mitigated to a letter of admonishment. The Department submits multiple witness accounts of the incident to bolster its contention that grievant did strike and yell at the guest in a public setting, which caused embarrassment to the Department and distress to the guest. The Department cites comparator cases which it contends establish that the proposed penalty is reasonable and consistent with penalties imposed for similar offenses in other discipline cases.

The Board finds that the preponderance of evidence establishes that the charged Improper Personal Conduct did occur. The parties are not in dispute, and the Board finds, that there exists a clear nexus between the charged misconduct and the efficiency of the service. Regarding the penalty imposed, the Board has recognized that government agencies have primary responsibility to determine what disciplinary measures will best promote the efficiency of the service, and defers to this authority unless the discipline in question is so unreasonable as to constitute an abuse of discretion. In the instant case, the Board finds a one-day suspension without pay to fall within the zone of reasonableness. Moreover, while grievant cites cases in support of her contention that the proposed discipline violates the principle of like penalty for similar offense, the Board has made clear in the past that the circumstances of each case are different and that strict equivalence of penalty is not required. In the instant case, the Board finds that a one-day suspension without pay is broadly consistent with penalties imposed in similar disciplinary cases. The appeal is denied in its entirety.

and grievant agree that [REDACTED] was not injured to the extent of requesting or needing medical attention, and that no complaint was filed with local police.

The [REDACTED] manager contacted the Embassy's Marine Security Guard post to report the disturbance, and two members of the Embassy's Regional Security Officer (RSO) staff responded. They questioned grievant and others who were present, and advised grievant to return home and call to let them know when she got there. The Deputy RSO followed up by interviewing witnesses and participants on September 9, 2012. On the following day (September 10) grievant signed the Diplomatic Security Service Warning and Assurance to Employee Requested to Provide Information on a Voluntary Basis (form DS-7619) and was interviewed. On November 23, 2012, the Department's Bureau of Diplomatic Security (DS) completed a Report of Investigation (ROI) concerning the incident. The ROI found "substantiated" the allegation that "Subject hit two individuals in the face with a partially filled water bottle while on U.S. Embassy property under Chief of Mission authority." The ROI concluded that the behavior constituted a violation of 3 FAM 4370 (List of Offenses Subject to Disciplinary Action – Foreign Service) and 18 U.S.C. § 113 (Assaults within Maritime and Territorial Jurisdiction).³

By letter dated August 21, 2013, the Director of the Office of Employee Relations, John Bernlohr, advised grievant of a proposal to suspend her for three days without pay under the provisions of 3 FAM 4300 (specifically, 3 FAM 4350). The charge in the proposal was a single specification of Improper Personal Conduct. By letter dated October 3, 2013, addressed to the Deputy Assistant Secretary for Human Resources Marcia Bernicat (DAS Bernicat, the deciding official), grievant submitted a written reply to the discipline proposal. Grievant (accompanied by her AFSA representative) further made an oral reply to DAS Bernicat on October 31, 2013. By letter dated December 11, 2013 (the decision letter), DAS Bernicat decided to sustain the charge,

³ ROP #001, p. 23

but mitigated the penalty from three days' suspension without pay to a one-day suspension without pay. The deciding official cited grievant's remorse and apology, and acceptance of that apology by the woman who had been hit by the water bottle, as mitigating factors. However, she ruled that grievant's action, which led to a person being struck at a social function in the presence of grievant's co-workers and other guests, could not be tolerated. Grievant filed an agency-level appeal of the discipline, claiming that the Department had made several findings of fact that were not supported by the evidence and that the one-day suspension should be further mitigated to a letter of admonishment. The Department denied that grievance by letter dated March 11, 2014.

Grievant filed the instant grievance appeal with the Foreign Service Grievance Board (the Board) on March 25, 2014. After completion of discovery, grievant filed a Supplemental Submission on July 2, 2014, to which the Department replied on July 31 2014. Grievant filed a rebuttal on August 22, 2014. The ROP was closed on August 27, 2014.

III. POSITIONS OF THE PARTIES

The parties do not dispute that: grievant was present at the [REDACTED] event on the evening of September 6, 2012; that she approached Doe and [REDACTED] after seeing Doe kiss [REDACTED] that she had a water bottle in her hand which contacted [REDACTED] face as grievant commented, "No PDA" to the couple; and that [REDACTED] did not sustain significant injury.

THE DEPARTMENT

The Department maintains that it has met its burden of proving, by a preponderance of the evidence, that grievant engaged in the misconduct alleged, that there is a nexus between the alleged misconduct and the efficiency of the service, and that the penalty is reasonable.

The charge of Improper Personal Conduct is founded upon the allegation that on September 6, 2012, grievant struck ██████ in the face with a water bottle. Most of the evidence introduced by the Department consists of interviews conducted by the RSO's office between the evening of the incident and September 10 with the persons named below. The Board has summarized the following RSO interviews that appear in the ROP in their entirety.⁴

GRIEVANT: The RSO interviewed grievant twice. The first time was on the evening of September 6, 2012, a short while after the incident occurred. The RSO reported that grievant went to the Marine Security Guard Residence, met with RSO staff, was distraught ("crying and shouting"⁵), stated that no one would care if she wrecked her vehicle, spoke of having no friends at post, and of having an overwhelming workload. Grievant stated that the cause of the incident was her witnessing Doe, with whom she claimed to have been involved in a romantic relationship, giving ██████ a kiss on the cheek. Grievant asked the RSO for guidance, and the latter advised her to inform her supervisor as soon as possible. Grievant was also advised to return to her home and call the RSO to confirm her arrival, which she did. The second interview took place on September 10 and was conducted after grievant had signed the DS-7619 form. The RSO reported that grievant acknowledged striking ██████ in the face with a water bottle as ██████ and Doe were kissing while seated in the ██████ bar area. She said that she had been involved with Doe romantically since June 2012, and was upset to see him kissing another woman. Grievant denied that she intended to strike anyone, but wanted to stop ██████ and Doe from kissing in public, and simply swung the bottle as she yelled, "No PDA" at them. Grievant

⁴ The use of quotation marks in these summaries indicates that the language quoted was in the ROI. However, the Board understands that the ROI is not a verbatim transcript of witness statements, but rather consists of characterizations of what witnesses said to DS interviewers.

⁵ ROP #001, p. 27.

expressed regret and said that she had never done anything like that before. She said that she had seen [REDACTED] at other functions, but did not know her well.

[REDACTED] [REDACTED] stated that she had attended the happy hour as a guest of [REDACTED] [REDACTED] (not otherwise identified in the record), and was talking with Doe, whom she had seen at other functions, but never outside of social events. She stated that she did not know his last name and was not in a relationship with him. Doe said that he would leave [REDACTED] soon and gave her a kiss on the cheek as a farewell gesture. Thereupon, [REDACTED] felt something hit her face and realized that grievant was “standing over her yelling something...”⁶ She was asked if she needed medical attention, but she said she just wanted to leave the event. [REDACTED] confirmed to the RSO that she did not wish to press charges against grievant, and assumed that she had simply been caught up in a lovers’ dispute between grievant and Doe.

[REDACTED] apparently somehow affiliated with [REDACTED] [REDACTED] told the RSO that she witnessed grievant strike⁷ [REDACTED] in the face with a water bottle and shout, “No PDA!” [REDACTED] stated that prior to the incident, grievant had expressed disgust at seeing Doe kiss [REDACTED]. Upon seeing grievant strike [REDACTED] [REDACTED] intervened, grabbing grievant and taking her to the [REDACTED] office. Upon reaching the office, grievant told [REDACTED] that she would resign from her position on the [REDACTED] Board. She told [REDACTED] that she was upset that Doe had been kissing [REDACTED]. Grievant also expressed worry about her job. [REDACTED] told grievant that she must leave the event, go home, and get some rest.

DOE: Doe stated that he attended the happy hour event with some of his colleagues. He stated that he had met grievant at a happy hour about a month before the incident, and had seen her at social functions, but denied that he had ever been in a romantic relationship with her. He

⁶ ROP 001, p. 32.

⁷ ROP 001, p. 34. The word “strike” is used in the ROI, but as the ROI is not a verbatim transcript of the interview, it is not clear whether [REDACTED] herself used this term, or whether it is the RSO’s characterization of the action.

had a brief conversation with grievant earlier in the evening. He later entered into a conversation with [REDACTED] (whom he had met at a previous party) about his impending departure from [REDACTED] and when she told him that she was about to go to [REDACTED] he kissed her on the cheek. He then heard “a crack” and saw grievant standing above them yelling, “PDA.” He stated that he left the event after the incident and returned to his residence.

[REDACTED] Manager: [REDACTED] did not witness the incident, but overheard a loud conversation concerning it between grievant and [REDACTED] in the [REDACTED] office. She thereupon called Marine Post One to report the incident to RSO. [REDACTED] recalled seeing grievant and Doe in a conversation earlier in the evening, and stated that grievant apologized to her before she knew the details of the incident.

[REDACTED] affiliation unclear from the record: [REDACTED] was in the [REDACTED] bar area while Doe and [REDACTED] were talking. [REDACTED] saw Doe kiss [REDACTED] and then noticed grievant moving quickly toward them with her right arm raised. [REDACTED] then heard a crunching noise. She saw grievant standing in front of Doe and [REDACTED]. She witnessed [REDACTED] escorting grievant away from the bar area. [REDACTED] heard another guest ask [REDACTED] if she needed medical attention. [REDACTED] judged that [REDACTED] “was in shock after being struck.”⁸

The Department contends that the foregoing interviews (including those with grievant) collectively prove that grievant initiated action to stop Doe and [REDACTED] from kissing, which resulted in [REDACTED] being struck in the face with a water bottle that grievant was holding. In sustaining the charge of Improper Personal Conduct, the deciding official noted, “While you may not have intended to strike the woman, that was the end result when you attempted to separate

⁸ ROP #001, p. 37.

her from the man she was with. You demonstrated improper personal conduct when you approached and made physical contact with the woman.”⁹

Regarding the nexus of the alleged misconduct to the efficiency of the service, the Department argues the following: “Using physical force against an unsuspecting individual is serious misconduct and the fact that you used an instrument to strike the individual is egregious. The Department has an obligation to maintain safety on its properties. Your use of physical force on another individual on Department property directly impairs the Department’s obligation to maintain safety and by its nature, is disruptive to the efficiency of the service.”¹⁰

DOUGLAS FACTORS: In the Douglas Factors worksheet prepared by the Department,¹¹ the deciding official considered the nature and the seriousness of the offense. She noted grievant’s status as a Consular Officer at the U.S. Embassy in [REDACTED] and an [REDACTED] Board member, and that the incident occurred at an event on Embassy property sponsored by [REDACTED]. The deciding official restated the Department’s view that grievant’s conduct directly affected the Department’s obligation to maintain safety and thus was by its nature disruptive to the efficiency of the service. The Department concedes that grievant may not have intended to strike [REDACTED] but finds that she did take action with intent to separate Doe and [REDACTED] that resulted in [REDACTED] being struck in the face by the water bottle grievant was carrying. The Department noted that although the incident occurred after hours, it happened at an event sponsored by [REDACTED] and was witnessed by co-workers and other guests, which caused embarrassment to the Department. The Department contends that, “As a Consular Officer, she knew, or should have known that her conduct was inappropriate. She has not asserted any belief that it was permissible for her to engage in such conduct. Moreover, she admits that as an

⁹ ROP #001, p. 62.

¹⁰ *Id.*

¹¹ ROP #001, pp. 69-72.

Officer under Chief of Missions Authority [COM], she has an obligation to always act with decorum.”¹² The deciding official noted that grievant has no prior record of disciplinary action, and that her performance record is satisfactory (which the Board understands to mean satisfactory or better).¹³ As evidence of capacity for rehabilitation, the deciding official noted that grievant accepted responsibility for her actions, resigned from the ██████ Board, and later underwent counseling. The worksheet indicates that the deciding official took the following other circumstances into consideration as possible mitigating factors:

- Grievant’s statements that she had been under considerable work-related stress, with a heavy workload and little staff.
- Her stress had been aggravated when Doe, whom she considered to be romantically involved with her, informed her shortly before the incident that he wanted to break up.¹⁴
- Very shortly after the break-up, Doe kissed ██████ in public and in sight of grievant.

Regarding the consistency of the penalty with those imposed upon other employees for similar offenses, the Department put forward two cases it considered similar to the instant case in its Case Comparisons Worksheet (CCW). Agency-level grievance No. 2011-035 involved an employee who was given a five-day suspension (mitigated to three days) for punching his driver with a closed fist. The incident took place at the employee’s embassy-provided residence. The employee intentionally inflicted physical harm, the driver was injured, and local police were

¹² ROP #001, p. 71.

¹³ Cf. grievant’s 2012-2013 Employee Evaluation Report (EER), ROP #001, p. 48; and discussion in agency-level grievance decision, ROP #001, p. 78.

¹⁴ The Board accepts grievant’s claim that she and Doe had a relationship despite Doe’s denial that this was so. The Department does not challenge the claim that grievant and Doe had broken up shortly before the incident, and indeed says that this was taken into account as a potentially mitigating factor.

called (although no charges were filed in the end). The second case, agency-level grievance No. 2008-288, concerned an RSO who grabbed a security guard and slammed him into a taxi cab. The penalty in that case was mitigated from seven days to one day, and the worksheet cites several mitigating factors in that case which are similar to the circumstances in the instant case: the incident did not occur in the workplace, the RSO apologized, and the victim accepted the apology. Given these similarities, the deciding official mitigated the penalty in the instant case to a one-day suspension without pay.

GRIEVANT

Grievant contends that the Department has not met its burden of proving by a preponderance of the evidence that she committed the misconduct with which she is charged. In her grievance appeal and supplemental submission, grievant enumerates several findings of fact in the decision letter that she claims were not supported by the evidence. Further, grievant contends that the proposed penalty is unduly severe, being harsher than penalties applied by the Department to similar offenses. She maintains that a Letter of Reprimand is the maximum reasonable penalty for her offense. In support of this position, she presents arguments to distinguish her case from the comparator case on which the deciding official relied (Case No. 2008-288), and introduces five other cases (one of which was submitted for the Department's consideration by her AFSA representative) which she claims are more similar to her own and which occasioned lesser penalties than a one-day suspension.

Grievant enumerates the following alleged errors in the findings of fact by the Department:

- Grievant contests the use of the word "strike" and phrases such as "used physical force against an unsuspecting individual" and "used an instrument to strike the

individual” in the Department’s charges. Grievant states: “This is not factually accurate. I was holding an almost empty 500 ml plastic water bottle, upside down by the lid, and did not forcibly separate [REDACTED] [i.e., the individual otherwise known as Doe] and [REDACTED] [REDACTED]. I tapped the water bottle between [REDACTED] and [REDACTED]. Therefore, it is not accurate to say I ‘swung’ the water bottle at [REDACTED] or ‘struck’ her as these words convey the false impression that I used physical force and could have caused [REDACTED] bodily harm.”¹⁵

- Grievant contests the statement in the ROI that during her voluntary interview with the RSO she stated that she struck a woman in the face with a water bottle. Grievant notes that the report of her interview in the ROI is not a verbatim transcript and says that she does not believe that she told the RSO that she “struck” [REDACTED]. She claims that this is a mischaracterization.
- Grievant contests the statement that the alleged misconduct occurred “in the presence of subordinates and guests...,” inasmuch as no subordinate of hers was present.
- With regard to Douglas Factor No. 4, while conceding that as a Consular Officer she dealt with the public, grievant stated that “as a first tour, untenured entry level officer, I did not hold a position of prominence.”¹⁶
- With regard to Douglas Factor No. 5, grievant objects to the deciding official’s statement that her performance record was satisfactory. Contending that her performance had been well beyond satisfactory, she submits her EER, in which

¹⁵ ROP #003, pp. 93-4.

¹⁶ ROP #001, p. 9.

the Consul General and the Deputy Chief of Mission (DCM) recommended her for tenure; she also submits copies of two performance awards she has won.

- Regarding Douglas Factor No. 7, grievant claims that the deciding official erred in finding that the incident was notorious or caused embarrassment to the Department inasmuch as the police were not called, there was no adverse publicity, and neither Doe nor ██████ filed an official complaint. “[B]oth ██████ and ██████ considered the incident a misunderstanding. Furthermore, ██████ submitted a letter acknowledging that her own behavior was also out of line.”¹⁷
- Grievant contends that the deciding official erred in stating that Doe broke up with grievant “on the same day” as the incident, whereas he “broke up with me within minutes before he began French kissing ██████...The deciding official also failed to note that ██████ and ██████ actions provoked me. ██████ herself acknowledged that her own behavior was out of line.”¹⁸

In addition to challenging the foregoing alleged errors in the findings of fact, grievant also contends that the Department violated the precept of similar penalty for like offense. First, she argues that the Department erred in not including cases on the CCW in which lesser penalties than a one-day suspension (e.g., Letter of Reprimand, Letter of Admonishment) were imposed.

Grievant also argues that both comparator cases listed by the Department in the CCW involved employees whose “actions...was [sic] much more egregious than my actions.”¹⁹ In particular, with respect to the agency’s Case No. 2008-288 (one-day suspension), upon which the deciding official relied as the more similar to the instant case, grievant contends that there were

¹⁷ ROP #001, p. 10.

¹⁸ *Ibid.*

¹⁹ ROP #003, p. 94.

aggravating factors which distinguish that case from hers and thus render it an unfit comparator. These aggravating factors include the fact that the employee in that case was a DS agent and thus should be held to a higher standard; that the Department brought two charges against that employee (versus only one against grievant in the instant appeal); that the victim in Case No. 2008-288 filed a police report accusing the employee of assault; and that the employee in that case had a prior record of arrest for disorderly conduct and resisting arrest, and previously had received a letter of admonishment. In light of these aggravating factors, none of which obtains in the instant grievance, grievant maintains that her penalty (if any) should be less harsh than the one-day suspension imposed upon the employee in Case No. 2008-288. Grievant notes that even though the employee in Case No. 2008-288 had an arrest record and letter of admonishment prior to the incident occasioning the imposition of discipline in that case, the Department contrasted that employee's "length and quality of...service" favorably as a demonstration of potential for rehabilitation, versus the smaller record of accomplishment that grievant had amassed in her briefer time with the Department.²⁰ Noting that provocation of the employee by the security guard was considered a mitigating factor in Case No. 2008-288, grievant argues that Doe provoked her "by making out with someone in public within minutes of breaking up with me"²¹ She also contends that the Department failed to consider her effective performance both before and after the incident. Grievant submits a letter of support from her supervisor as evidence of her continued effectiveness.

Grievant submits three cases in addition to those on the Department's CCW which she considers more similar to her own, and thus more appropriate comparators. In each of these cases, either no penalty or a lesser penalty than a one-day suspension was imposed.

²⁰ ROP #001, p. 81.

²¹ ROP #003, p. 95.

1. Agency Case No. 2010-061. Grievant notes that the employee in that case used a rolled up newspaper to strike a subordinate a few times even though the employee was yelling, “Stop!” The employee also used profanity toward the subordinate. The incident took place in the presence of local police officers and the ARSO. The employee was a Principal Officer and thus could be held to a high standard of decorum. The proposed penalty was a one-day suspension, but in the end was mitigated to a Letter of Admonishment

2. Agency Case No. 2002-118. An RSO initiated an altercation with a Marine Security Guard (MSG) at a social function in the residence of another employee. The RSO slammed the MSG against a nearby taxicab repeatedly, resulting in minor scrapes to the face and elbow of the MSG. Witnesses reported the incident to the OIG. The employee’s punishment was a Letter of Reprimand.

3. Agency Case No. 2008-282 (which grievant says is also identified as AGS 2009-020), listed in the CCWs provided by the Department during discovery.²² A DS agent slapped a subordinate on the face, causing some redness and swelling, later claiming that it was a jovial incident and joking about it. A five-day suspension was proposed, mitigated to a two-day suspension by the deciding official. The Department further mitigated the proposed penalty to a one-day suspension, but subsequently reached a settlement with the employee, the terms of which are confidential. In response to this citation, the Department stated: “This case [i.e., AGS 2009-020] was settled with the inclusion of a non-precedential clause and, therefore, I will not consider it as a case comparator.”²³ In rebuttal, grievant states that, “AFSA has advised me that it reviewed the settlement agreement and disagrees with the Department’s position that the proposal, decision, and revised decision rendered in the

²² ROP #3, pp. 108 and 109. It is unclear from the record whether either case listed on ROP #3, p. 110 refers to Agency Case No. 2008-282.

²³ ROP #001, p. 82.

agency-level grievance are non-precedential. According to AFSA, only the terms of the settlement agreement are confidential. Nothing that occurred prior to the settlement is confidential or subject to the non-precedential clause.”²⁴ Grievant relies on the revised decision (one-day suspension) to argue that the other employee’s misconduct was more egregious than hers, and that, as a DS agent, he is held to a higher standard of conduct than she. Therefore, she asserts, it is not reasonable that she receive the same penalty as the employee in that case.

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. 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 (Aug.15, 2012).

The Board finds that, with the exception of grievant’s own statements, the witness statements summarized in the ROI are generally consistent and clearly establish by a preponderance of the evidence that grievant approached Doe and ██████ at the time and place specified in the charge, swung a water bottle which struck ██████ in the face, and shouted, “No PDA!” The parties are agreed that ██████ was not injured, and witness accounts support this.

²⁴ ROP #3, p. 98.

Grievant argues that she did not intend to strike ██████ and the Department does not dispute this. However, the Department relies on grievant's own statements to argue that her motive in approaching the couple and swinging the water bottle was to separate Doe and ██████ physically and stop them from kissing. The consequence of this action was that ██████ was struck in the face. The Department concludes: "hitting an unsuspecting individual in the face with a water bottle was a serious offense and warranted corrective action. . . . [Y]ou conducted yourself in a reckless and unprofessional manner."²⁵ Grievant argues that the water bottle could not have caused any harm as it was held upside-down by the cap and was nearly empty. The Board agrees with the Department that even if grievant did not act with specific intent to harm either Doe or ██████ and notwithstanding the fact that the bottle may not have been full, grievant's action to physically separate the two people resulted in ██████ being struck unawares and was both reckless and unprofessional. Moreover, such irresponsible action could have had the unintended consequence of causing serious injury if, for example, the water bottle had made contact with the guest's eye.

Grievant argues that such words as "strike" and "swung" inaccurately exaggerate her much more mild action. Witness accounts refer to the sound as a crack and a crunching noise. ██████ was said by one witness to be in a state of shock. The Board concludes that the record does not provide any basis for finding the contested words inaccurate or falsely prejudicial. In so concluding, the Board accepts that the ROI interview statements are not verbatim transcripts and accepts grievant's assertion that she does not believe that she used the word "strike" to describe her actions during her interview.

Regarding grievant's claim that it is inaccurate to say that the misconduct occurred in the presence of subordinates, the Department has already conceded this point and substituted "co-

²⁵ ROP #001, P.83.

workers” for “subordinates” in the charge. Grievant does not dispute that co-workers were present. Therefore, this point is moot.

Grievant argues with respect to Douglas Factor No. 4 that the Department erred in finding that she held a position of prominence inasmuch as she was an untenured first-tour officer. However, prominence is not simply a question of an employee’s rank, but also depends on context. The Board finds that in the context of a public function on Embassy property hosted by the [REDACTED] she did hold a position of prominence. She was a Consular Officer of the U.S. Embassy and a Board member of [REDACTED] so her public action in confronting guests (Doe and [REDACTED] yelling at them, and striking an unsuspecting member of the non-official American community ([REDACTED] clearly created a disturbance and an embarrassment for the Department. The Board finds that the Department correctly evaluated Douglas Factor No. 4.

Regarding Douglas Factor No. 5, grievant argues that the deciding official erred in listing her performance as “satisfactory,” whereas her rating official had evaluated her performance as “satisfactory or better.”²⁶ In the agency grievance decision, the Department concedes that a deciding official generally uses the phrase “satisfactory or better” when that EER box has been checked, but that, “I do not find that the inclusion of the word ‘or better’ would have had any effect on [the deciding official’s] conclusion that a one-day penalty was appropriate for your offense.”²⁷ The Board finds no evidence in the record that consideration of grievant’s performance as being satisfactory (versus satisfactory or better) played, or should have played, a role in penalty determination. The Department indicates that it took into consideration grievant’s lack of prior disciplinary action, her EERs, and the two performance award nominations she submitted. We find no error in the Department’s evaluation of Douglas Factor No. 5.

²⁶ Cf. grievant’s 3-21-2012 to 3-20-2013 EER, ROP #001, P. 48.

²⁷ ROP #001, p. 78.

Regarding grievant's contention that the Department erred in evaluating Douglas Factor No. 7, as stated above, the Board finds that grievant's actions certainly must have caused public embarrassment to the Department. We find that Douglas Factor No. 7 was correctly evaluated.

Grievant contends that the Department erred in stating that Doe broke up with grievant on the same day as the incident, whereas she states that he broke up with her just minutes before the incident. For purposes of argument, the Board accepts (as apparently does the Department) grievant's assertion that she and Doe had been involved in a relationship, though we note that even that fact is disputed by Doe. We would agree that someone might be more upset minutes (rather than, say, hours) after a breakup, but do not find that the shorter time lag would excuse conduct that is otherwise unacceptable. We find the temporal distinction irrelevant. The Department's statement that the breakup occurred on the same day as the incident is accurate and not prejudicial.

Notwithstanding ██████ written statement of support for grievant, the Board entirely rejects grievant's argument that ██████ provoked her and shares some of the responsibility for grievant's misconduct. Indeed, we find that such argument undercuts her expressions of contrition and perhaps her capacity for rehabilitation. Nothing in the record suggests that ██████ knew grievant well, was aware of grievant's relationship with Doe, had or desired any relationship of her own with Doe, or was even aware of grievant's presence in the vicinity. Given the facts that grievant has asserted, if anyone provoked grievant, it was Doe, so it is illogical for grievant to assign shared blame to ██████. But even Doe's possible provocation seems a matter of dispute: grievant refers to Doe and ██████ as "French kissing" and "making out" in the public bar area, whereas other witness accounts state that Doe gave ██████ a single kiss on the cheek in recognition of the fact that each of them was about to depart ██████.

In light of the foregoing discussion, the Board finds that the Department has met its burden of proving by a preponderance of the evidence that grievant did engage in the misconduct charged.

The Board further finds that the Department has established that a nexus exists between the charged misconduct and the efficiency of the service. Grievant does not dispute this, but explicitly states: “While I contest some of the deciding official’s findings, I do not contest the nexus between the facts and the efficiency of the Service.”²⁸

Finally, grievant contends that the Department has violated the principle of like penalty for similar offense. As this Board has recognized previously, “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 (Aug. 2, 2001); FSGB Case No. 1998-084 (Feb. 23, 2000)).”²⁹ As the Board further elaborated in FSGB Case No. 2002-034 (Feb. 24, 2004) at p.36, citing *Parker v. USPS*, 819 F. 2d 1113 (Fed. Cir. 1987), “...deference is to be given to the agency’s judgment *unless the penalty is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.*” [emphasis added] We find that the Department has not abused that discretion here.

As noted above, the Department has submitted two comparator cases whose facts, it contends, are reasonably similar to those of the instant case. Relying on these comparator cases, the Department originally proposed a three-day suspension without pay, which the deciding official mitigated to a one-day suspension. Grievant cites other cases which she contends demonstrate that a one-day suspension without pay would violate the principle of same-penalty-for-like-offense. She argues that consistency would require that her penalty be further mitigated

²⁸ ROP #001, p. 5.

²⁹ FSGB Case No. 2002-052 (July 18, 2003).

to a non-disciplinary Letter of Admonishment. The Board, having found that the Department has carried its burden of proving that grievant committed the misconduct charged, concludes that a one-day suspension without pay falls within the zone of reasonableness for the offense, and does not constitute a penalty “so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.”

That being the case, the Board need not address the particular disparities among the facts of the comparator cases cited by the parties. FSGB Case No. 2002-034 (February 24, 2004) notes that:

There is no precedent that holds that the principle of “similar penalties for like offenses” requires mathematical rigidity or perfect consistency regardless of variations in circumstance...In 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.

It is axiomatic that the facts and merits of any two cases will be different; therefore it is unrealistic to expect that there will be no discrepancies whatsoever among cited comparator cases or between those cases and a pending grievance appeal. Having reviewed the information available to us regarding the cases cited by the parties, we find that the Department has properly discharged its responsibility to compare the key facts in the comparator cases cited by the parties with those of the instant case in determining that a one-day suspension was an appropriate penalty.

Finally, we address two additional issues raised by grievant. First, grievant’s discussion of Agency Case No. 2011-035 might be understood to claim that retention of a letter of discipline in the OPF is itself a disciplinary action. The Department correctly notes³⁰ that the requirement for, and duration of, retention of a letter of discipline in the OPF is stipulated in regulation, and is a matter over which the Department has no discretion once the appropriate

³⁰ ROP #004, p. 125.

level of discipline has been determined. We agree with the Department's explanation in this respect.

Second, grievant asserts, "As I am not tenured, a one day suspension could prevent me from getting tenured, and thus result in separation from the State Department."³¹ The Department responds, "Neither an employee's tenure status nor the number of boards that will review a letter of discipline are (sic) a consideration in determining the penalty under the Department's discipline regulations (3 FAM 4375) or the Douglas Factors. Moreover, whether the letter of discipline would prevent grievant from being tenured is only speculation at this point."³² The Board agrees with the Department's position as stated above and finds no cause for weighing grievant's tenure status in determining the appropriateness or reasonableness of the discipline imposed.

V. DECISION

The Department has met its burden of proving that improper personal conduct occurred and that the one-day suspension imposed was reasonable under the circumstances. The appeal is denied in its entirety.

³¹ ROP #003, p. 95.

³² ROP #003, pp. 125-6.

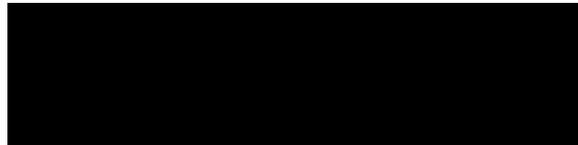
For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Bernadette M. Allen
Member



Gregory D. Loose
Member