

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

and

The Department of State

Record of Proceedings

FSGB Case No. 2014-045

November 10, 2015

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

J. Robert Manzanares
Harlan F. Rosacker

Special Assistant:

Joseph J. Pastic

Representative for the Grievant:

Pro Se

Representative for the Agency:

Meg McPartlin
HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD: The Board finds that the Department has met its burden of proving that two disciplinary charges against the grievant – Failure to Comply with Directives and Failure to Follow Instructions – are justified. The Board further finds that a ten-day suspension without pay was a reasonable penalty. Having sustained the Department’s decision, the Board denies as moot the Department’s Motion to Strike certain arguments made by the grievant in her rebuttal.

CASE SUMMARY

Grievant appeals the Department’s decision to suspend her for ten days without pay based on its findings that during an overseas assignment as a Public Affairs official and while designated as a grants officer, grievant (1) failed to comply with agency regulatory directives in making and overseeing numerous sole source grants totaling \$1.5 million dollars to a single firm and (2) failed to follow direct instructions from her immediate superior, the Deputy Chief of Mission.

Grievant seeks rescission or mitigation of the suspension, asserting that there was undue and prejudicial delay when the Department failed to propose any discipline for her alleged misconduct for approximately nineteen months. Grievant admits that she made “mistakes” in processing the awards at issue, but alleges that her mistakes were the direct result of bullying and harassment by the DCM, by personal and family stressors, and by inadequate treatment of her mental condition that included both depression and anxiety.

The Board finds that the Department met its burden of proving that the two charges are justified and that the penalty is reasonable. Accordingly, the Board denies the grievance in its entirety and therefore denies as moot the Department’s Motion to Strike certain arguments made for the first time in grievant’s rebuttal submission.

DECISION

I. THE GRIEVANCE

Grievant requests that the Board rescind or mitigate a ten-day suspension without pay that her employer imposed based on two charges of misconduct, involving 214 specifications of improper grant awards made in violation of several agency policy directives, and one specification of failure to follow a direct order from a supervisor.

II. BACKGROUND

██████████ (grievant) is an FS-02 Foreign Service Officer employed by the Department of State (Department, agency) for over 12 years. During an assignment to the U.S. Embassy in ██████████ (Embassy) as Assistant Public Affairs Officer in 2005, grievant received individual transaction authority as a grants officer for up to \$25,000 per grant. From 2007 – 2010, she served as the Public Affairs Officer (PAO), heading the Embassy's Public Diplomacy Section (PD) while continuing to exercise authority as a grants officer.

From March 13, 2007 to November 30, 2009, grievant awarded approximately 63 grants totaling approximately \$1.5 million U.S. Dollars (USD) to a video production company, ██████████ that was owned and run by ██████████, a personal friend of grievant. Most of the grants were for the production, filming and editing of a television show conceived by grievant, called ██████████ that was aimed at raising awareness in the country about HIV/AIDS. In February 2009, the Department's Office of Inspector General (OIG) reviewed the grants to ██████████ as part of a routine inspection of the Embassy. In a May 2009 Report of Inspection, the OIG made several recommendations to the post. It found that grievant had been splitting grants in order to avoid

exceeding her transaction authority ceiling of \$25,000 per grant. In doing so, she had failed to comply with certain reporting requirements under the Federal Financial and Transparency Act. The OIG inspectors recommended that grievant seek an increase in her grant warrant authority rather than continue to “split” the grants. The OIG also noted that grievant was not requiring competition in awarding grants as mandated by Grant Policy Directive (GPD) Number 5. It recommended that grievant prepare a justification for issuance of all grants for which there was limited or no competition either in the solicitation or the award. Notwithstanding this report by the OIG, grievant did not increase her transaction authority ceiling, nor did she compete grants, or provide a justification for not doing so, nor did she utilize required forms for awarding the grants.¹

On September 19, 2009, [REDACTED], the budget analyst on grievant’s local staff, informed the Deputy Chief of Mission (DCM), [REDACTED], of potential fraud in grievant’s management of grants to [REDACTED]. DCM [REDACTED] informed the Ambassador of [REDACTED] concerns, documented his actions with a memorandum to the file and eventually joined the Ambassador in requesting on September 21, 2009 that the OIG/Office of Investigations (OIG/OIV) investigate these allegations.

In an October 8, 2009 Counseling Certification, DCM [REDACTED] grievant’s rater, discussed the OIG inspector’s findings with her and directed grievant to request an increase in her grant authority ceiling. He also counseled her to study and master the grant regulations. In response to the Embassy request for an investigation, OIG/OIV reviewed the grant awards at post and reported its findings to the Ambassador on March 18, 2010. Based on the OIG/OIV findings, the

¹ The record is conflicting on the issue whether grievant failed to request an increase or whether her request was denied.

DCM requested that the Department revoke grievant's grant making authority immediately, which was done.

Based on an OIG/OIV Report of Investigation (ROI), dated March 23, 2011, the Department proposed on December 31, 2012 that grievant be suspended for ten days on two charges: Charge 1 – Failure to Comply with Directives, with 214 specifications classified under five categories of GPD violations, with one specification for each grant in which grievant had allegedly violated that particular directive – and Charge 2 – Failure to Follow Instructions, with one specification pertaining to the DCM's claim that grievant disobeyed a direct order not to engage ■ on a particular project. After receiving grievant's response to the discipline proposal, the Deciding Official sustained all specifications of both charges on June 26, 2014 and found that the proposed discipline was fair and reasonable.

Grievant filed a grievance challenging the discipline on June 25, 2014. The Department denied the grievance on November 3, 2014 and grievant appealed to this Board on November 17, 2014. Grievant filed a Supplemental Submission on March 3, 2015; the Department submitted a response to the grievance appeal on May 4; and grievant filed a rebuttal on May 19. On June 24, 2015, the Department submitted a motion to strike one new argument that grievant made in the rebuttal or, alternatively, for permission to file a sur-reply. Grievant opposed the motion to strike on July 20. The record of proceedings is closed with this decision.

III. POSITION OF THE PARTIES

A. The Department

The Department contends that grievant, as grants officer, awarded and signed all of the grants to ■ after she had received appropriate grants management training, including the Department's Grant Policy Directives (GPD) in 2005. She was taught where to find the

Department's grant policies online and was given the name of a grants policy analyst who could assist her. The Department asserts that grievant's failure to adhere to the GPDs was based on expediency. Rather than follow applicable regulations, grievant split grants into segments within her grant authority; failed to provide sole source justification for numerous grants she made to ■ amounting to over \$1.5 million USD; failed to secure regional bureau approval for grants issued in excess of \$10,000; and created the appearance of favoritism and impropriety.

With respect to each specification within the charge of Failing To Follow Directives, the Department asserts that grievant admits the conduct, but dismisses the offenses as paperwork errors for which she blames someone else, rather than taking personal responsibility. The Department contends, in addition, that grievant was specifically told by the DCM not to involve ■ in filming a concert at his residence, but she disregarded the instruction and engaged the company anyway. The Department asserts that its evidence proves by a preponderance of the evidence that the disciplinary action is justified and the appeal should be denied. With regard to the specific charges and specifications, the Department makes the following arguments:

Charge 1: Failure to Comply with Directives

Specifications 1 through 61

The Department states that an August 16, 2005 letter appointing grievant as a grants officer made clear that according to GPD Number 11, grants in excess of \$10,000 USD require regional bureau approval, even if the grants officer has a maximum warrant authorization above that amount. The Department contends that the source of funding is immaterial and does not relieve grants officers from seeking necessary regional approval. Funding in this case was provided by PEPFAR (the President's Emergency Plan for AIDS Relief) and a Country Operational Plan (COP) for utilizing those funds was agreed upon by a committee of

representatives from the Center for Disease Control, the U.S. Agency for International Development, the Department of Defense, and the Department of State (represented by grievant). The Department rejects grievant's assertion that because the Ambassador and DCM had approved the COP, she was absolved of the requirement to obtain the regional bureau's approval for each grant over \$10,000.

Specifications 26 through 122

The Department states that GPD Number 5 requires that all federal assistance "allow for full and open competition unless a written justification documents sufficient reason for the lack of competition." The agency contends that grievant was reminded of this requirement when the budget analyst on her staff requested in an email message that she provide non-competition notes for certain [REDACTED] grants. Grievant responded: "There is no other person or group in [REDACTED] at the moment with the unique combination of knowledge and skills, and abilities in both the health field and television and sound production. Therefore we do not compete the grants for [REDACTED] television project." The Department asserts that even if grievant was convinced that [REDACTED] was the only entity that could successfully undertake the project and viewed it as one long-term, continuing project, she was still obligated by GPD Number 5 to submit a sole source justification with each of the individual grants that were subsequently awarded.

Specifications 123 through 183

The Department points out that GPD Number 3 provides that a DS-1909 Notice of Award Cover Sheet must be submitted with all Department of State Awards. Grant recipients are expected to complete and sign the DS-1909 form and return it to the Grants Officer. Grievant did not ensure that the form was prepared or executed by [REDACTED]

Specifications 184 to 214

The Department asserts that grievant failed to use the Standard Terms and Conditions and Notice of Award format as required by GPD Number 31. The Department challenges grievant's claim that this was a paperwork error, compounded by her mental health issues at the time. The agency contends that as the PAO and grants officer for the Embassy, it was incumbent upon grievant to be aware of and to follow all directives, policies and regulations that governed the work she was entrusted to do.

In response to grievant's claim that she was unable to follow the GPDs more closely because of mental health issues, the Department argues that this claim is not supported by grievant's psychiatrist who stated that grievant's medication was not adequately monitored or evaluated, leaving her depression untreated and "contribut[ing] to her inability to *close out* the numerous and detailed grants." (Emphasis added.) The Department contends that the psychiatrist misunderstood the charges against grievant. She did not fail to "close out" grants, but handled them in complete disregard of governing regulations. In addition, the Department argues that grievant's psychiatric evaluation does not prove a causal link between her depression and her conscious disregard of policy directives and a direct order from her supervisor not to hire a particular contractor for an event.

Charge 2: Failure to Follow Instructions

The Department did not credit grievant's denial that the DCM instructed her not to use ■ to film the concert at his residence or her claim that the DCM lied to the OIG. The agency notes there is no evidence to suggest that the DCM had any motivation or reason to lie to OIG investigators, or that he derived any benefit from what he told them. On the other hand, the Department claims, grievant has a strong motive to deny that she disobeyed a specific instruction

from her superior because she faces disciplinary action as a result. The Department points out, moreover, that the charges and specifications brought against grievant were not based on allegations made by the DCM alone. The ROI from OIG/OIV includes corroborating statements from more than six individuals from the Embassy, including the Ambassador, the Financial Management Officer (FMO), the Cultural Affairs Officer and the locally employed budget analyst who reported directly to grievant.

The Department also refutes grievant's arguments that she was prejudiced by the delay between her conduct in 2009 and the proposed discipline in 2012, and that the intervening death of DCM ██████ deprived her of an opportunity to depose him concerning his instructions to her vis-à-vis Count 2 (Failure to Follow Instructions). The Department argues that Charge 2 is not based solely on DCM ██████ assertions to the OIG about what he instructed grievant to do. Rather, it was independently corroborated by statements from Embassy staff members. In addition, the Department contends that the death of DCM ██████ did not deprive grievant of an opportunity to present a defense to the greater charge - Charge 1 (Failure to Comply with Directives) - because this charge was almost entirely established by the findings of a forensic OIG auditor who identified the deficiencies and lack of documentation in the grant files. The Department also asserts that the Deciding Official considered the timeliness issue raised by grievant and found that the delay in proposing discipline did not prevent her from being able to support her case or properly defend herself.

The Department provides the following timeline of relevant events as evidence that it carried out the disciplinary process in a timely manner:

- The OIG/OIV investigation was conducted at post from March 7 to March 19, 2010. Grievant was interviewed during the investigation and knew of the allegations against her.

- OIG/OIV issued its ROI on March 23, 2011.
- By September 21, 2011, the Department had the complete case file from OIG/OIV.
- The Department proposed disciplinary action on December 31, 2012.

The Department argues there is no statute of limitations with regard to disciplinary actions. Instead, its only obligation is to carry out disciplinary procedures in a ‘fair, timely and equitable manner.’ 3 FAM 4321. The Department claims it did not impose discipline until the investigation was completed, copies of the grant files were forwarded to the agency for review, the record was sufficiently developed and it had carefully considered an appropriate penalty. The Department argues, moreover, that even assuming grievant could establish that her discipline was unduly delayed, she cannot establish that the delay resulted in any harm to her.

Douglas Factors and Penalty

With regard to the penalty, the Department cites as an aggravating factor the fact that as the grants officer, grievant had responsibility for complying with all of the applicable GPDs. Instead, she circumvented and ignored several directives and awarded approximately \$1.5 million USD in grant money to a single source company owned by a friend of hers.² The Department notes that grievant did not express remorse for her actions. Instead, she appears to make excuses for her decisions and attempts to blame others for her “dereliction of ... duties as a Grants Officer.” With regard to aggravating and mitigating factors, the agency contends that grievant’s misconduct was repeated each time she approved a grant in disregard of the applicable guidelines and despite being placed on notice of the violations. At the same time, the agency acknowledged that grievant had no prior discipline at the time of this misconduct and she had more than ten years of satisfactory service with the Department.

² Grievant concedes that [REDACTED] was a personal friend.

In this case, the Department argues that the comparator cases cited by grievant involved far different and less serious conduct than grievant's misconduct. This conduct was far more egregious than the conduct involved in the comparator cases because not only did grievant in this instance fail to follow regulations governing the use of government funds, she created the potential for misuse of those funds and "created an appearance of impropriety and favoritism that is inappropriate for a Public Affairs Officer and had the potential to negatively impact the post and the Department's reputation." Although the agency did not discuss any other *Douglas* factors with any specificity, it concluded that the Deciding Official carefully considered each *Douglas* factor before rendering a decision.

B. Grievant

Grievant acknowledges that she made mistakes in the technical application of the GPDs when she issued and oversaw the award of grants to [REDACTED] despite having had training in grants management. She claims her mistakes were neither malicious nor willful misapplications of the regulations, but were rather born of inadequate staffing at her job, bias by her rater, family crises and untreated medical issues. Grievant asserts she was consumed with getting the television project up and running and ensuring its success. She claims she does not know why her budget analyst did not use the form/cover sheets she is charged with failing to use. She asserts that this was an inadvertent mistake and resulted in no loss to the government or any gain to her. Grievant acknowledges it was a mistake not to pay proper attention to the details of grant administration; however, her inattention was not due to an improper or inappropriate relationship with [REDACTED] or its owner. Rather, she claims she made an objective determination that [REDACTED] was the "only viable group in [REDACTED] at the time that could fulfill the requirements of the

project.” She points out that the [REDACTED] owner had previously won grants for USAID-funded projects.

Charge 1: Failure to Comply with Directives

Specifications 1 through 61

On the issue of regional bureau approval for grants exceeding \$10,000 USD, grievant argues that the funds for the grants to [REDACTED] were not from the [REDACTED] Bureau’s Office of Public Diplomacy ([REDACTED]), but were instead provided by PEPFAR. She further argues that a COP was agreed upon by an inter-agency committee that included the Department of State. This plan identified the funding and implementing partners, including [REDACTED] and was approved by the Ambassador. In addition, the [REDACTED] Director was aware of the grants to [REDACTED] and the level of funding. Grievant asserts that the regional bureau had no authority to approve or deny use of PEPFAR funds. She claims that although she is remorseful, securing bureau approval of each grant to [REDACTED] would not have changed anything.

Specifications 62 through 122

With the benefit of hindsight, grievant states that she regrets her failure to document full and open competition for the grants. She explains that she told her budget analyst that she did not write any non-competition notes for grants to [REDACTED] because she had concluded that there was no other viable group in [REDACTED] that could fulfill the requirements of the long term production project. She claims that the justification would have been the same for each grant and she was never told by the budget analyst, the FMO, or the Management Counselor that the lack of documentation was improper. Grievant insists that she closely monitored the progress of the project that was highly praised.

Specifications 123 through 183

Grievant regrets that a DS-1909 Notice of Award Cover Sheet was not included with each grant, but she claims that she was not aware of the serious nature of the requirement. The cover sheet had not been used by the section's budget analyst and the OIG officer who conducted the post inspection in 2009 did not mention the lack of such documentation.

Specifications 184 through 214

Grievant claims that it had not been the practice of the budget analyst to use the Standard Terms and Conditions and Notice of Award format/templates required by GPD Number 31. She asserts that she was not aware of the seriousness of this matter and the OIG inspector had not mentioned it in 2009. Grievant stated her regret for being inattentive to the paperwork requirements.

Charge 2: Failure to Follow Instructions

Grievant states that three days before a concert scheduled at the DCM's residence, he asked her to arrange for (1) "multiple giant televisions" to scroll [REDACTED] translations of songs that would be sung in English, (2) the concert to be tape recorded, and (3) a DVD to be produced of the concert. She claims that she informed the DCM that her section did not have such TV monitors and that his request would be beyond the section's budget. She denies that the DCM told her to handle his requests "in-house" and, if he had, she would have explained that her section did not have such capabilities. Grievant claims instead that the DCM said: "I don't care who you use." She speculates that because he knew the OIG investigation team had been called in, perhaps he allowed her to use [REDACTED] to tape the concert in an effort to entrap her.

Mental Health Issues, Douglas Factors and Penalty

Grievant offers in defense of her actions several clinical evaluations, dated December 30, 2013, February 23, 2015 and June 16, 2015, by [REDACTED], a psychiatrist and psychoanalyst whom she consulted after being medically evacuated from a subsequent post in 2013. Based on these evaluations, grievant claims that her grant mistakes were causally linked to her impaired mental health. Grievant avers that she suffered with depression and anxiety that were aggravated by bullying and harassment from her supervisor, the DCM. She contends that this began around the time of Secretary Clinton's [REDACTED] visit to the Embassy, when she claims the DCM told her she had a problem with authority and that the advance team had complained about her. Grievant states that when she asked the head of the advance team, he told her that he had not complained. Grievant also claims that the DCM's harassment became more severe in September 2009 when she was accused of failing to comply with grant directives. She states that when she questioned the DCM's requests, he told her that all he wanted to hear when he gave her an order was: "Got it."

Grievant also claims that she was taking the anti-malarial drug, Mefloquine that contributed to her depression. She states that no doctor thought to change her prescription for anti-malarial prophylaxis or for anti-depression, despite the fact that her depression did not improve. She argues that the treatment provided by the Embassy's Medical Unit was entirely ineffective. Grievant points out that her medical records establish that between June 2008 and 2012, she sought psychiatric support from Department practitioners, including a regional psychiatrist (RMO-P), yet, she was not evaluated or properly treated by a psychiatrist at post; she was not prescribed effective medication; and she was not offered psychotherapy, despite it being recommended as early as 2010. Grievant claims that this inadequate medical care impacted both

her performance and her health during the time of her alleged misconduct and should be taken into consideration as a mitigating factor.

Grievant asserts that another mitigating factor in her favor is the significant delay between when the grants were awarded in 2009 and when the Department proposed to discipline her in 2012. She argues that the Department's delay in pursuing disciplinary action is contrary to 3 FAM 4321 that requires disciplinary procedures to be carried out in a "fair, timely and equitable manner." Grievant contends that she has been prejudiced by the delay because the DCM is now deceased and, therefore, she has lost the ability to question him concerning the charges. She maintains that with regard to the charge of Failure to Follow Instructions, at no time did DCM [REDACTED] tell her not to use [REDACTED] for his concert and, thus, she argues she did not fail to follow his instructions. She asserts that the determination of this charge was largely a matter of his word against hers because she and the DCM were the only two persons who participated in the conversation.

Grievant also cites as mitigating factors her claim that she did not engage in favoritism toward [REDACTED] she has no prior past misconduct or discipline; she did not intend to violate any regulation or directive; she fully cooperated with the OIG inspectors and investigators; and she tried her best to close out grants after the four predecessor PAOs curtailed from post.

In addition to these mitigating factors, grievant argues that the Department must determine the penalty according to the precept of like penalties for similar offenses. She asserts that individuals who have been found to have committed far more serious misconduct received equal or lesser penalties. She, therefore, contends that her penalty is comparatively too harsh.

Grievant requests the following relief:

1. interim relief from disciplinary action during the pendency of this grievance;

2. rescission or mitigation of the disciplinary action; and
3. any other relief deemed just and proper.³

IV. DISCUSSION AND FINDINGS

In cases involving discipline, the Department bears the burden of establishing by a preponderance of the evidence that the disciplinary action is justified. See 22 CFR § 905.2. In the instant case, the Board finds that the Department has met its burden of proof and the proposed 10-day suspension without pay is appropriate and reasonable. Given these findings, the Board denies as moot the Department's Motion to Strike new arguments raised by grievant in her rebuttal submission.

Charge 1: Failure to Comply with Directives Specifications 1 through 61

These specifications pertain to grievant's failure to comply with GPD 11 that requires all grants in excess of \$10,000 USD to be approved by the regional bureau. Grievant concedes and expresses remorse that she violated this provision in each of the 61 awards that are the subject of these specifications. Her arguments about the source of the funding for these awards (from PEPFAR, not █████) and the approval of the COP by the Ambassador are irrelevant. Grievant does not argue or prove that the regulation is inapplicable when a grant funding source is PEPFAR or where the Embassy approves use of those funds.

We disagree with grievant's contention that even if she had sought regional bureau approval, the outcome – issuing each of the grants to █████ – would have been the same. We find, instead, that had she complied with the applicable regulation and sought regional bureau approval for each of the numerous grants to the same vendor in excess of \$10,000, the regional

³ Grievant volunteers the fact that she was identified for selection out by the Performance Standards Board (PSB), but was able to resolve that issue by making a "commitment to continuing my mental health care" She claims that a 10-day suspension will "most assuredly result in repeated low ranking and a more than likely chance that I would face the PSB again."

bureau would have been alerted to her award of so many sole source grants to the same company, run by an admitted friend, and to her repeated splitting of awards into small increments, each below her award ceiling of \$25,000. By avoiding regional bureau approval with each of these awards, grievant avoided bureau oversight in addition to violating applicable regulations. The Board finds that the Department has met its burden of proving these specifications.

Grievant claims she subsequently made two online requests to have her warrant amount increased but that DCM [REDACTED] never processed these requests. The record does not support this claim. In fact, in an e-mail dated 9/29/2009, [REDACTED], Director, Federal Assistance, Office of the Procurement Executive, Department of State, writes:

There is no pending request in the automated grants warrant system showing that you ever requested an increase to your grants warrant. In addition, you have not had grants training for the past four years and we have a refresher requirement after three years. You cannot keep splitting grants to get under the reporting requirements of the Federal Financial Accountability and Transparency Act reporting requirements or the requirement for competition on grants.

She continues:

[M]y staff cannot continue to fix your grant documents ... if you are unable to comply with grant regulations, due to urgent grants, I recommend you pay A/LM/AQM 1 percent to execute your grants properly.

[REDACTED] then provided grievant a point of contact for follow up.

Specifications 62 through 122

Grievant acknowledges that she violated GPD Number 5 that requires all grants to be fully and openly competed “unless a written justification documents sufficient reason for the lack of competition.” She stated: “[In] hindsight, I should have insisted ... that a sole source justification was plainly evident on each and every grant document.” Despite admitting these violations, grievant claims that she provided one generic justification to her budget analyst

(██████ who could/should have used it to justify the lack of competition for each of the grants to ██████████ We find, however, that by the time grievant offered an email justification for the sole source awards to ██████████, she had already approved many sole source awards to ████████ without any accompanying written justification, in violation of the policy directive. We find, moreover, that grievant's justification came only after she was prompted by ██████████ in his email, dated March 18, 2009, asking for non-competition notes to justify an award to ██████████ He wrote: "Just a reminder from my weekly meeting with B&F [Budget and Finance]: Could you please write non-comp notes so that these ████████ ████████ grants can be paid? Thanks, ████████ It was then that grievant responded: "There is no other person or group in ██████████ at the moment with the unique combination of knowledge, skills and abilities in both the health field and in television and sound production. Therefore we do not compete the grants for the ██████████ television project." Grievant claims: "Neither ██████████ nor [the Financial Management Officer, nor the Management Counselor] ever spoke to me about what they thought was allegedly improper about these grants." We find that this claim is belied by the email from ██████████ and the report of the OIG inspectors.⁴ We find that the Department has shown by a preponderance of the evidence that, pursuant to GPD #5, it was grievant's responsibility, as grants officer, to ensure that a written justification was provided for each sole source grant that she approved to ████████ and that she failed to comply with this directive, even after being prompted by her staff to do so.

⁴ We note that grievant was not charged with violating any policy directive that prohibited splitting the grant awards to ██████████ each month, although it was reported to be a violation of the Federal Financial and Transparency Act. The grant splitting was raised as a serious concern by the OIG inspectors when the post underwent a routine inspection in February 2009. The inspectors found that despite grievant having a \$25,000 warrant limit, the monthly invoices from ██████████ amounted to \$75,000. OIG found that grievant was approving multiple grants for less than \$25,000 each, totaling the amount of each monthly invoice from ████████ The inspectors reported the grant splitting and recommended that grievant request that her grant authority be increased to \$100,000. Despite this input from the inspectors, grievant continued grant splitting and failing to follow policy directives. This, then became a concern of ██████████, the Director, Federal Assistance, Office of the Procurement Executive as evidenced by the e-mail noted above.

Specifications 123 through 183

Grievant also concedes that she violated GDP Number 3 by not including with each grant a DS-1909 Notice of Award Cover Sheet and by not ensuring that the grantee completed and executed the forms and returned them to her. Grievant claims that she was unaware of the “seriousness” of the requirement; that it was not the practice of the budget analyst (██████████) to use the form; and that during the 2009 on-site post inspection, the inspector did not mention her failure to use the form. This claim is contradicted by an email grievant received on September 25, 2009 from ████████████████████, a Grants Management Specialist in the Department. The email read:

After review of the documents, I am wondering why this is not one document. I have combined all of the grants into one and am sending them individual [sic] and then a final document which combines all three into one. Also, I reformatted the documents to meet your requirement for substantial involvement or a Cooperative Agreement. Once you have made the decision how you would like to handle these, I can put together the DS-1909(s) for you. Also, please remember that this requires ████████████████████ approval prior to signature by the Grants Officer according to GPD 20 (see attachment). Additionally, as discussed earlier, there is a requirement for a proposal, grant budget and narrative. I am available to assist you further.

Given this express reminder of grievant’s duty to prepare DS-1909 forms and the offer of assistance in getting the forms prepared, grievant cannot argue that no one brought this directive or obligation to her attention. In any event, her effort to deflect responsibility does not alter the fact that she was tasked as grants officer to know the applicable policy directives and to utilize the appropriate forms that she was trained were required. The Board finds that the Department has met its burden of proof on these specifications.

Specifications 184 through 214

Grievant admits that she violated GPD Number 31 that requires all overseas posts to use standard terms and conditions and Notice of Award formats/templates for all Department

assistance awards, effective October 1, 2008. Grievant again offers the excuse that the grant specifics were included in the grants “descriptively,” but acknowledges that she should have filled out the forms in detail. We find that the Department has shown by a preponderance of evidence that grievant violated GPD Number 31. The Board sustains these specifications.

Charge 2: Failure to Follow Instructions

The parties dispute the facts underlying this charge. The Board notes that the conversation between the DCM and grievant about not hiring ██████████ for the concert at his residence reportedly took place in February 2010. At that point, the DCM was aware of the following: (a) In May 2009, the OIG expressed concerns about the manner in which grievant was managing the ██████ grants. (b) One of grievant’s staff reported to the DCM his suspicions of misfeasance by grievant vis-à-vis grant awards. (c) The DCM and the Ambassador had requested in September 2009 that OIG/OIV investigate grievant’s awards of grants to ██████.⁵ (d) In October 2009, the DCM counseled grievant about the reported deficiencies in her management of grants and informed her that until further notice, the FMO would not approve grant payments unless the DCM was assured that “all regulations are satisfied.” Given what information was available to the DCM at the time of the concert at his residence in February 2010 – the OIG inspector’s report, the report about grievant’s insistence that ██████████ be hired to film the

⁵ In his memorandum to the file, dated September 19, 2009, DCM ██████ also reported that he received a complaint by an employee, who headed the Embassy’s support team for a visit by Secretary Clinton from ██████████ that grievant was insisting that the owner of ██████████ be hired to film the visit. According to the DCM, the employee reported that “[t]his had irritated the line officers from Washington ... [and] gave the appearance of ██████████ having her own agenda.” ██████ wrote in the memorandum that he counseled grievant “to desist in efforts to involve ██████████ He also wrote that he “told her by phone that it would be better ‘to never mention his name again until after the trip.’” ██████ retained grievant’s written response that reads in part:

No, I just don’t know what to do. I really don’t know what they want from me. Your call just confused the hell out of me, and of course, I’m worried that they seem to be jumping to negative conclusions about me personally, which would indicate that they have way too much time on their hands. ... This is stressful enough without the personal element added in – and I’m such an intensely self-critical person that I don’t really react well to strange and unjustified criticism. Don’t worry, I’ll get over it, and probably double up on my meds. ☺ = ██████████

Secretary's visit in [REDACTED], the concerns raised by the budget analyst, [REDACTED] in September 2009, and the Ambassador's request that OIG investigate grievant's grant awards to [REDACTED] – we think it is likely that he expressed reservations about awarding additional monies to [REDACTED] to film the concert and ordered grievant not to contract with [REDACTED] for its services. In addition, there is in the record a statement from the FMO that in October 2009, DCM [REDACTED] instructed him that he (the FMO) was not to authorize any more payments to [REDACTED]. This provides independent corroboration of the DCM's statement that he told grievant not to engage [REDACTED] for the concert at his residence. Ultimately, we find that there is preponderant evidence that the DCM instructed grievant not to hire [REDACTED] to film the concert at his residence.

Mental Health Issues

Grievant claims she suffered from depression that was exacerbated by unfortunate circumstances in her personal and family life and by harassment and bullying by the DCM. She also claims that taking the anti-malarial drug, Mefloquine, may have contributed to her depression, compounded by the Department's misdiagnosis and mistreatment of her condition that, in turn, impaired her ability to follow the GPDs more closely. To support her contention that her mental health caused her to disregard the GPDs, grievant submitted a statement from her psychiatrist, [REDACTED], who blames the Department for grievant's deteriorated mental health.

The record proves that grievant encountered personal and professional challenges during her long assignment to [REDACTED] that might well have contributed to her depression and anxiety. Grievant bears the burden of proving by a preponderance of evidence her defense that her mental health condition caused her to violate the numerous policy directives. Her defense, however, rests almost entirely on her own lay conclusions and the statements of her psychiatrist, [REDACTED] [REDACTED] who did not meet her until several years after she had left the post. And, in circular

fashion, the psychiatrist's account of what happened in those earlier years relies almost entirely on grievant's reports. Upon review of the doctor's evaluations, moreover, we note that [REDACTED] [REDACTED] opined that various factors contributed to grievant's worsening depression, but he did not offer an opinion that her mental state was in any way the cause for her mismanagement of the grants she awarded while in [REDACTED]. The most the psychiatrist stated was that grievant's depression was triggered by DCM [REDACTED] alleged abuse.⁶ [REDACTED] then stated: "[DCM [REDACTED] reported alleged 'irregularities' in [grievant's] management of funds that led to an OIG investigation lasting years" He then described how the investigation exacerbated grievant's depression, but he never averred that the grant "irregularities" occurred because of grievant's depression.

In her Supplemental Submission, grievant adds that [REDACTED] later reviewed the instant charges and the proposed discipline and allegedly "c[a]me to the conclusion that the errors for which the Department now proposes a 10-day suspension are directly the result of, and a manifestation of, the medical issue that I have been dealing with." She then quotes him as saying: "These psychiatric observations documented during her one and one half year continuing psychotherapy with me attest to her compromised mood, thinking, judgement [sic] and relations with others in [REDACTED]. But this statement does not represent the opinion that grievant claims. It is specifically not an assertion that grievant's "compromised mood, thinking and judgment" had any bearing on her repeated decisions to ignore grant directives.⁷ We are particularly struck

⁶ The psychiatrist, [REDACTED], M.D., P.C., reported in an evaluation, dated December 30, 2013, that grievant's "mental illness was triggered by the extremely stressful environment in [REDACTED] and by her rater, [REDACTED], an insensitive and bullying supervisor whose abuse was sometimes brutal." [REDACTED] acknowledged that he first met grievant in his Washington, D.C. office in late September 2013 and met with her for fifteen hours of out-patient treatment to the date of the report. He did not cite any source other than grievant for the facts that informed his opinion.

⁷ [REDACTED] further opined that grievant's poorly treated depression "contributed to her inability to close out the numerous and detailed grants that constitute one set of charges against her." He clearly misread the nature of the

by grievant's non-compliance with directives that were repeatedly brought to her attention by coworkers and the OIG inspectors. We conclude, therefore, that grievant's attempt to link her depression and her admitted failures to follow known applicable regulations is purely speculative, unsupported by independent medical or psychiatric evidence. The Board finds that grievant has not met her burden of proving this defense.

Alleged Harassment and Bullying

The record makes clear that for several years, grievant was regarded as a creative officer and her project, ██████████, was regarded as highly successful. Her first two performance evaluation reports by DCM ██████████ reflected his approval of her performance and her value as a part of his team. For the period ending April 15, 2009, the DCM described grievant as "the most innovative and strategic thinker among the seven section chiefs and one princip[al] officer I supervise." He strongly recommended her for promotion. After the OIG inspection report in 2009, however, the DCM wrote more critical performance evaluations of grievant and later deferred judgment on her promotability until the OIG investigation was completed.

Despite grievant's claims that the DCM began to harass her and became hostile toward her, beginning with the Secretary's visit in ██████████, and that this treatment allegedly intensified after the OIG investigation found fault with how she awarded and administered grants, we find that grievant has presented no evidence to corroborate her bare assertion of bullying and harassment. She did not prove that she was the victim of a hostile work

charges, inasmuch as grievant was not charged with failing to close out grants. ██████████ also wrote: "Pertaining to decisions and acuity of thinking, chronic depression blunts judgement [sic] and exacerbates procrastination, self-justification and denial. ... In short, her undiagnosed and untreated depressive symptoms have not been taken into account when adjudicating her behavior in the closing out of her ██████████ duties." Again, it does not appear that ██████████ comprehends the nature of the charges against grievant. The issue is not her delay in closing out grants. Rather, it is whether she followed the rules in awarding over \$1.5 million USD in numerous sole source grants to a single company that was owned by a friend.

environment or that her rater was biased. While she might have found the DCM's closer scrutiny and criticism were a dramatic change from her earlier relationship with him, records of their counseling session on October 8, 2009, support a conclusion that the DCM began to have legitimate concerns about the OIG inspection findings and other aspects of her recent performance. He noted that grievant did not readily accept instructions, was argumentative and was found by the Ambassador and his wife to have been uncooperative and impolite. We find that the concerns the DCM raised were serious performance issues and were supported by examples. We also note that at the time, grievant expressed appreciation for her rater's constructive criticisms.

As the Board noted in FSGB Case No. 2007-035 (August 6, 2008), a mere showing that a grievant experienced "a work environment that was difficult, and possibly even unpleasant" is not sufficient in and of itself to establish that she was subjected to a hostile work environment. We find that grievant has not met her burden of proving her defense – i.e., that she was subjected to bullying and harassment from the DCM.

Timeliness

The Board finds that the Department has not satisfactorily explained the long delay between grievant's grant award violations in 2009 and the initiation of the disciplinary process in 2012.⁸ The Department received the complete file of the OIG investigation on September 21, 2011, but it did not propose disciplinary action until more than one year later, on December 31, 2012. The Department's only explanation for this 15-month delay was that it took some time to decide what penalty to propose. It also suggests that grievant knew of the allegations against her when she was interviewed at post by OIG in March 2010. The critical event, however, is not the

⁸ We note that the Department's referral of the matter to the Department of Justice for possible prosecution occurred before the ROI issued and, therefore, this process did not appear to contribute to the delay in the proceedings.

date on which grievant was first interviewed by OIG, but the date on which the Department informed her that her conduct would result in proposed discipline.

We find that the Department's delay in proposing discipline in this case violated the requirement in 3 FAM 4321 to "carry out ... disciplinary procedures in a fair, timely, and equitable manner." Nonetheless, we find that grievant did not present persuasive evidence that she was prejudiced by this delay or prevented from being able to support her case or properly defend herself. Despite grievant's assertion that the death of DCM [REDACTED] prevented her from questioning him about the facts underlying each charge, especially the charge that she failed to follow his instructions, the Board is not persuaded that grievant would have elicited any new information from him, had he been available for examination. We note also that DCM [REDACTED] allegations were corroborated by his memorandum to the file in September 2009 describing the report that grievant pressed to have [REDACTED] hired to film the Secretary's visit in [REDACTED]. In addition, his allegations are corroborated by FMO [REDACTED] statement that in October 2009, [REDACTED] instructed him that he was not to authorize any more grant payments to [REDACTED]. With respect to the specifications in Charge 1, we find that DCM [REDACTED] was not a critical witness necessary to prove or disprove these specifications.

Douglas Factors

The Department properly considered as mitigating factors grievant's lack of past discipline and her satisfactory record of performance over the years. The Board finds that grievant did not prove any other mitigating factors. As we previously stated, grievant did not establish that her mental health issues bore directly on her repeated decisions to authorize grants to one private company run by a personal friend. We, therefore, disagree with her that her impaired mental health or the alleged inadequate treatment she received were mitigating factors.

This Board likewise found no support for grievant's assertion that she was the victim of bullying and harassment by her supervisor, DCM [REDACTED]. Thus, we do not find that her work environment or relationship with her rater were mitigating factors. Also, although we found that the delay in bringing the charges in this case was inappropriate, our related finding that the delay was not prejudicial to grievant's defense leads us to conclude that the delay was not a mitigating factor in the assessment of the discipline.

As for aggravating factors, we find that the Department was justified in citing the nature and seriousness of the charged offenses and grievant's duties and responsibilities as the grants manager. Grievant's conduct, including the total number and amount of the grants, raised clear concerns about the propriety of the awards and put the Department's reputation at risk. As the Department stated, grievant's conduct: "created an appearance of impropriety and favoritism that is inappropriate for a Public Affairs Officer and had the potential to negatively impact the post and the Department's reputation." Another aggravating factor was grievant's persistence in ignoring procedural and documentation requirements in making the awards to [REDACTED] despite being clearly warned by agency employees that she was not following mandatory grant policy guidelines. Her excuses, denials, and attempts to blame others also undermine any conclusion that she is rehabilitated.

Comparator Cases

Grievant contends that her alleged misconduct is much less serious than that in several comparator cases. For example, in one case, a DS agent was suspended for only 5 days for failing to follow regulations when he shipped personal weapons to a post where they were forbidden and lacked candor during the investigation. Grievant contends that her 10-day suspension is much harsher than any of the discipline imposed in seven comparator cases she

presents. We find, however, that the comparator cases are not sufficiently similar to permit a meaningful comparison.

The Board has held that:

[T]here 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. . . . [T]hat principle should be applied with practical realism. 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.

FSGB Case No. 2002-034 (Feb. 23, 2004) at unnumbered pp. 36-37. The Board also recognizes that management has the primary responsibility for disciplining its workforce. Our role is restricted to determining whether the discipline imposed is reasonable, not whether it is the best penalty. We intervene only if it appears that “the penalty is so harsh and unconsciously disproportionate to the offense that it amounts to an abuse of discretion.” See FSGB Case No. 2000-037 (November 3, 2000); FSGB Case No. 2002-029 (December 2, 2002).

The Board finds that the Department has proved: (1) that it properly considered whether there were legitimate comparator cases in order to propose a like penalty for similar offenses; (2) whether there were mitigating or aggravating circumstances, along with other Douglas factors;⁹ and (3) that the penalty imposed is appropriate and reasonable under the particular circumstances of this case. We conclude that this is a unique set of circumstances and that the comparator cases cited by grievant are significantly different than the misconduct cited here. We further find that grievant has not established that she was the victim of bullying or harassment by her rater or that her depression contributed to her failure to follow regulations in awarding grants or her failure to follow the instructions of the DCM. The penalty imposed, a 10-day suspension without pay, is sustained.

⁹ See, *Douglas v. Dept. of Veterans Administration*, 5 MSPB 313 (1981).

Because we deny the grievance, we deny the agency's Motion to Strike grievant's new argument made in the rebuttal and the agency's request to file a surrebuttal.

V. DECISION

Grievant appeal is denied in its entirety.

For the Foreign Service Grievance Board:



Susan R. Winfield
Presiding Member



J. Robert Manzanares
Member



Harlan F. Rosacker
Member