

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

**[REDACTED]**

Grievant

And

Department of State

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Record of Proceedings

FSGB Case No. 2014-049

November 3, 2015  
(corrected November 5, 2015)

**DECISION**

REDACTED

For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

William J. Hudson  
Jeanne L. Schulz

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

*Pro se*

Representative for the Department:

Thomas Lipovski, HR/G

Employee Exclusive Representative:

American Foreign Service Association

## CASE SUMMARY

**HELD:** The Department of State carried its burden to prove by a preponderance of the evidence that grievant, a tenured Diplomatic Security Officer, committed the acts with which he is charged. The Board found that a 10-day suspension without pay was reasonable. The grievance appeal was denied.

**OVERVIEW:** Grievant, a tenured Diplomatic Security (DS) Agent, appeals the Agency's denial of his grievance in which he sought a reduction of a 10-day suspension, the penalty he received for multiple disciplinary charges. The original charges included: (1) improper personal conduct; (2) misuse of government resources; (3) lack of candor; (4) poor judgment; and (5) failure to follow regulations. Although the deciding official declined to find grievant liable for Charge 4 and although grievant takes responsibility for Charges 2, 3, and 5, he denies the misconduct alleged in Charge 1 and the reasonableness of the penalty. The deciding official determined that the 10-day suspension originally proposed remained reasonable even though one charge was not sustained.

The Board concluded that agency satisfied its burden of proving that grievant committed the improper personal conduct as charged, *i.e.* groping a female, subordinate employee (grabbing her buttocks) at a Marine House toga party in [REDACTED]. The Board also concluded that the 10-day suspension was reasonable under the totality of the *Douglas* analysis and that the agency was not obligated to reduce the penalty originally proposed merely because one of the charges was not sustained.

## DECISION

### I. THE GRIEVANCE

Grievant is a tenured Diplomatic Security (DS) Agent who was assigned as the Assistant Regional Security Officer (ARSO) to the [REDACTED] [REDACTED] at the time of the incidents in question. Based on a DS Report of Investigation (ROI) and another ROI prepared by the Office of Civil Rights, the Director of Human Resources issued a letter on October 31, 2013, proposing to suspend grievant for 10 days without pay.<sup>1</sup> The proposed suspension was based on charges of: 1) improper personal conduct, with two specifications; 2) misuse of government resources; 3) lack of candor, with two specifications; 4) poor judgment, with two specifications; and 5) failure to follow regulation. Grievant responded by acknowledging he made errors in judgment, expressing regret at hurting his family and others, and taking responsibility for charges 2, 3 and 5. Nonetheless, he contested the finding of culpability on Charge 1.

On January 22, 2014, after considering grievant's reply to the charges, the Department's Deputy Assistant Secretary (DAS) for Human Resources upheld all charges with the exception of charge 4, but did not reduce the penalty.<sup>2</sup> The officer filed his grievance on February 18, 2014. In a letter issued on December 3, 2014, a different DAS for Human Resources denied the grievance.<sup>3</sup> Grievant appealed that decision to this Board. After briefing by both parties, the Record of Proceedings (ROP) was closed on May 7, 2015.

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<sup>1</sup> A copy of this letter is in the record as Attachment A to grievant's Appeal Submission.

<sup>2</sup> A copy of this determination is in the record as Attachment C to grievant's Appeal Submission.

<sup>3</sup> That document is in the record as Attachment F to grievant's Appeal Submission.

## II. BACKGROUND

Grievant's employment began with the Department in October 2006. His first assignment, to the [REDACTED], ended in 2008. He then served as the ARSO in [REDACTED]. Subsequently he was the ARSO at the [REDACTED] [REDACTED] from January 2011 until his involuntary curtailment from post in July 2012. He was then assigned to the Washington Field Office. At the time he filed his Supplemental Appeal Submission, grievant was at the Foreign Service Institute, studying [REDACTED].<sup>4</sup> The incident that is the subject of this appeal occurred at a so-called "toga party" staged in late January, 2012 at the Marine House in [REDACTED]

The disciplinary charges that were sustained against grievant are quoted below, briefly noting the factual specifications supporting them.<sup>5</sup>

### Charge 1: Improper Personal Conduct

#### *Background to Specification:*

In her June 4, 2012 interview with DS investigators, the RSO Office Management Specialist (OMS) [REDACTED] recounted an event that took place at the Marine House. ([REDACTED] worked in the office in which you worked in [REDACTED] and she stated that you were her supervisor.) [REDACTED] stated that at one point, you, she and two others participated in a group hug. [REDACTED] stated during the group hug, you squeezed the middle portion of her posterior. She further stated that it happened distinctly with significant force and at least two squeezes, and that she is '100% sure' it was you and not accidental. She also stated that she was 'immediately offended and angered by the squeeze.' (DCS ROI Attachment 1) [REDACTED] makes similar statements in her May 31, 2012 declaration, and further states that you 'violated' her. (S/OCR ROI [C] Declaration, page 2, paragraph 1 and 2 and page 3, paragraph 2)

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<sup>4</sup> Grievant's Supplemental Submission at 1.

<sup>5</sup> We quote from the Department's December 3, 2014 letter, denying the grievance (No. AGS 2014-013). The numbering of the charges is original. Charge 4 was not sustained.

In your August 9, 2012 declaration and in your June 6, 2012 interview with DS investigators, you deny touching [REDACTED] posterior. (S/OCR ROI [grievant's] Declaration, page 6, paragraph 6 and DS ROI Attachment M). The record does not indicate, however, that [REDACTED] had any reason to fabricate her story.

*Specification:*

You demonstrated improper personal conduct when you squeezed the posterior of [REDACTED] your subordinate, during an event at the Marine House.

Charge 2: Misuse of Government Resources: On May 2, 2012, during a work event, you misused your USG-issued phone by sending a text message of a sexual nature to an employee you supervised.

*Background to Specification 1:*

On May 2, 2012, while working a VIP visit, you sent a text message from your USG-issued phone to the USG-issued phone of [REDACTED] the Senior Foreign Service National Investigator (FSNI) for the Regional Security Office in [REDACTED]. You were [REDACTED] supervisor. In this text message, you wrote, 'Got me hard.' (DS ROI Attachment G and S/OCR ROI Attachment 5) In her August 30, 2012 declaration, [REDACTED] states that she received this message from you. (S/OCR ROI [REDACTED] Declaration, page 1, paragraphs 1 and 6)

In your August 9, 2012 declaration, you stated that you 'inadvertently sent a text to [REDACTED] that read, 'Got me hard.' You further stated that you had been flirting with your wife by texting her and that the only phone you had was your business phone. (S/OCR ROI [grievant's] Declaration, page 4, paragraph 4)

*Specification 1:*

On May 2, 2012, during a work event, you misused our USG-issued phone by sending a text message of a sexual nature to an employee you supervised.

*Background to Specification 2:*

While assigned to the [REDACTED], you had an extra-marital relationship with the wife and Eligible Family Member of a Drug Enforcement Agency (DEA) employee at post (the wife will be referred to in this proposal as [REDACTED]). In your June 6, 2012 interview with DS investigators, you stated that [REDACTED] provided you with a SIM card that

you put into an RSO office phone. You further stated that you used the phone because you ‘wanted constant communication with [REDACTED].’ (DC ROI Attachment M)

Specification 2:

You misused government resources when you used a USG-issued phone for the main purpose of conducting personal communications with [REDACTED]

Charge 3: Lack of Candor

*Background:*

On the evening on [sic] March 12, 2012, your wife confronted [REDACTED] about your relationship at [REDACTED] USG-provided residence. Later that evening, you and your wife went back to discuss the situation with [REDACTED] and her husband. The four of you agreed to keep the relationship secret to avoid being removed from post. (DC ROI Attachment A)

*Background to Specification 1:*

In your April 5, 2012 interview with an RSO from [REDACTED] [REDACTED] you were asked if your relationship with [REDACTED] was intimate and you responded that you and [REDACTED] had kissed and that the contact was consensual. (DS ROI Attachment A)

In your June 6, 2012 interview with DS investigators, you stated that you and [REDACTED] were in a relationship that was sexual. (DS ROI Attachment M)

Specification 1:

You lacked candor in your April 5, 2012 interview when you were not entirely forthcoming about the nature of your relationship with [REDACTED]

*Background to Specification 2:*

In a March 18, 2012 e-mail from you to [REDACTED] you wrote in part, “Email (sic) is much easier to hide and we can still be in touch and keep each other informed . . . it’s the smarter thing to do [REDACTED] and I think you know that.” (DS ROI Attachment A)

In an 11:14 AM march 28, 2012 e-mail from you to [REDACTED] you wrote in part, ‘i (sic) really don’t know what happened yet, i’m (sic) not hearing much detail from anyone beyond rumors.’ (DS ROI Attachment A)

In a 12:12 PM March 28, 2012 e-mail from you to [REDACTED] you wrote in part, 'We both know how to get a hold of each other if we really need to . . . we should stop communicating. . .' (DS ROI Attachment A)

In a 1:51 PM March 28, 2012 e-mail from you to [REDACTED] you wrote in part, 'I'm also ready and willing to face any consequences for my actions, but that doesn't mean I want to leave and I will fight that.' (DS ROI Attachment A)

In your April 5, 2012 interview with an RSO from [REDACTED] [REDACTED] you were asked if you had any contact with [REDACTED] since your relationship was brought to light and you said, 'No.' (DS ROI Attachment A)

On April 17, 2012, at your request, you were again interviewed by an RSO from [REDACTED]. In this interview, you stated that you had not been forthcoming during your initial interview and had not admitted to being in contact with [REDACTED] after the events of March 12, 2012. You stated that you had used two private e-mail accounts to correspond with [REDACTED] and that your last contact was approximately two weeks prior to the April 17 interview. You further stated that you met with [REDACTED] in person to discuss your situation and the administrative inquiry, and that you met at work and once outside of work to discuss your respective issues and to exchange information regarding the inquiry process. (DS ROI Addendum)

In your June 6, 2012 interview with DS investigators, you stated that after March 12, 2012, you kept in contact with [REDACTED] via phone and e-mail, despite being ordered by Post not to communicate with her. You also admitted that you lied about doing so for a time. (DS ROI Attachment M)

#### Specification 2:

You lacked candor in your April 5, 2012 interview when you stated that you had not had any contact with [REDACTED] since your relationship was brought to light on the evening on [sic] March 12, 2012.

#### Charge 5: Failure to Follow Regulations

5 FAM 526.2 Restrictions for Cellular Telephone usage Domestic and Abroad: In facilities abroad, cellular telephones are prohibited from being brought into and/or used within controlled access areas (CAAs).

Background:

In your June 6, 2012 interview with DS investigators, you stated that you believe you brought the cell phone you used to communicate with [REDACTED] into the RSO office in the CAA ten times or less.

Specification:

You failed to follow regulations when you brought a cell phone into the CAA at post on multiple occasions.

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

While the Board in discipline cases typically recapitulates the government agency's position first, it makes sense herein to commence with a summary of grievant's particular assertions on appeal. He is the protagonist and has narrowed the scope of the issues that were the basis for his agency-level grievance. Summarizing the issues specifically raised on appeal, will facilitate our ability to set forth the agency's responses in a logical, corresponding order.

#### **THE GRIEVANT**

On appeal, grievant raises two issues, seeking relief in the form of a reduced penalty. One, grievant accepts full responsibility for Charges 2, 3 and 5, along with their accompanying specifications, and he appeals only the finding that he engaged in the misconduct alleged in Charge 1, Improper Personal Conduct. Two, grievant contests the severity of the 10-day suspension and contends that he deserves only a five-day suspension (which he would accept). We summarize his arguments as follows.

*Liability for Charge 1:* Grievant maintains that it was his friend and guest, ([REDACTED]), who at the toga party in January 2012 behaved boisterously and inappropriately, groped others, and called for the group hug. He asserts that [REDACTED] had

earlier faked tripping on top of [REDACTED] and grabbed her in multiple areas of her body while she was seated in a stairwell.<sup>6</sup>

Grievant claims that the night of the toga party was the first time he and [REDACTED] “had any type of contact or conversation that would be considered flirtatious.”<sup>7</sup> On page two of his Rebuttal, filed in this appeal, grievant states:

[REDACTED] and I went to the hallway to be away from the crowd, in order to talk away from potential on lookers. More significantly, I in no way wanted to draw attention to us. We were not kissing. We were close to each other when sitting on the stairwell and she did put her leg on mine, but that was the absolute extent of our intimacy in that setting that evening. We were close because it was a party with very loud music, even in the hallway, and in order to be heard you would have to be close to the person you’re speaking with. As have [sic] stated and reiterated many times, [REDACTED] arrived and I immediately noticed her very apparent displeasure.

Grievant asserts that he did not wish to be seen talking to [REDACTED] at all and was trying to “shade” his actions.<sup>8</sup>

Grievant surmises that [REDACTED] who did not raise the accusation that he groped her until months later, did so in retribution for what she viewed as his offensive verbal behavior towards her. She had “stormed out of the office crying,” after receiving an email from another employee informing her that grievant was accusing her of gossiping and spying on him. It was only after this episode that [REDACTED] accused grievant of groping her. Based on [REDACTED] account of events in her Declaration of May 31, 2012, it appears that the episodes of “storming out of the office” and later reporting the groping to the EEO Counselor evolved between “late February” and May 16, 2012.<sup>9</sup> Grievant observes

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<sup>6</sup> Grievant’s Appeal Submission, Attachment E at 2.

<sup>7</sup> Rebuttal at 1.

<sup>8</sup> Rebuttal at 1.

<sup>9</sup> A copy of the Declaration is in the record as Attachment A of the Department’s Response.

that the Department's analysis of his credibility against that of [REDACTED] does not take into consideration his consistent denial of groping her and his consistent denial that he called for the group hug.

*Severity of the Penalty.* Grievant argues that the Department has not met its burden of proof on the appropriateness of his penalty. He proffers several theories.

First, grievant complains that the deciding official, without any explanation, dismissed one charge (poor judgment), carrying two specifications, but did not reduce his 10 day penalty. He contends that the Department thus violated the requirement of imposing discipline that is "fair and equitable." *See* 3 FAM 4374(1).

Second, grievant contends that the Department did not correctly determine the penalty based upon a proper application of what is known as the twelve *Douglas* factors. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

In particular, grievant focuses on the sixth *Douglas* factor, *i.e.* the consistency of the penalty with those imposed upon other employees for similar offenses and with the table of penalties. He asserts that his penalty is not consistent with penalties levied in similar cases in which the penalties were less severe. In an effort to explain why his suspension was inconsistent with penalties for "like" offenses, grievant offers two points.

One, grievant complains that "a 10-day suspension is excessive, particularly given the factual disposition of the cases used to determine the proposed penalty here."<sup>10</sup> While he spoke of "cases" plural in his Supplemental Submission, grievant actually identified only one of the Department's comparator cases as being an inappropriate source for the Department's decision. That case was Administrative Case No. 2009-440 (an

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<sup>10</sup> Supplemental Submission at 4.

administrative grievance decision). Grievant's theory of comparison is reflected in the following argument:

I understand that the facts in 2009-440 are very different from the facts present in my case. In 2009-440, the employee was charged with five specifications of lack of candor whereas I am being charged with two specifications. The employee in 2009-440 was charged with three specifications of harassment.

Supplemental Submission at 4.

Two, grievant contends that the Department should have relied on certain other specific comparator cases that would have justified only a five-day suspension. Those cases are decisions of this Board: FSGB Case No. 2005-042, FSGB Case No. 2008-054, and FSGB Case No. 2012-015. In these cases penalties less than a 10-day suspension were issued for offenses of the same type, *i.e.* lack of candor, improper personal conduct, and failure to follow procedures.<sup>11</sup>

Third, grievant maintains that the "deciding official focused exclusively on aggravating factors without balanced consideration of several mitigating factors" that he believes would have tipped the balance in his favor.

In his Supplemental Submission, grievant set forth in detail his own arguments as to each *Douglas* factor, suggesting that the DAS should have accepted the same interpretation of the factors and should have explicitly discussed all of them in the decision. For example, as to his prior disciplinary history grievant states:

My only previous conduct issue was an improper record check in the Department's Consular Consolidated Database in 2007, for which I received an official warning. This occurrence was the result of a misunderstanding . . . but I did not contest the warning and was extremely cautious in moving forward in my duties.<sup>12</sup>

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<sup>11</sup>Supplemental Submission at 4-5.

<sup>12</sup> Supplemental Submission at 6.

Grievant emphasizes what he believes to be other elements that lessen the seriousness of what he did. He suggests that the agency should have discussed each of these elements specifically as part of the *Douglas* analysis. For the sake of brevity, we will not repeat all of the other details that he set forth. However, it suffices to list grievant's key assertions: (1) that another person was culpable for the touching of ■■■ ■■■ *i.e.* a theory that one of his friends ■■■ was the perpetrator; (2) that ■■■ fabricated the allegations against him to take revenge for various reasons; (3) that his seven years of service as a DS employee (citing various operational accomplishments) are important and should have carried greater weight; and (4) that he has had a record of being "cooperative."<sup>13</sup>

#### **THE DEPARTMENT**

In the Department's Response to grievant's Supplemental Submission, it notes that grievant accepts full responsibility for Charges 2, 3, and 5 and does not contest the corresponding specifications. Therefore the only remaining issues on appeal are whether Charge 1 can be sustained and whether a ten-day suspension without pay is reasonable based on the sustained charges and specifications. The Department maintains that the answer to both is "yes."

*Liability on Charge 1:* The Department cites to the following record evidence in support of what it claims occurred. On May 31, 2012 ■■■ provided a written account of relevant events at the Marine House toga party. We summarize her account in detail, because the differences in her story and grievant's story form a pivotal factual dispute.

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<sup>13</sup> By this term, he did not mean to say that he had been cooperative with the DS investigators. Rather, grievant claimed to have a "[r]ecord of cooperation," *i.e.*, being "able to work well with other employees and departments," as well as having a "good understanding of Department regulations and policies . . . implement[ing] them in a balanced method." This is what he wrote as part of his original Grievance Supplemental Submission of March 28, 2014, included in his Appeal Submission to this Board.

She and grievant both were present at the party. She thought grievant must have consumed alcohol or was in a good mood, because he hugged her while she was on the phone telling her son she would be home later. He had not hugged her previously. There were about 10 people present; grievant and [REDACTED] were attending without their spouses.

According to [REDACTED] within an hour of her arrival, a friend of [REDACTED] came outside the house to where [REDACTED] was located and whispered that she had seen grievant and [REDACTED] kissing inside the house. [REDACTED] went back inside and located them, sitting in the stairwell in near darkness. Grievant had his arm around [REDACTED] and she had one leg on top of his. [REDACTED] to leave, and [REDACTED] used her foot to pry their legs apart, saying “I’m not leaving without you.” After they stood up, one of grievant’s friends arrived. This annoyed [REDACTED] as she was trying to get [REDACTED] out of the dark hallway and into more light. [REDACTED] stated that grievant called out for a “group hug” and reached around the three of them. In a written Declaration of May 30, 2012, [REDACTED] reported the following:

I realized that [grievant’s] hand was squeezing my bottom and I was kind of looking around and saw that his other hand was on [REDACTED] bottom. I confirmed to see if that really was [grievant’s] hand inappropriately touching me. After I felt him squeeze me, I said, ‘Okay, we need to go’ and I broke up the group hug. I was the last person to leave the stairway/hallway to make sure everyone left. Everyone walked back outside, and I went back to the table. My boss [the RSO] said he walked [REDACTED] and grievant] to get a taxi. I felt violated and sickened. I was in shock after seeing inappropriate behavior between two people who are married to other people who also work within the [REDACTED] I wanted to help by stopping a situation between two people and ended up feeling violated and uncomfortable around [grievant] since he works in my same office.<sup>14</sup>

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<sup>14</sup> A copy of this Declaration is included in the record as Exhibit A, attached to the agency’s Response.

On June 4, 2012, [REDACTED] was interviewed by DS agents, and her recollections are in a Memorandum of Interview (MOI). The MOI is in the record as Exhibit B, attached to the agency's Response. In part, she added therein, the following details:

A male friend of SUBJECT'S appeared (name unknown). SUBJECT then suggested everyone participate in a group hug. During the hug, SUBJECT squeezed the middle portion of [REDACTED] posterior. She stated it happened distinctly with significant force and at least two squeezes. Subject was on her right and his friend on her left, and she is 100% sure it was the SUBJECT that squeezed her. The hug itself was fairly short in duration and was not accidental. [REDACTED] was immediately offended and angered by the squeeze, and did not believe she had done anything to suggest it and felt it was not appropriate. SUBJECT was visibly intoxicated.

Nearly two years later, when asked by a member of the Department's grievance staff how certain she was that the hand was grievant's, [REDACTED] claimed to be certain by stating, "During the group hug I turned to see who's [sic] arm lead [sic] to the hand who [sic] was on my posterior, and was surprised that it was [grievant's]. I immediately pulled away."

During the grievance process, the Department discerned a direct conflict between the factual accounts of grievant and [REDACTED]. In contrast to the specific factual assertions of [REDACTED] grievant strongly denied having squeezed [REDACTED] rear. He asserted that it was his friend who called for the group hug<sup>15</sup>, and that contrary to [REDACTED] recollection, [REDACTED] was on his right side (as opposed to the left as [REDACTED] states). He further claimed that he merely had put his arms over the shoulders of the two women.

The record shows that the official who denied the grievance at the agency level, detailed in her decision dated December 3, 2014 her analysis of the facts under the analytical model prescribed in *Hillen v. Dep't of the Army*, 35 M.S.P.R. 453 (1987). She

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<sup>15</sup> Grievant referred to him as a non-government friend and later as an acquaintance.

ultimately drew the factual inferences in favor of the version of events offered by [REDACTED]. Accordingly, she found grievant not to be credible.<sup>16</sup>

In *Hillen*, the Merit Systems Protection Board enumerated certain fundamental factors that should be used as a structure for weighing credibility. The Merit Systems Protection Board held that a sufficiently full and reliable credibility determination can be made when an administrative judge considers and weighs several fundamental elements when there is differing testimony concerning the same factual issue: (1) the witness's opportunity and capacity to observe the event or act; (2) the witness's character; (3) any prior inconsistent statement of that witness; (4) bias or lack thereof; (5) contradiction by or consistency with other evidence; (6) the inherent improbability that the event occurred as the witness claims; (7) demeanor of the witness during testimony. *Id.* at 458-462 (1987).

In briefing this case to the Board, the Department presented its arguments as to why this Board also should credit the version of events offered by [REDACTED]. In crafting its arguments, the Department sets forth what it urges the Board to conclude as to the credibility of [REDACTED]. The Department tracks the *Hillen* analysis used in the original adjudication of the grievance.

As summarized below, the Department urges the Board also to weigh the competing factual accounts against the *Hillen* factors, contending that the Board will reach the same conclusions that the Department found to be convincing.<sup>17</sup> Because this credibility issue is so central to the case, we pause to summarize how the Department parsed the facts.

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<sup>16</sup> That letter is in the record as Attachment F to grievant's Appeal Submission.

<sup>17</sup> The Department's *Hillen* analysis is found on pages 10-16 of the agency's Response. The quotations in text above are found on those pages.

1. Opportunity and Capacity to Observe.

The Department contends that grievant and ██████ had an equal temporal vantage point at the time of the improper touching (arms over shoulders versus posterior grabbing). However, the agency argues that ██████ ultimately had the greater capacity to observe and remember the overall event. This is because she acknowledged that she had consumed only half of a beer. In contrast, grievant admitted that he had consumed three to four rum and coke drinks during the party, by the time of the incident. Yet, he claimed not to be a “big drinker.” The Department infers that it was likely that grievant’s “consumption significantly impaired his judgment . . . .”<sup>18</sup> ██████ states the grievant was “visibly intoxicated” at the time of the incident, and that the RSO “who made it a point to walk” grievant and ██████ “out to separate taxis because [they] were intoxicated.” The Department regards these details as corroboration of ██████ basic version of the event.

2. The use of character evidence for impeachment purposes, established by prior misconduct.

Grievant is charged with two specifications of lack of candor, and in his Supplemental Submission he stated “he took full responsibility” for the charge and specifications. Therefore, in the agency’s view, grievant’s prior lack of candor (*i.e.* denying the nature of his relationship with ██████ and denying having contact with her after March 12, 2012) is appropriate for consideration in determining how much weight should be given to his version of events.

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<sup>18</sup> Response at 10.

### 3. Prior Inconsistent Statement.

Neither grievant nor ██████ made any statements that conflicted with their own, earlier recollections as to the identity of the person who inappropriately pinched ██████. Therefore, the Department suggests that this factor is neutral.

### 4. Bias.

Bias, if it exists, is a significant factor in assessing credibility, because circumstances and relationships can affect the impartiality of a witness, who might then shade his or her testimony for or against another. Self-serving testimony is one aspect of bias and is considered when assessing the probative weight of evidence. The Department argues that grievant was biased because he had an interest in the DS/OCR investigations into his conduct as ARSO in ██████. He likewise had an interest in the HR/G determinations on potential discipline.

The Department suggests that ██████ recollection of events is credible, in part because grievant initially conceded that she had no reason to fabricate the group hug perpetrator, and he did not believe she would do so. The Department also considered grievant's conjecture, raised for the first time on appeal, that ██████ may have fabricated her story against him. Grievant pointed out that ██████ had made no mention of the group hug to him, until months later, and then only because grievant was upset that she was gossiping about him.

Ultimately, the Department contends that ██████ was not biased, based on several elements. One, ██████ stated that she had wanted to put the incident behind her and did not report it until after grievant's wife learned of his relationship with ██████ and after ██████ husband reported an incident that precipitated an investigation by an ARSO from

the Embassy. Two, ██████ reported her experience to the new EEO counselor and explained that she had not done so sooner because she “felt uncomfortable mentioning this to any of the men here in the office and wasn’t sure who to speak to about this violation”<sup>19</sup> In addition, the Department highlights how ██████ statements were perceived by others. For example, ██████ stated to the agency that she believed ██████ account. Moreover, a female Locally Employed Staff member (LES) in the RSO office stated that on the night of the toga party, ██████ told her that grievant had grabbed her and that ██████ was very angry about it. Altogether, the Department argues that these details concerning ██████ account do not support grievant’s supposition that ██████ never really believed he had touched her and grievant’s theory that she made up her story for unidentified, ulterior reasons.

##### 5. Contradiction by or Consistency with Other Evidence.

The Department notes that ██████ story is somewhat inconsistent with the statement of one other witness, but that the inconsistency is not material. ██████ had asserted that at some point during the party, the female LES investigator told her she had seen grievant and ██████ kissing. The LES employee (██████) was interviewed by DS. The memorandum of her interview in this matter indicates that she denied seeing the two kissing.<sup>20</sup> In the Department’s view, this inconsistency is not determinative. Taken at face value, as the Department argues, she may only have mistakenly informed ██████ that she had seen it.<sup>21</sup> In her DS interview, the LES employee did not deny reporting to ██████ that something suspicious was going on. She told the DS investigators several details

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<sup>19</sup> Response, Exhibit A at 3. Also in her Declaration, ██████ noted that the EEO Counselor was appointed to serve in that capacity only one week before she consulted him. She implies that there was no EEO officer at post before that time, although the record does not elucidate such facts.

<sup>20</sup> A copy of her MOI is in the record as Attachment J to the agency’s Response.

<sup>21</sup> Response at 15.

consistent with grievant and ██████ having an illicit interlude. For example, she told the investigators that she had seen grievant and ██████ “having shots of liquor and getting ‘cozy,’” that she ‘felt they were inappropriately close,” and that the two of them went off somewhere together for “45 minutes to an hour” and were not seen at the toga party during that period.

#### 6. Inherent Improbability.

This factor focuses on whether it is inherently unlikely that the event occurred as described by the accuser. Grievant claims it would not have made sense for him to grope ██████ as he “did not want her to think anything inappropriate was taking place,” and because he was aware she had arrived to “oversee” ██████ and him. Nonetheless, the Department concluded that grievant was not acting logically on that night. ██████ recalled that she had to pry ██████ leg off of grievant’s leg. As to this factor, the agency argues:

These are not the logical acts of an individual who was attempting to conceal a romantic relationship with ██████ [Grievant’s] conduct in this regard, considered in tandem with his admissions regarding the amount of alcohol he consumed prior to the incident and the characterization of [grievant] on the night in question by ██████ and RSO [█████] as having been intoxicated, significantly diminishes the strength of any argument that it was logically improbable that [grievant] would have touched ██████. ██████ in the manner described in the specification of misconduct.<sup>22</sup>

Grievant’s lack of candor and repeated acts of taking a cell phone into the CAA were in direct conflict with his duties as the ARSO. In the Department’s view, his lack of candor has potentially impaired his ability to carry out his duties as a federal law enforcement officer.

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<sup>22</sup> Response at 16.

## 7. Demeanor.

The Department notes that since there is no hearing in this appeal and, thus, no live testimony, this particular factor is inapplicable.

Overall, the Department urges this Board to conclude that, in light of the *Hillen* factors, ██████ was more credible than grievant and that grievant had committed the acts that are the basis for Charge 1.

*Severity of the Penalty:* The Department argues that the 10-day suspension is justified for the following reasons, offered in response to grievant's arguments.

First, as to the deciding official's failure to reduce the proposed penalty after dismissing the charge of "poor judgment," the agency emphasizes that grievant has cited no law or regulation requiring such a result. There is no law, regulation, or Precept that compels the agency to reduce a proposed penalty based upon the lowered number of the charges.

Second, the Department argues that the grievant's list of allegedly more appropriate comparator cases should be rejected, for a variety of reasons. For example, some of the cases are factually distinguishable because the officer in question was not a DS agent (recalling that DS agents are held to a higher standard of conduct than other Foreign Service Officers). There is a broader reason that explains why this group of cases does not reflect a meritorious attack on the agency's comparator cases analysis. The agency cites a previous decision of the Board, in which the Board stated, "Whether or not offenses are alike will be based on the similarity of the underlying conduct rather than how the charge is worded." FSGB No. 2005-042 (February 23, 2006) at 14 (emphasis added), quoting, 3 FAM 4374. The underlying conduct in some of grievant's

comparator cases is not similar to his own. For example, he relies on Administrative Case 2011-13199 (where the proposed penalty was a five-day suspension for Failure to Follow Regulations, Improper Personal Conduct, and Lack of Candor). That case did not involve inappropriate touching of a subordinate employee, misuse of a government cell phone, the introduction of a cell phone into a controlled access environment on multiple occasions, nor did it involve curtailment of the offender. The same kinds of distinctions are seen in other cases he cites, *i.e.* Administrative Case 2011-13282. Furthermore, in that case, the grievant was not a DS agent. The Department emphasizes that in Administrative Case 2011-13199, the charge was not sustained, and the Department decided not to impose any discipline at all – giving absolutely no explanation for its decision. Obviously, that case is not instructive and provides no proof that the Department’s choice of comparator cases was mistaken or deficient.

Third, the Department responded to grievant’s claim that the deciding official did not consider certain mitigating factors that he believes were important. The culpability of others is one of the mitigating factors under a *Douglas* analysis. As to the potential culpability of grievant’s friend as the person who groped [REDACTED] and as to [REDACTED] alleged fabrication of her story, the deciding official considered these possibilities and, having performed an explicit credibility assessment using the *Hillen* factors, drew inferences against grievant’s story. As to grievant’s several years of service and accomplishments, the deciding official acknowledged that his “work performance has been rated as satisfactory or better . . . .” Nonetheless, this was weighed against other evidence that his professional conduct was unacceptable. Thus, his positive professional record was not ignored, but instead, viewed in the context of both the good and the bad.

As to grievant's record of being cooperative, the deciding official explicitly acknowledged that grievant did not contest three charges of misconduct and that he apologized for his behavior. Thus, these various mitigating factors were not ignored.

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

In grievances concerning disciplinary actions, the agency has the burden of establishing by a preponderance of the evidence that grievant committed the acts charged, that a nexus exists between the acts charged and the efficiency of the service, and that the penalty is proportionate to the offenses. 22 C.F. R. 905.2 a. We set forth our findings and conclusions as to the merits of the only charge that Grievant is still challenging, as well as the merits of the penalty for all of the misconduct. We find that the Department has met its burden of proof on Charge 1 and that the decision to suspend Grievant for ten days was reasonable and not the product of an abuse of discretion.

##### *Liability on Charge 1: Improper Personal Conduct.*

The Board finds that the Department has presented preponderant evidence that during the group hug, grievant pinched the buttocks of [REDACTED] an employee he supervised. Ultimately, we are persuaded that the agency decided this issue on the basis of a credibility assessment and that the agency properly applied the appropriate *Hillen* factors for making such assessments. We find that the agency's parsing of the facts in denying the grievance was sensible and based on logical inferences. We have reviewed the facts and draw the same inferences articulated by the Department. In addition, the following particular considerations reinforce our view that the agency's weighing of the credibility factors was correct and not an abuse of the agency's fact-finding role.

The factual dispute herein was a classic “he said, she said” question. The two participants in the incident had diametrically different accounts. The basis for deeming grievant to be less credible makes sense. One important element, certainly, was the contributing factor of the consumption of alcohol. Grievant admits that he had drunk “three to four drinks” (which he described as “rum and coke”).<sup>23</sup> [REDACTED] admits that she had “half of a beer” before the incident.<sup>24</sup> Moreover, the RSO present at the party recalls in pertinent part, “I know [grievant] and [REDACTED] were intoxicated. I made it a point to walk them out to separate taxis because they were intoxicated.”<sup>25</sup>

Furthermore, we take into account the fact that grievant was untruthful to fellow DS officers, who investigated the allegations regarding grievant’s misconduct. He admitted the instances of “lack of candor.” However, as far as the Board can discern from the record, grievant was not telling the truth to the RSO when he stated that he and [REDACTED] were just flirting and not in a relationship as of March 12, 2012. In an April 5, 2012 interview grievant was asked if he and [REDACTED] were in an intimate relationship and grievant untruthfully replied that they had only consensually kissed. On that same date, grievant denied any contact with [REDACTED] after March 12, 2012, when he had been instructed to stop all contact. Nevertheless, on April 17, 2012, he admitted he had that he had e-mailed [REDACTED] four times in March, using two private e-mail accounts, and had met with her in person twice at work and outside of work to exchange information about the investigation. In his June 6, 2012 interview with DS, grievant admitted that he and [REDACTED]

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<sup>23</sup> He made this admission in his August 9, 2012 Declaration (Exhibit D attached to the Department’s Response).

<sup>24</sup> She made this admission in her May 31, 2012 Declaration (Exhibit A attached to the Department’s Response).

<sup>25</sup> These details were part of his July 10, 2012 Declaration (Exhibit G attached to the Department’s Response).

were in a sexual relationship and that he had not been truthful when he implied otherwise on April 5, 2012.<sup>26</sup>

Another important and convincing factor is that a third person, an LES employee who was present that night, described [REDACTED] as being very upset because she said her supervisor had pinched her rear. This was specific corroboration coming from a person who had no apparent motive to be biased or to fabricate her recollections.

As a law enforcement officer, grievant was well aware that he is held to the highest standard of conduct and that the path he chose instead, in attempts to avoid the consequences of his actions, *i.e.*, making untruthful statements in the course of the investigation, contradicted those standards. These facts are relevant, his later retractions of certain false statements notwithstanding.

An important matter that the Department must establish is that there is a nexus between grievant's misconduct and the efficiency of the Foreign Service. Although it should be self-evident from the facts of this case, we point out that the efficiency of the Service was impaired in several respects. Among them are the facts of an untoward impact on a subordinate employee, the need to curtail grievant from post, and the damage to his usefulness as a law enforcement officer. His credibility as a witness would be in doubt because of his proven lack of candor.

For all of the reasons set forth above, the Board concludes that grievant did commit the offense as charged and that the agency has met its burden of proof.

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<sup>26</sup> Quotations of grievant's various admissions appear in the January 22, 2014 decision of the DAS, Attachment C to grievant's Appeal Submission, pages 5-7.

*Severity of the Penalty.*

As grievant does not contest Charges 2, 3 and 5, we do not address them, other than as they apply to the reasonableness of the penalty. While contesting Charge 1 (Improper Personal Conduct) and maintaining that because Charge 4, carrying two specifications was dismissed, grievant argues that his penalty should be reduced to a five day suspension. In our view, he has provided no persuasive evidence to support his position. We sustain Charge 1 on the merits. Therefore, the question for this Board is whether the 10-day suspension remains a reasonable penalty when imposed for the four charges that were sustained.

We conclude that the 10-day suspension was a reasonable penalty as originally imposed. We draw this conclusion based upon our analysis of grievant's two fundamental challenges. We address each issue area as follows.

Failure to Lower Original Penalty After Dismissal of Charge 4. Grievant has never articulated why the penalty automatically should have been lower than a 10-day suspension merely because the DAS elected not to sustain one of the original charges. The determination of a penalty is not dependent upon totaling up the number of specifications or charges; nor is it dependent upon any kind of numerical formula. The length of a suspension is not to be ratcheted upward or downward, depending upon the numerosity of allegations. What counts is that the 10-day suspension was not unreasonable under the circumstances, but rather a considered decision that meets the Board's legal standard for affirmance.

The Board's legal standard for reviewing the Agency's choice of penalty in a disciplinary case is well established. The Board's role is not to interpose its own

preference for a penalty, based on whether the Board would have made the same decision rendered by the agency. Instead, “our role is to determine whether the suspension imposed is a reasonable one; not whether it is the best penalty.” FSGB No. 2006-037 at 16 (September 28, 2007). As we have emphasized previously, we defer 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.” FSGB No. 2002-052 (July 18, 2003).

It is clear that the lack of any reduction of the proposed, 10-day suspension was not inadvertent. The DAS acknowledged specifically her choice to impose that penalty – despite the removal of one of the charges. In her decision letter of January 22, 2014, she wrote in pertinent part:

Although one charge was not sustained, the gravity and extent of your misconduct remains, particularly given the nature of the position you occupied as well as the conduct underlying the substantiated charges. Based on all these considerations, it is my decision to sustain the proposed suspension of ten (10) calendar days without pay. I believe this discipline is consistent with, and appropriate to, the circumstances of this case.

Appeal Submission, Attachment C at 11.

The agency has correctly argued that there is no structural reason to deem the penalty unreasonable simply because one of the many charges was not sustained by the highest official to rule on the grievance. As this Board previously has stated, “ ‘The most significant *Douglas* Factor is the nature and seriousness of the misconduct and its relation to the employee’s duties, position and responsibilities, including whether the offense was intentional or was frequently repeated.’ ” FSGB No. 2010-038 (November 23, 2011) at 20, quoting, *Luciano v. Department of Treasury*, 88 M.S.P.R. 335, 343 (2001).

On the facts of the present case, we are convinced that pinching the buttocks of an employee supervised by the officer is very serious misconduct. While the other charges

may appear to be less serious (when viewed alone), most of them were nonetheless related to the same personal misconduct. Thus, we find nothing unreasonable in the deciding official's conclusion that the suspension herein was justified even with the removal of the charged based on "poor judgment."

In his Rebuttal, grievant offered nothing to refute the quoted language above. For all of these reasons, we find no merit in this particular challenge to the penalty. Below, we address why the suspension comports with our standard for affirmance, despite grievant's other arguments.

Mis-application of the *Douglas* Factors (Dissimilar and Omitted Comparator Cases). Grievant has challenged the agency's application of the Douglas factors, focusing closely on the principle of imposing discipline in accord with discipline imposed in "like" cases. We discern two aspects of his challenge: (1) claiming that the comparator cases used by the agency are substantially distinguishable from the facts herein; and (2) that the Department failed to rely upon certain other disciplinary cases that grievant asserts are similar to his but which resulted in lower penalties. We discuss these challenges separately below and ultimately reject both of them.

Of the various administrative decisions that the agency used as comparator cases, grievant identified only one that was allegedly an inappropriate (*i.e.* dissimilar) comparator. That case was Administrative Case No. 2009-440 (an administrative grievance not appealed to the Board).<sup>27</sup>

The agency has made it clear that the various cases it reviewed in comparison to the present case were used purely for "context" and that none was interpreted as a mirror

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<sup>27</sup> There is no need for us to discuss the remaining comparator cases for which grievant offers no defined challenge.

image of the present factual scenario or even a close analogy. Nonetheless, grievant argues that they actually involved lower penalties and should have persuaded the agency to impose a suspension lower than 10 days. Having considered the facts of each case, we conclude that the agency properly used them for contextual value, but that they all contained one or more key elements explaining why lower penalties were assessed. We agree with the agency's rationale for not using them to justify a lower penalty, and we recapitulate that rationale below.

In Administrative Case No. 2011-13199, the non-DS employee was suspended for 5 days for failure to follow regulations when he shipped firearms in his household effects, and then lacked candor in telling DS that his supervisor knew about the shipment and his personal weapons were allowed in the country involved, as well as his involvement in a road rage incident. That employee, unlike grievant, was not curtailed from post.

In Administrative Case No. 2011-13282, the employee was suspended for three days for lack of candor about his relationship with a local national employee, and two insulting e-mails he sent that employee after a break in the relationship. Although involuntarily curtailed, the employee was not a DS agent and the Department included this as one of its comparator cases.

Administrative Case No. 2011-13317 involved a seven-day suspension for engaging in multiple extramarital affairs, making the employee vulnerable to blackmail, misuse of the visa referral system, poor judgment in requesting the local government to run a license plate check, lack of candor for lying about the number of his affairs, and for not reporting his sexual relations with foreign nationals in his security clearance investigations. Though involuntarily curtailed, the employee was not a DS agent.

Grievant cited several FSGB cases as comparators that the agency should have used to assess his penalty. Those Board decisions are: FSGB No. 2005-042, FSGB No. 2008-054, and FSGB No. 2-12-015. We examine them as follows and conclude that they are not relevant comparator cases.

In FSGB No. 2005-042 (February 23, 2006), the particular errant behavior was that the officer left three classified documents in a taxi cab. The Board sustained her security violation and two day suspension.

In FSGB No. 2008-054 (February 2, 2011), an officer left classified documents on an aircraft after landing in [REDACTED]. The Board remanded the case to the Department for reconsideration of the penalty.

In FSGB No. 2012-015 (March 5, 2013), the grievant was a DS agent who had been drinking at a bar and was arrested in a confrontation with others outside the bar. All charges against the grievant were dismissed, and the Board remanded the case, as it determined that there were numerous flaws in the Department's analysis of an appropriate penalty.

3 FAM 4374 provides:

The disciplinary action taken should be consistent with the precept of like penalties for similar offenses with mitigating or aggravating circumstances taken into consideration. Whether or not offenses are alike will be based on the similarity of the underlying conduct rather than how the charge is worded. The action taken should be fair and equitable; and if a penalty is warranted, it should be no more severe than sound judgment indicates is required to correct the situation and maintain discipline.

We find that grievant's conduct was not similar to the personal conduct of the officers in the cases he cites. In contravention of the above-quoted distinction in the FAM, he bases his argument on how the charges were worded. As a supervisor, grievant

is held to a higher standard, and as a DS agent, he is held to the highest standards, with no appearance of wrongdoing. In consequence of his actions, he was involuntarily curtailed from post, causing disruption, added work for those required to assume his duties, and was subjected to the temporary loss of his security clearance and a two-year period of probation.

Failure to Balance Mitigating Factors. In his Supplemental Submission on appeal, grievant complains about how the deciding official weighed the aggravating and mitigating factors. He wrote:

I maintain that the deciding official focused exclusively on the aggravating factors without balanced consideration of several mitigating factors. DAS [B] goes into an extensive and detailed discussion of several aggravating factors in her decision while ignoring and failing to comment on several mitigating factors I outlined in my written response.

Supplemental Submission at 5.

While grievant does not identify specifically which mitigating factors were allegedly “ignored,” we pause to identify the mitigating factors that were included in his response to the proposal of discipline. We compare them to the actual treatment of those factors in the deciding official’s analysis.

Grievant’s response to the proposal of discipline was his letter of December 8, 2013. It is in the appeal record as Attachment B of grievant’s Appeal Submission. In it, he enumerates what he describes as ten “mitigating factors, and we summarize them below.

One, as to history of past conduct problems, he essentially asserted, “My only previous conduct issue was an improper record check in the Department’s Consular Consolidated Database in 2007, for which I received an official warning.”

Two, as to intent, he argued, "I had no intention of deliberately disobeying Department procedures and regulations. I was trying to control the situation and not get out of hand and was not able to do so appropriately."

Three, as to "enticement or provocation," he noted, "Not Applicable."

Four, he noted his employment position as "Special Agent with Diplomatic Security." He did not elaborate as to why this was "mitigating" of the kind of misconduct charged in this case.

Five, with regard to "culpability of others," he accused the LES of "fabricating allegations in order to seek revenge upon me for what she feels is a greater disservice by the US Consulate in [REDACTED] and for the EPR which she received, both of which were not to her satisfaction."

Six, he cited the fact that he had been a DS agent for 7 years and that he was 37 years of age. He described his previous post locations.

Seven, as to the quality of his work history, he claimed,

My work history has been of excellent quality. I was promoted to the grade of FS-3 on my first look due to the important work being accomplished in my assignments in [REDACTED] and [REDACTED]. Further, I feel I positively contributed to every assignment I have held, including TDY assignments to the Secretary's Detail and other throughout the world and here at the Washington Field Office.

Eight, as to his past contributions and achievements, he similarly extolled his exploits at two Embassies, not only as a DS agent but previously as a Marine Security Guard.

Nine, describing his "record of cooperation," grievant noted that he is able to work well with other employees and departments, adding, I have received feedback from those that appreciate my management style and work, particularly overseas."

Ten, under the category of “other mitigating or extenuating circumstances,” he argued,

Department regulations mandate that those employees suspended over five days will receive a letter of suspension that is placed in the employee’s file until the employee is next promoted. I maintain that my work should not be overshadowed by my temporary lapse in judgment. The ten-day suspension is particularly unfair given that two of the charges are based on distortions and mischaracterizations of the facts.

The decision letter of the DAS reveals that she did not fail to acknowledge those mitigating factors that were pertinent to the charges. For example, she gave him credit for being contrite, not intentionally violating standards of conduct. She wrote:

In both your oral and written replies, you expressed regret for your actions and the entirety of the situation, and for allowing yourself to get into the situation that gave rise to this proposal notice. You stated that you had ‘no intention of deliberately disobeying Department procedures or regulations, and that ‘your lack of judgment stemmed mostly from personal issues that got the best of you in a stressful environment, both personal and professional, and which you quickly allowed to get out of control.’ While I believe that you are remorseful, I do not believe that your current expressions of remorse serve to negate the seriousness of the misconduct noted by these charges.

Decision Letter at 10.

The DAS did not forget grievant’s professional history as a DS agent. Quite to the contrary, she focused on his role as a law enforcement officer in noting that his misconduct not only derailed his own service in DS, but caused his curtailment, and undermined his ability to conduct investigations. Ironically, his work history only highlighted why his misconduct was central to his value as an employee.

Likewise, we find that the DAS did consider the issue of whether grievant got along well with other employees, insofar as she found that his curtailment cable

highlighted his pattern of behavior as “damaging morale within Consulate General

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We are constrained to say that much of what grievant describes as “mitigating” does not actually serve to lessen the significance of what he did, nor does he explain why it should. For example, there is nothing “mitigating” about grievant’s age or his status as a DS agent. The same is true with respect to performing well in his discrete job duties at other posts and being “cooperative” with unnamed, other employees. Those details are irrelevant to the real issue.

Ultimately, an officer cannot credibly argue that a subject is “mitigating” of his misconduct simply because he labels the topic as “mitigating.” It is not true that a factual scenario is “mitigating” if, as here, it dissolves into quibbling about the facts of the accusation. This is what grievant did in accusing the LES of fabricating allegations against him; grievant does not provide any legal support for the concept that a Deciding Official necessarily must “comment on” each and every mitigating factor a grievant chooses to list. There is no such requirement. We have noted previously that “not all factors need be discussed in a given grievance, rather only those significant to the particular case.” FSGB No. 2002-029 (December 2, 2002) at 13 (citing *Kumpferman v. Navy*, 785 F.2d 286 (Fed. Cir. 1986)). Rather, what is important is that the Deciding Official discussed the relevant mitigating factors, even if she did not write in equal depth about all of them. We find that the deciding official did perform an appropriate and adequate balancing of the aggravating and mitigating factors and that she identified why certain aggravating factors should be accorded greater weight. Though one charge was not sustained, as the DAS explained, “The gravity and extent of your conduct remains,

particularly given the nature of [your position] as well as the conduct underlying the substantiated charges.”

The Board notes that the deciding official used a highly important principle in her consideration of the appropriate penalty to be levied here. In her January 22, 2014 decision, she stated:

As a law enforcement officer, you are held to the highest standards of conduct. Your actions must be beyond reproach and without the appearance of wrongdoing. Your behavior does not reflect the good judgment and reliability to perform at the level of trust and confidence expected of a law enforcement official. Your duties require you to investigate federal crimes and to testify in federal criminal trials where your testimony can be the key evidence against a defendant. Your actions have undermined your credibility and therefore your ability to conduct investigations and pursue those investigations to their completion in federal court. As a result, your effectiveness as a law enforcement officer has been significantly compromised.

Without referring to the case explicitly, it is clear that the deciding official alluded to the Supreme Court decision in *Giglio v. United States*, 405 U.S. 150, 154 (1972), requiring a prosecutor in a criminal case to reveal to the defendant any information that may impeach the credibility of any witness. Here, the deciding official was mindful of the decreased value of this DS agent, because of the future obligation to reveal his misconduct in criminal cases in which his testimony would be needed. This is a liability to the agency. Grievant did not address this in his appeal. We agree with the Department that this factor was a legitimate consideration in determination of grievant’s penalty. In May 2011 grievant completed the DS Law Enforcement Ethics Review Training, which is “designed to expose agents to the federal laws and regulations required to fulfill their ethical obligations and avoid government sanctions.” One of the competencies addressed in the course was “Integrity/Honesty.” Grievant knew that candor was a very important

element in his position as ARSO. 3 FAM 4114 requires a high degree of integrity, reliability and prudence during and after working hours. Grievant chose to ignore his training and common sense. His lack of candor resulted in a loss of trust for and serves as a nexus between his misconduct and the efficiency of the service.

For all of the reasons set forth herein, we find that the Department has carried its burden of proof by a preponderance of the evidence and that the 10-day suspension is not unreasonable under all the facts and circumstances of this case.

## **V. DECISION**

The grievance appeal is denied.

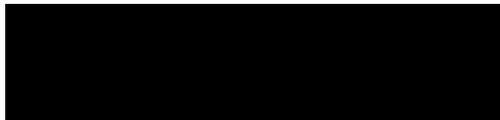
### **For the Foreign Service Grievance Board:**



Cheryl M. Long  
Presiding Member



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