

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

  
Grievant

And

Department of State

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Record of Proceedings  
FSGB Case No. 2015-015

November 3, 2016

**DECISION**

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Barbara C. Cummings

Nancy M. Serpa

Special Assistant

Andrew D. Large

Representative for the Grievant:

*Pro se*

Representative for the Department:

Akia F. Roane  
Attorney Adviser, HR/G

Employee Exclusive Representative:

Zlatana Badrich  
American Foreign Service Association

## OVERVIEW

**Held** – The Department’s decision on remand to reaffirm the seven-day suspension previously imposed upon grievant is upheld as reasonable and properly considered.

**Summary** – In an Interim Decision dated May 9, 2016, we sustained most of the charges against grievant, and dismissed two relatively minor ones. Accordingly, we remanded the case to the Department for consideration whether the previously imposed penalty should be reduced.

Meanwhile, in May 2015, unbeknownst to the Board, grievant requested and the Department agreed to suspend Interim Relief (IR) in this case, apparently so that grievant could serve his suspension prior to taking a new assignment. Because IR had been suspended, a Discipline Letter was placed in grievant’s Official Performance File and reviewed by the 2015 Selection Board, which low-ranked him and referred his file to the 2015 Performance Standards Board (PSB). The PSB recommended grievant’s separation from the Foreign Service for failure to meet the standards of his class.

On remand, in response to the Board’s Interim Decision, the Department decided to retain the seven-day suspension, and explained its decision to this Board. Grievant strongly opposed the Department’s action, arguing that it had resulted in constructive separation for cause because the Letter of Discipline had been largely responsible for his low-ranking and the PSB’s recommendation for his selection out.

The Board, in this Final Decision, sustained the Department’s retention of the seven-day suspension in this appeal, agreeing that the majority of charges against the grievant, and those constituting the most egregious conduct, had been sustained. The Board found unconvincing grievant’s attempts to re-argue points already dismissed by this Board. We also found no procedural error in the Selection Board’s and the Performance Standards Board’s consideration of the Letter of Discipline prior to the Board decision. Moreover, because the most serious charges were sustained and there were several longstanding weaknesses in grievant’s file unrelated to his conduct in this case, noted by both the Selection Board and the Performance Standards Board, we found his contention that the Discipline Letter caused his separation from the Service unavailing.

## DECISION

### I. THE ISSUE

On May 9, 2016, the Board issued an Interim Decision in this discipline case, in which we dismissed one charge of misconduct as well as one specification of another charge.<sup>1</sup> We sustained four specifications of Improper Personal Conduct, involving charges of inappropriate touching or hugging of female colleagues, as well as an admitted extramarital affair with a foreign national. We also upheld a charge of Lack of Candor (one specification) by grievant during an investigation, and one charge of Failure to Follow SCI Reporting Requirements, in which grievant, who had an SCI clearance, failed to report his intimate relationship with a foreign national. Since the charges and specifications were not sustained in their entirety, we remanded the decision to the Department for consideration of whether the seven-day penalty previously imposed should be modified.

On July 15, 2016, the agency issued a Report Regarding Penalty in this case, in which it reaffirmed the seven-day suspension in this case, finding that the one charge and one specification dismissed by the Board were minor in comparison to the major charges that were sustained, and that, consequently, no reduction in penalty was justified. Grievant responded to that Report on August 12, 2016, claiming that the agency's proposed penalty in this case was overly punitive, and that it had already caused him severe and damaging consequences.<sup>2</sup>

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<sup>1</sup> We dismissed one specification (of five) under the charge of Improper Personal Conduct, in which grievant was charged with inviting a female officer to his home to watch a movie. We also overturned a charge of Inappropriate Comments, in which grievant was charged with making offensive remarks in the office about the Supreme Court's having overturned the Defense of Marriage Act.

<sup>2</sup>On August 17, 2016, the agency filed a request for Leave to File a Surreply, to which grievant objected on August 18, 2016. Grievant requested that the agency's surreply contained in the request itself be stricken from the Record of Proceedings (ROP) in this appeal, and the Board hereby orders it removed from the ROP.

Thereafter, upon our further inquiry, the parties advised this Board that, at grievant's request, he had been taken off of Interim Relief (IR) and had served his seven-day suspension in the summer of 2015. Because he was no longer on IR, the Letter of Discipline was placed in his Official Performance File (OPF) on June 23, 2015, and was reviewed by the 2015 Selection Board (SB). At that time, the Letter of Discipline still included the charge and specification ultimately not sustained by the FSGB. Grievant was low ranked by that SB and referred to the Performance Standards Board (PSB) for possible selection out. The 2015 PSB subsequently recommended that he be selected out of the Foreign Service.<sup>3</sup>

## **II. POSITIONS OF THE PARTIES**

### **The Grievant**

The grievant argues that the Department's proposed penalty in this case is overly punitive, and that its consequences have been extremely damaging and outside the bounds of reasonableness. He argues that his referral to a PSB by the 2015 Selection Board, and the PSB's subsequent recommendation for separation from the Foreign Service, were based primarily, if not entirely, on the charges contained in the Letter of Discipline in his OPF. The agency's decision to uphold charges that are, in his view, not sustainable, has resulted in a constructive separation for cause based on misconduct. He argues that the deciding official in his discipline case, who noted that there was a potential for grievant's rehabilitation and that his work performance was satisfactory or better, clearly did not intend that his punishment would result in his separation from the Service.

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<sup>3</sup> These facts were relayed to the Board by the agency in its August 25, 2016 reply to the Board's August 18, 2016 Show Cause Order, which sought clarification as to why the Letter of Discipline had been in grievant's OPF in 2015, when the Board believed he was on IR. The Board's Show Cause Order also extended grievant's IR until December 2016 or until final resolution of this appeal, whichever came first. Given the facts noted above, the Board hereby rescinds the IR portion of that Order as moot.

Moreover, he argues, this Board's dismissal of Charge 4 (Inappropriate Comments) against him after the addition of that charge was the apparent reason the Department added two days to its original five-day suspension makes the agency's failure to implement a reduction of the seven-day suspension both unreasonable and incongruous.

He also argues that the Department's revision of the Douglas Factors Worksheet, and its inclusion therein of several agency-level cases it claims are comparable is unfair because, discovery having been completed in his case, he has no way of verifying that the newly-cited cases are comparable or relevant. Moreover, he contends that his case is more similar to cases cited by the Department which imposed much lighter discipline than he received.

Finally, he argues that the investigation by the Office of Civil Rights (OCR) in which he was implicated began primarily as an examination of the actions of his supervisor, the Chargé d'Affaires at post, while grievant was Acting Deputy Chief of Mission. Grievant claims that the Chargé ultimately received only a Letter of Admonishment for his actions/inappropriate comments, and that the Department has not explained the significant difference in the penalties imposed in these two related cases.

### **The Agency**

The Department, in its Report Regarding Penalty dated July 14, 2016, maintains that a seven-day suspension is still justified and reasonable, even after the Board's dismissal of one specification of one charge and the reversal of another charge. Even with those portions of the charges against grievant not having been sustained by the Board, the agency contends that the remaining charges constitute egregious acts of misconduct: Grievant, a Foreign Service Officer for 20 years, inappropriately touched three women, conducted an extramarital affair with a

member of his domestic staff, was untruthful during an interview with the Regional Security Officer (RSO), and failed to follow SCI Reporting Requirements.

The agency claims that the penalty imposed in this case is consistent with that imposed in similar cases, and that there are, in fact, some comparable cases in which the Department has imposed a higher penalty of 10- and 14-day suspensions. It claims that it took into consideration grievant's lack of a prior discipline record, and his satisfactory service, but also found that grievant, by virtue of his EEO awareness training and experience, knew or should have known that his misconduct could result in disciplinary action.

After careful consideration of the Board's decision, comparable cases, and the Douglas mitigating and aggravating factors, the Department concluded that a seven-day penalty was appropriate and fair, and that no lesser sanction would serve effectively to deter such misconduct in the future.

### **III. DISCUSSION AND FINDINGS**

In grievances concerning discipline, the Department has the burden of establishing that the disciplinary action was justified (22 CFR § 905.2). Our interim decision sustained most of the more serious charges against the grievant, but we remanded the matter to the Department for consideration of whether the previously-imposed penalty should be mitigated in light of the Board's findings. After careful consideration of the Department's Report on Penalty, and grievant's response thereto, the Board finds that the Department has justified a seven-day suspension as reasonable, proportionate to the offenses, and consonant with the penalties imposed for similar offenses in the past.

In his opposition to the Department's decision affirming the seven-day suspension, grievant repeats several arguments about the seriousness of his misconduct that have already

been rejected by this Board. In referring to his extramarital affair as the “limited inappropriate relationship” he had with a household employee, he attempts to minimize that relationship despite the Board’s previous finding to the contrary. In addition, his claim to credit for a mitigating factor inasmuch as the grievant in a comparable case only corrected a lie to investigators well after the end of his interview, “whereas I rectified my misstatement in the course of the interview,” also was rejected by this Board in our interim decision, where we said:

The record reflects that grievant first told investigators that Ms. P-C had arrived at his home uninvited. When he was told that the woman had claimed that grievant had picked her up and brought her to his home, he immediately changed his initial statement. We find it more likely that grievant corrected his recollections of how Ms. P-C arrived at his home only after having been told by investigators that Ms. P-C’s rendition of events differed from his, and that, having been caught in a misrepresentation of the facts, he decided to tell investigators the truth. His defense of having been overly fatigued during the interview strikes us as an illogical excuse for lack of candor.<sup>4</sup>

We find no basis for mitigation at all in the timing of grievant’s having decided to tell the truth to the RSO. In our view, grievant’s lack of candor has been proven by preponderant evidence, and we wonder whether he would have corrected his “misstatement” had he not been faced with a conflicting account from someone else who had direct knowledge of how she arrived at grievant’s home.

We are also unpersuaded that the OCR case against grievant’s supervisor in [REDACTED] who apparently received only an admonishment for his actions, has any relevance to this case. Grievant presents no evidence that his supervisor was charged with anything other than making inappropriate comments, whereas the Department has met the burden of proving that grievant was involved in much more serious misconduct.

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<sup>4</sup> Interim Decision dated May 9, 2016 at 12-13.

Finally, we address grievant's claim that the Letter of Discipline resulted in constructive discharge. The fact that the 2015 SB and PSB had access to and considered the Letter of Discipline was the direct result of grievant's choice to end the IR that he had been granted in order to serve his suspension earlier in 2015, prior to a Board decision on his appeal. Were it not for that decision by grievant, the 2015 SB and PSB would have had no access to the Letter of Discipline at all. It was therefore not a procedural error for the SB and PSB to have considered the letter as it stood at that time.

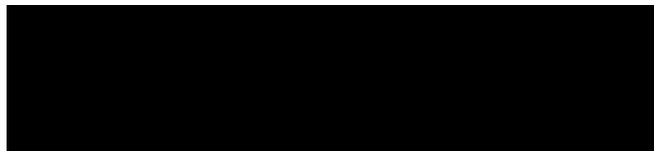
To the extent that the letter included the charge and specification not sustained by the Board, as noted earlier, in the Board's view that charge and specification were minor compared to the charges and specifications that remained. Furthermore, the PSB based its decision to a large extent on long-standing performance weaknesses unrelated to the discipline. We therefore do not believe that even if the PSB had reviewed the corrected Letter of Discipline the outcome would have been different.

We are compelled to agree with the Department that the more serious charges against grievant were sustained by the Board, and we are persuaded by the evidence it provided that the seven-day suspension is reasonable when compared to other similar cases. We find no merit to grievant's claim of constructive discharge.

#### **IV. DECISION**

The seven-day suspension imposed by the Department is upheld as having been properly considered and within the zone of reasonableness.

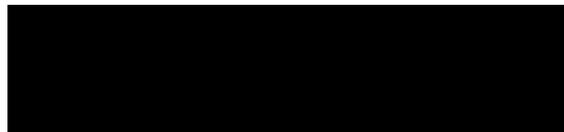
**For the Foreign Service Grievance Board:**



Arthur A. Horowitz  
Presiding Member



Barbara C. Cummings  
Member



Nancy M. Serpa  
Member