

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

and

Department of State

Record of Proceeding

FSGB No. 2015-019

April 28, 2016

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

William Persina

Board Members:

Barbara C. Cummings
Nancy M. Serpa

Special Assistant:

Katherine D. Kaetzer-Hodson

Representative for the Grievant:

Pro se

Representative for the Department:

Dorian Henderson
Grievance Analyst, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD: The Board (Presiding Member Persina dissenting in part) found that the Department failed to meet its burden of proof with respect to the Charge of Misuse of Position and the Charge of Misuse of Official Time. The grievance appeal is sustained.

SUMMARY: While serving as management officer, grievant requested that a subordinate in the Management Section, who was also a personal friend, check on the work being done on a house grievant was constructing privately in the host country. Grievant also asked her subordinate for guidance in fixing a septic system problem in the house. In addition, on the way back to the embassy from an official excursion to look at and measure houses for the mission housing pool with two of her subordinates, grievant stopped for approximately a half hour at the house she was constructing. Grievant showed her house off and assisted one of the employees with measuring the home's dimensions. As a result of findings from an OIG investigation, grievant was charged with Misuse of Position with three specifications and Misuse of Official Time with three specifications. As penalty, the Department suspended grievant for 15 days, and grievant appealed, arguing that she had not misused her position or official time, that the OIG investigation was flawed, and that the penalty was overly harsh. Given the longstanding friendship between grievant and the employee, and the agency's failure to prove that grievant intended to misuse her position, the Board determined that the Department failed to prove the Misuse of Official Position charge based on her requesting assistance from her subordinate with her personal construction project. The agency also failed to sustain its burden on the Misuse of Official Time charge, and the Board found that grievant had a reasonable explanation for the stop with her staff that was within grievant's broad discretion as management officer. The appeal is sustained. The Board's findings in favor of the appellant mean that it did not reach any conclusions about the appropriateness of the proposed penalty.

DECISION

I. THE GRIEVANCE

On February 9, 2015, grievant appealed the Department's December 30, 2014, disciplinary decision suspending her for 15 days based on the charge of Misuse of Position (three specifications) and Misuse of Official Time (three specifications) based on the results of an Office of the Inspector General (OIG) investigation. Grievant claimed that her actions did not constitute Misuse of Position or Misuse of Official Time, and that the Department disregarded the information she provided in response to the Department's August 12, 2014, initial letter proposing suspension, that the OIG investigation lacked "thoroughness and objectivity," and that the penalty imposed was overly harsh. In its agency-level decision, the Department sustained the charges and penalty. Grievant appealed that decision to the Foreign Service Grievance Board (FSGB, Board) on May 29, 2015, and supplemented her submission on August 18, 2015. Grievant requested Interim Relief, the rescission or mitigation of the 15-day suspension, and all other appropriate relief. Interim Relief was granted for one year from the filing date of the grievance. The Record of Proceedings (ROP) was closed on November 9, 2015.

II. BACKGROUND

Grievant, [REDACTED], is a Foreign Service Management Officer at the FS-01 grade, who has been employed with the Department of State (Department, agency) since April 1, 1997. She began a tour as the management officer at U.S. Embassy [REDACTED], on September 4, 2011.

The ROP indicates that the OIG was called to post to investigate allegations of fraud in the awarding of a post travel management contract, and in the creation of a partnership under

which a private party was to construct housing for the embassy to lease. Both allegations were found to be without merit. While at post, the OIG investigator learned of allegations of possible misconduct by grievant and in August 2013 initiated an investigation into grievant's conduct as management officer. During the course of this investigation, the OIG agent conducted two interviews of the Post's Residency Maintenance Supervisor (RMS), who was grievant's subordinate. In those interviews, the RMS stated that he had visited the personal residence that grievant and her husband were constructing two or three times, and that grievant "had invited him to inspect"¹ the construction work. In the first instance, grievant had described a problem with the house's septic system and had asked for his assistance, but he did not have time to address the problem on his initial visit, so he returned approximately a month later with equipment. He investigated the septic problem at that time and showed grievant and her husband how to fix the problem. The RMS stated that grievant had asked him on another occasion to double check the electrical work that had been done on the property by another contractor. The RMS returned to the house a final time at grievant's request to further inspect the electrical system.

Grievant was interviewed by the OIG regarding this matter and stated that her husband was overseeing the construction of their retirement home in [REDACTED]. She confirmed that she had asked the RMS to look at the septic system and inspect the electrical work done by a local contractor.

As a result of the OIG findings, the Department charged grievant with Misuse of Position under 5 CFR § 2635.702, with three specifications: 1) for asking the RMS for advice about the septic system of grievant's personal residence, 2) for allowing the RMS to return to grievant's

¹ Department's Proposal to Suspend, August 12, 2014, ROP page 5.

personal residence to inspect the septic system, and 3) for asking the RMS for advice about the electrical system of grievant's personal residence.²

As part of its investigation the OIG also interviewed the former Post Housing Coordinator. She stated that while she, grievant, and the RMS were on their way back to the embassy from a work-related excursion measuring the dimensions of embassy-leased properties, grievant asked the RMS to stop at her house under construction as they were passing by. While there, grievant used the embassy's laser measurer to measure some dimensions of her property and assisted the Housing Coordinator in taking measurements of the house. Based on this information, the Department charged grievant with Misuse of Official Time under 5 CFR § 2635.705, with three specifications: 1) misuse of her own time, 2) misuse of the time of the RMS, and 3) misuse of the time of the Housing Coordinator.

The Department found that grievant's misconduct was intentional and committed for personal gain. Taking into consideration grievant's rank and supervisory position and the extent of her prior management training that put her on notice that her conduct was unacceptable, and after reviewing comparator cases and any mitigating circumstances, the Department proposed to suspend grievant for 15 days without pay. Grievant responded to the charges in writing and orally. After reviewing the grievant's response, the Deciding Official sustained the proposed 15-day suspension. Grievant filed an agency-level grievance, which the Department denied. She has appealed that decision to this Board.

III. POSITIONS OF THE PARTIES

² During a second interview, the RMS stated that grievant had also called to ask his advice about a problem with the water and foundation of the house. The RMS made two visits to grievant's house regarding that issue. Although these two visits are recited in the background section of the OIG's charge, they are not included in the specifications with which grievant was actually charged.

A. THE AGENCY

The Department argues that the facts underlying the charges against grievant are undisputed. The Department relies on grievant's own admission that she asked the RMS for advice about her personal residence's septic system, allowed him to return to her home to conduct an investigation of the septic system, and asked him for advice on her home's electrical work to support Charge 1 against grievant for Misuse of Position. Similarly, the Department references grievant's admission that she stopped by her personal home when out on an official excursion to measure embassy-leased homes and used embassy property to conduct measurements in her own home. In doing so, grievant not only misused her own personal time but that of the RMS and the former Housing Coordinator.

The Department rejects grievant's challenge to the method and thoroughness of the OIG investigation. To support its argument, the Department cites a Board case in which the Board declined to second-guess OIG investigatory practices,³ and also claims that the presumption of regularity of government actors must extend to the investigation. The Department asserts that grievant has failed to present any evidence to support her claim that the investigation was flawed or fails to support the charges levied against her.

With respect to Charge 1, the Department rejected grievant's claim that her 18-year friendship with the RMS somehow superseded her position as the RMS's supervisor when she asked the RMS for advice on the construction of her private house. Neither grievant's friendship with her subordinate, nor the subordinate's perspective on whether he felt coerced, alter the fact

³ FSGB Case No.1999-063 (December 30, 1999).

that grievant misused her position when she sought personal favors from a subordinate, the seeking of which she knew or should have known was inappropriate.

With respect to Charge 2, the Department rejects grievant's claim that she did not need her home measured and that she stopped at her residence during official work hours to give the Housing Coordinator an additional training opportunity in how to measure potential houses for the embassy housing pool. The Department found this argument concocted by grievant to try to justify her misuse of her and her subordinates' official time and pointed out that neither the RMS nor Housing Coordinator were aware that the stop was intended as a training opportunity.

The Department maintains that the Deciding Official thoroughly reviewed all of the information in this case, including grievant's response to the proposed penalty, and that the penalty applied was reasonable and commensurate with like offenses. Grievant's misconduct was particularly egregious because of the prominent supervisory position that she held and the negative impression her misconduct made on others in the mission. As management officer, she was specifically charged with maintaining appropriate internal controls to prevent waste, fraud and mismanagement. Grievant was clearly on notice as to the proper procedures and standards required of her by her extensive training in management responsibilities. The Deciding Official also took into consideration grievant's 17 years of service with the Department at the time of her misconduct, her prior Peace Corps service, and her exemplary performance record but did not find that these or any other mitigating factors outweighed grievant's misconduct. The Bureau of Human Resources (HR) prepared a Case Comparison Worksheet in accordance with the Douglas Factors⁴ to support the reasonableness of the penalty. While the comparator cases did not match

⁴ 3 FAM 4137 and *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

the facts of grievant's case exactly, elements of the offenses, in particular grievant's high rank and prominent supervisory position within the mission, were similar and supported the 15-day suspension. As such, the penalty must be upheld.

B. THE GRIEVANT

Grievant maintains that the Department has failed to meet its burden of proof to establish that she merits the discipline imposed. Grievant argues that the charges of Misuse of Position and Misuse of Official Time are not warranted, that the OIG investigation was flawed, incomplete and one-sided and that, even if the charges are substantiated, the penalty imposed is overly harsh and the Deciding Official erred in fixing the penalty based on comparator cases that were not similar to her case.

Grievant asserts she did not misuse her position and cites the language of 5 CFR § 2635.702(a), emphasizing that intent is a required element of the charge of misuse of position:

. . . an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is *intended to coerce or induce another person*, including a subordinate, to provide any benefit, financial or otherwise, to himself. . . . [Emphasis provided by grievant.]⁵

Grievant maintains that she never intended to use her position to coerce or induce the RMS, whom she claims to have been her personal friend of 18 years, into providing any benefit to her and that, in fact, the RMS never felt pressured to provide assistance to grievant because she was his supervisor. To support her argument, grievant quotes the RMS's statement from the OIG Report of Investigation (ROI) that he "thought of it more as a favor for a friend" and that he "offered to go to the house" to see the problem that grievant had asked about. Any of the calls she made to the RMS regarding the work on her house were made outside official work hours

⁵ 5 CFR § 2635.702(a).

and from her home rather than within the embassy. Grievant refuted the Department's assertion that her request of the RMS created the appearance of coercion by pointing out that the regulation with which she was charged requires an actual intent to induce or coerce, and not merely the creation of an appearance to do so.

Grievant also asserts she did not misuse her official time or that of her subordinates in making a brief stop at her unfinished personal house as they were returning from an official excursion. Since grievant had recently measured her house and had an architect's drawings of it, she had no need to measure the house again. Rather, the official excursion had been to measure potential houses for the embassy housing pool, and grievant had not been satisfied with the houses that the team had visited so stopped at her own house for approximately 20-30 minutes to show the Housing Coordinator an example of the type of home she considered appropriate. She acknowledges that she wanted to show off the construction progress to the RMS, but she used the opportunity for another demonstration for the Housing Coordinator as to how to measure housing properties. Since the stop was spontaneous as the party was passing her house, the fact that the RMS and Housing Coordinator were not aware that the brief stop was a training opportunity is not relevant. Finally, the charge of misuse of official time does not take into consideration the reality of life abroad in the Foreign Service. Grievant works numerous uncompensated hours beyond the official work day that should have been taken into consideration when putting such an innocent and brief stop on the way back to the embassy into context.

Grievant argues that the OIG investigation lacked objectivity and was not thorough because the OIG interviewed a limited list of witnesses, who were possibly biased. Grievant presented additional witness statements from, among others, her rating and reviewing officers,

whose comments would have provided a more balanced assessment of grievant's actions. Grievant believes that the allegations of her misconduct were made by an employee or employees who were unhappy that she had begun implementing required procedures and enforcing regulations that had been previously overlooked, and therefore lacked credibility.⁶

Grievant maintains that even if the charges are upheld, the penalty imposed was overly harsh and unreasonable and should be significantly mitigated. The six cases selected by the Department for comparison and determination of the appropriate penalty varied significantly from the allegations in grievant's case. Four of the cases involved FS-04 grade officers. In two of these cases, the employees each received a five-day suspension for having used their positions to access personally identifiable information relating to a third party for their own purposes.⁷ Grievant did not engage in similar egregious conduct that put a third party's private information at risk. In another case, of an FS-04 officer who asserted his diplomatic status while on a private cruise in order to look into the visa status of crewmembers, the employee received a Letter of Reprimand.⁸ In another case, a Deputy Chief of Mission (DCM) Senior Foreign Service employee was charged with numerous instances of willful misuse of position and recommended for separation but ultimately received a 45-day suspension.⁹ The employee's misconduct in that case was so significantly more egregious than grievant's that the case should not have been considered as a comparator.

⁶ The ROP does not include a copy of the OIG's report of investigation, and, as noted above, the parties disagree with its propriety and validity. Given our inability to read for ourselves the entirety of the report, we decline to rule on grievant's claims that the ROI was incomplete and biased.

⁷ Case 2013-324, involving a Diplomatic Security Agent who inappropriately accessed a database to check on an individual for his personal reasons; Case 2007-160, in which an employee shared information from a visa database with a personal acquaintance and interceded on behalf of her friend with the visa processing staff.

⁸ Case 2006-291.

⁹ Case 2012-463.

The remaining two cases apparently were chosen for comparison solely because the employees held supervisory positions, as the underlying conduct is dissimilar to that in her own case. While position is one of the factors to be considered, the Department erred in making it the sole reason or according it undue weight in choosing these cases for comparison when the underlying facts of the cases are so dissimilar. In one of those cases, the employee, an FS-04 officer, received a Letter of Reprimand, and in the other the employee, an FS-01 officer, received a 30-day suspension. The Department apparently chose the median penalty to apply to grievant's case despite the widely disparate fact circumstances of the underlying offenses.¹⁰ The use of these cases as comparisons was inappropriate as those cases involved employees who knowingly engaged in misconduct and, in the latter case, even made false statements.

In grievant's view the Department has failed to establish that there was any negative impact on the efficiency of the mission as a result of grievant's conduct. The Department presented no independent evidence that the mission suffered as a result of grievant's conduct or that the morale of the mission somehow declined because of the alleged misconduct. In fact, grievant provided statements from post's DCM and copies of grievant's Employee Evaluation Reports (EERs) substantiating that mission operations had improved since grievant assumed her position. The Department also argued that grievant's actions made it more difficult for her to supervise her employees effectively or allow them to perform their duties appropriately, but the Department presented no evidence to support this claim.

Finally, the Deciding Official erred in stating that there were no mitigating factors in this case. Grievant had served honorably with the Department for 16 years prior to the allegations

¹⁰ In Case 2006-224 an employee misused his diplomatic passport to travel and secure visas for personal reasons; in Case 2006-175, an employee wrongfully took and purchased government property and made false statements to the OIG regarding the matters under investigation.

being made against her. She had been recommended for promotion into the Senior Foreign Service in each evaluation she received since her promotion to FS-01 and had received commendations for her work, including a Superior Honor Award. It appears that the Deciding Official completely disregarded these factors in determining the unwarranted penalty.

IV. DISCUSSION AND FINDINGS

The Department bears the burden of proof in cases involving disciplinary action, to establish by a preponderance of the evidence that the grievant committed the offense, that the conduct had a nexus to the efficiency of the Service, and that the penalty imposed was reasonable and commensurate with similar penalties for like offenses.¹¹ With respect to penalties, the Board's responsibility is to ensure that action taken by an agency was reasonable, *i.e.*, not arbitrary or capricious, and was consistent with pertinent laws and regulations. *See* FSGB Case No. 1995-052 (March 12, 1996). For the reasons stated below, the Board finds that the Department has not met its burden of proof with respect to the charges filed in this case.

Charge 1: Misuse of Position.

In Charge 1, grievant was charged with violating 5 CFR § 2632.702 – Use of public office for private gain. The charge cites the introductory paragraph of this regulation:

5 CFR § 2635.702 - Use of public office for private gain. An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

¹¹ 22 CFR § 905.2.

A preliminary issue is whether there was any benefit, or private gain, to grievant from the services provided by the RMS. There undoubtedly was. Grievant received the benefit of the RMS's useful construction expertise in sorting out problems and assuring the quality of work done in the construction of her and her husband's private home.

Grievant has not disputed the basic facts alleged regarding her requests to the RMS for construction advice, as set forth in the specifications. However, she points to section (d) of the regulation, the most pertinent to Charge 1, which states as follows:

(a) *Inducement or coercion of benefits.* An employee shall not use or permit the use of his Government position or title or any authority associated with his public office *in a manner that is intended to coerce or induce another person, including a subordinate*, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity. (Emphasis added.)

Grievant argues that 5 CFR § 2635.702(a) explicitly requires the *intent* to use one's position to gain a benefit; in this case, the intent to use her position to induce or coerce her subordinate into providing a benefit. The few cases the Board found on this issue support that assertion. Although the circumstances of the case are very different from the one at hand, in *Mosley v. Department of Justice*,¹² the issue of intent played prominently in the MSPB's discussion of the case. The appellant in that case was a Deputy United States Marshal who entered an Air Force base in his personal vehicle on a personal errand. He was stopped by military security officers and given a citation for a traffic violation. Appellant was charged with Misuse of Office for explicitly using his status as a U.S. Marshal to request that contacts on the base have the citation dismissed; for asking a subordinate of his to do the same; and for contacting the prosecutor to discuss dismissal of the charges. The MSPB stated:

¹² *Mosley v. Department of Justice*, 2009 MSPB 5204 (August 11, 2009).

With a charge of misuse of office, the agency must prove that the appellant purposefully made use of his status as Chief Deputy United States Marshal in order to secure a benefit which might not have otherwise been provided.¹³

With respect to the first two specifications, the MSPB found that the agency had proven the requisite intent of the appellant to misuse his office through his specific statements and actions. With respect to the specifications relating to contacting the prosecutor, however, the MSPB found it that the agency had not proven by preponderant evidence that the appellant had referred to his position when talking to the prosecutor or in other ways tried to influence the outcome on his traffic citation by his employment status.¹⁴

*Garcia v. Department of Justice*¹⁵ also provides guidance on the issue of intent under the relevant regulation. Again, the facts in that case are distinct from those in this case. The appellant was a Language Specialist for the FBI. As he was driving past police officers engaged in a traffic stop, he yelled something apparently inappropriate out his window. The officers then pulled the appellant over. Garcia immediately displayed his FBI credentials to the officers and did not dispel their mistaken assumption that he was an FBI Special Agent. Appellant was charged by the FBI with Misuse of Position; Unprofessional Conduct; and Lack of Candor, all in violation of the FBI Offense Code. The FBI sought to remove appellant, and he appealed his dismissal to the MSPB.

With respect to the charge of Misuse of Position, relating to Garcia's displaying his credentials and not dispelling the mistaken impression of the officers that he was an agent, the administrative judge reiterated the standard cited in *Mosely*:

With a charge of misuse of position, the agency must prove that the appellant purposefully made use of his status as an FBI employee in order to secure a benefit which might not have otherwise have been provided. See 5 CFR§ 2635.702(a). . . .

¹³ *Id.* at 5.

¹⁴ *Id.* at 9.

¹⁵ 2008 MSPB LEXIS 3909 (2008).

The administrative judge found that the agency had proven that Garcia misused his position when he displayed his credentials:

I find it more likely than not that the appellant exhibited his credentials in the hopes that he would be afforded some advantage as an employee of the FBI that a member of the general public might not be afforded. . . . He testified that he displayed his credentials to show that he posed no threat . . . and that he was “one of the good guys.” Thus, by his own admission, he was seeking to be treated differently than he otherwise might have been had he not displayed his credentials. Accordingly, I find that the agency has proven this specification by preponderant evidence.

However, the administrative judge found that the agency had *not* proven by preponderant evidence that the appellant had misused his office by not disabusing the officers of their impression that he was an FBI agent, since they had not said anything specifically to him to indicate such an assumption.

Another example of misuse of position is found in the Office of Government Ethics Advisory Opinion cited in the dissent (OGE Advisory 06x7, 2006 OGE Lexis 12 (Aug. 9, 2006)). In that case, where a contract employee repaired, in a matter of minutes at home, the laptop of the contracting officer’s daughter, without compensation, the OGE stated that there could be the appearance that the contracting officer used his official position to induce or coerce the contractor employee to do so.

None of these cases is exactly on point with the facts of the case at hand. Neither of the first two cases presents the situation of a supervisor and subordinate relationship. The OGE advisory opinion is within the context of a Question and Answer memorandum regarding ethics and working with contractors. The employee in the example cited was the federal contracting officer responsible for supervising the contract under which the computer specialist was employed. Although there are similarities between a supervisory-subordinate relationship and a contracting officer-contractor relationship, the two relationships are distinct. We found no cases

that involved a supervisor-subordinate relationship and, by extension, none that also involved a friendship; nor did either of the parties point us to such a case.

With this limited case law as guidance, we examine the pertinent legal question of whether the Department has proven by a preponderance of the evidence that grievant intended to induce or coerce the RMS into providing her a benefit that he might not otherwise have provided.

There is very limited evidence in the record on this issue. Grievant was not questioned about this charge during her interview at post with the OIG. In her subsequent statements and supplemental, she states that she had been friends with the RMS since they first met 18 years earlier; that she knew that he had a contracting business outside of his employment with the embassy and was interested in residential construction; and that she was “simply ask[ing] a longtime friend for his advice and assistance. . . .” Grievant states that she did not intend to coerce or induce the RMS into providing her any benefit; rather, she considered the help she received from the RMS as akin to one friend helping out another friend. Further, she points out that she always asked for the RMS’s help after official hours and that he always provided his assistance in the evening or on weekends.

In his interview with the OIG, the RMS stated that he “did not feel pressure[d] to assist [grievant] because she was his boss”; that he “thought of it more as a favor for a friend”; and that, although grievant tried to explain the issue over the phone, he “offered to go to the house to see the problem the following day.”

The Department does not challenge or refute grievant’s assertion that she and the RMS were long-term friends. Nor does it offer any evidence that grievant referenced her position as management officer when requesting the RMS’s assistance, as was true in the cases cited above,

or evidence that the RMS felt either induced or coerced by grievant's position as his supervisor to help her out. Rather, it relies primarily on the argument that the friendship did not supersede grievant's position as the management officer, or insulate her from the prohibition against misuse of her official position for personal gain. The Department is essentially arguing that by virtue of grievant's position alone she necessarily misused her office in requesting the RMS's assistance.

It is undeniable that a subordinate may feel pressured to assist a supervisor with a personal favor when asked because of the supervisor's influence, negative or positive, over his work or career. However, we find it equally plausible that friendships may exist between colleagues that could be the motivation behind granting a favor, and that are of such a nature that both parties would be comfortable that the subordinate could say no to a supervisor's request without fear of retribution.

It is also undeniable that the statements of the supervisor and subordinate under these circumstances about their subjective intentions merit serious scrutiny. We recognize that grievant's statement that she lacked intent to use her office to gain a private benefit may appear self-serving. However, we find the statements made about grievant by her rater and reviewer, who were the DCM and the Ambassador; statements made by other colleagues; and her performance at prior posts during a lengthy career all point to her as a highly ethical person who sought to comply with agency regulations both personally and by virtue of her position. There is no indication that grievant generally carried out her work in anything less than an ethical manner -- quite the contrary. Even in this case, she was careful to confine all contacts to non-work hours. Additionally, grievant was completely forthcoming during the investigations of this issue about her requests to the RMS. Under these circumstances, we attribute greater credibility to grievant's statements about her subjective intentions than we might otherwise do.

The Department has the burden to prove all elements of the charge, including whether grievant intended to use her office to induce or coerce the RMS into providing a benefit she would not otherwise have enjoyed. The Department has presented no objective evidence that grievant overtly used her position, as was true in the cases cited above, to get the RMS to provide construction advice. The record portrays grievant as a forthcoming and otherwise ethical person, someone who followed the rules over a long and successful career, thus giving an element of additional credibility to her statement that she was asking the RMS as a friend, not a subordinate. The RMS's statement is consistent with the view that their friendship was the predominant motivation in his providing help. The Department has not disputed that the grievant and RMS were long-term friends. Under this fact situation, with the limited amount of evidence in the record, we find it at least equally plausible that grievant and the RMS were motivated by their friendship rather than their supervisor-subordinate relationship, and that the Department has not carried its burden of proof to show that grievant intended to or did use her position to gain a benefit she would not otherwise have been provided. Charge 1 is therefore not sustained.

Grievant further argues that the Department has created its own standard for 5 CFR § 2635.702 by stating that, for the sake of argument, even if grievant did not intend to induce or coerce her subordinate to assist her, she created the appearance of inducement or coercion. The appearance of impropriety is a separate charge, with different elements of proof. Since the Department did not charge grievant with the appearance of impropriety, we do not address this issue.

Charge 2: Misuse of Official Time.

Charge 2 cites 5 CFR § 2635.705(a) and (b):

Misuse of Official Time

a) Use of an employee's own time. Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. 6301 (2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

(b) Use of a subordinate's time. An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

This charge with its three specifications arises from a short stop at the house grievant was constructing, while the grievant, the RMS and the Housing Coordinator were returning from an official excursion reviewing potential properties for the embassy housing pool. The Department presented no evidence to refute grievant's contention that the stop was spontaneous and brief in duration. Grievant explained that she made the stop to show off the progress of the construction to the RMS and also to show the Housing Coordinator the type of properties that the grievant thought should be sought for the embassy housing pool. Grievant further explained that while there, she thought to take advantage of another opportunity to demonstrate to the Housing Coordinator how to measure a property for consideration in the embassy housing pool. This explanation seems plausible to the Board, and the Department has not presented any evidence to contradict grievant's version of events. Grievant maintained, and the Department does not dispute, that she did not need her house measured, since she had the dimensions from her architectural drawings; and, when the party returned to the embassy and the Housing Coordinator asked if she should enter the dimensions in the computer program that calculated the square footage of a property, the grievant told the Housing Coordinator not to do so. It does not appear that grievant benefited or sought any benefit from the brief stop at her personal home. Rather, it

appears to us that the brief stop was sufficiently related to grievant's official duties as to take it out of the scope of the prohibition in 5 CFR § 2635.705.

In addition, grievant, as management officer, had a great deal of flexibility in the performance of her duties and the direction of her office. Her February 21, 2012, Employee Evaluation Report (EER), which covered the period in which the stop at grievant's private residence occurred, lists among grievant's work requirements the wide-ranging responsibility to provide leadership in management, including guiding and mentoring her staff and serving as the Real Property Manager – the person ultimately responsible for securing appropriate housing for mission personnel. We do not credit the Department's contention that, since neither the RMS nor the housing coordinator knew the stop was a training opportunity, that excuse was manufactured by grievant after the fact to justify the stop. Instead, we find that the stop at grievant's personal house for the reasons she stated is consistent with her duties and within her discretion. The Board is also persuaded by grievant's argument that her position in the embassy required her to work numerous hours outside of a routine workday. As the third highest ranking officer at the embassy and in her capacity as management officer, grievant was basically on-call 24 hours a day if the needs of the Service required her to work. The Department has failed to provide probative evidence that grievant's decision to stop at her personal residence for a short time on the way back to the embassy constituted grievant's misuse of her official time or that of her two subordinates.

DECISION

Neither the charge of Misuse of Position nor that of Misuse of Official Time are supported by the preponderance of the evidence. Neither charge is sustained.

For the Foreign Service Grievance Board:



Nancy M. Serpa
Member



Barbara C. Cummings
Member

Presiding Member Persina, concurring in part and dissenting in part.

I concur with the majority's holding that the Department failed to establish by preponderant evidence that grievant violated 5 CFR § 2635.705, concerning Misuse of Official Time (Charge 2). However, I respectfully dissent from the majority's holding that the Department also failed to establish by preponderant evidence that grievant violated 5 CFR § 2635.702(a), concerning Use of Public Office for Private Gain (Charge 1).¹⁶ I conclude that the Department did meet its burden of proof as to this charge, and I would sustain it.

The majority bases its decision primarily on the finding that grievant did not purposefully misuse her official position when she requested that the RMS provide uncompensated professional consulting services on her and her husband's private residence that was under construction. Rather, the majority says, she was intending only to call on a personal friend to do her a favor. I believe, however, that this holding calls for a more in-depth consideration of grievant's friendship with the RMS than is undertaken by the majority.

The record in this case shows that the friendship was centered solely at the workplace. Put another way, there is no indication that this friendship had any dimension that was independent of the workplace. Grievant's only description of her friendship with the RMS is her statement in response to the proposed suspension that:

I have *known* [the RMS] since approximately *1997*. I met [the RMS] when I first served in the Embassy Nouakchott and he worked as a contractor to build the Embassy's septic tank. I know of his *personal interest* in residential construction, as this is what he did before joining the Embassy and *continues to do* with a *private consulting company*. [Italics and bold in original]

Grievant also states that she has "known him for a long time," and that she "knew of his personal interest in construction." At no point does grievant refer to any personal social interactions with

¹⁶ There is no dispute about the fact that grievant received ethics training on the Standards of Ethical Conduct for Employees of the Executive Branch on at least two different occasions.

the RMS outside of work. Thus, as far as the record shows, the extent of her interactions with the RMS was always in their capacities as superior and subordinate, or as Embassy employee and outside contractor.¹⁷

The apparent lack of any dimension to this friendship outside the workplace concerns me. Neither the RMS nor other Embassy employees could look on grievant's various requests of the RMS for free construction consulting services, and his granting the favor by making as many as six different visits to Grievant's home site (one of which involved the RMS bringing with him an employee from his outside construction business), and attribute it to a long-standing non-work-related personal relationship between the two.¹⁸ Rather, questions could arise in both the RMS's and other Embassy employees' minds as to what would have happened to the RMS if he had refused the request. Would it affect his next appraisal or other work opportunities? Further, does his acquiescence to the request mean that he might as a result get promotions that other employees would apply for? To my mind, the purpose of section 2635.702(a), with its explicit inclusion of superior/subordinate interactions being covered in the rule, is the elimination of just these kinds of questions from the federal workplace.

Further, I do not agree with the majority's approach to implementing the "intent" requirement of section 2635.702(a).¹⁹ As I understand the majority holding, it credits, based on the "entire context of the request," grievant's subjective statement that she did not in her own

¹⁷ Grievant states that the RMS's private construction business did work for the Embassy in 1997. It does not appear that the RMS was an Embassy employee at that time, nor does it reflect grievant's and the RMS's exact work connections. The record also does not show that grievant and the RMS had any social connections outside the workplace during that time.

¹⁸ The majority omits several significant facts in its opinion, in addition to the fact that the RMS brought one of his construction business employees with him on one of his trips to grievant's personal residence. Others are that the RMS operated a private construction business while employed at the Embassy, and that grievant did not compensate the RMS for his services.

¹⁹ That section provides in relevant part that federal employees are prohibited from using their position "in a manner that is intended to coerce or induce another person, including a subordinate," to provide a benefit to the employee.

mind intend to use her official position to coerce or induce the RMS to grant her request. I do not read relevant authorities as understanding the intent requirement to be applied in this manner. In fact, one of the decisions cited by the majority seems to me to contradict this approach. *Moseley v. Department of Justice*, 2009 MSPB Lexis 5204 (Aug. 11, 2009), is a decision of a Merit Systems Protection Board (MSPB) Administrative Judge (AJ). The case involved an employee of the U.S. Marshals Service who received a traffic citation from military police while driving on a military base. The employee asked a subordinate to contact individuals the subordinate knew at the base to try to intercede on the superior's behalf regarding the citation. The subordinate contacted a member of the military he knew and asked if there was anything the member could do about the citation. The AJ said that the superior was able to ask the favor of the subordinate, and the subordinate was, in turn, able to make inquiries at the base, "because of their relationships established through the Marshals Service." This fact alone was sufficient to cause the AJ to sustain the charge of Misuse of Position.²⁰

The majority focuses on another aspect of *Mosley*, concerning the employee's contacts with a prosecutor who was considering possible charges against the employee. The MSPB AJ said that the agency had not proven that aspect of the charge of misuse of position because there was no evidence that the employee tried to use his position to influence the prosecutor concerning the outcome of his traffic citation. It is puzzling to me why the majority glosses over the superior/subordinate aspect of the charge, which the AJ did sustain, and focuses on this wholly inapposite situation involving the prosecutor.

²⁰ The other case cited by the majority, *Garcia v. Department of Justice*, 2008 MSPB Lexis 1475 (March 10, 2008), involves an employee who used his law enforcement credentials to attempt to keep police who had stopped him in his car for a traffic violation from giving him a ticket. As it does not involve a superior/subordinate situation, I do not view it as being directly relevant here.

Moreover, there are several issuances from the Office of Government Ethics (OGE) that counter the majority's view of the intent issue. For example, in OGE Advisory 06x7, 2006 OGE Lexis 12 (Aug. 9, 2006), OGE said that a contracting officer for a federal agency who brings in his daughter's laptop to the workplace to be repaired without compensation by a contractor employee violates section 2635.702(a). In this connection, OGE said, "given the contracting officer's authority over the contractor and the circumstances in which he asked for help, there could be an appearance that he used his official position to induce or coerce the contractor employee to provide this service." *See also* 5 CFR § 2635.705(b), Example 1 (it is a violation of section 2635.702(a) for a superior to ask a subordinate to type personal correspondence for the superior during non-duty hours, unless the superior pays the subordinate at market rates for such services); FSGB Case No. 2007-022 (March 31, 2008) (a supervisory General Services Officer violated section 2635.702(a) by asking subordinate foreign service nationals to take actions in furtherance of an improper scheme to enable the employee to purchase a surplus vehicle without competitive bidding).

In the above-mentioned situations no inquiry was made as to the employee's subjective intent as to his/her use of official position in dealing with a subordinate. Rather, the intent is inferred from the inherent dynamics of the superior/subordinate relationship. Put another way, if an employee intends to take an action, such as grievant's request of the RMS for uncompensated consulting services, the employee is also understood to intend the reasonably foreseeable consequences of that action. In a case such as this OGE has identified those reasonably foreseeable consequences for us, namely, that a superior that requests personal benefits from a subordinate undermines the critical principle that there should be no question that workplace personnel decisions are based solely and exclusively on merit, not on personal favors. *See*

Suarez v. HUD, 96 MSPR 213 (2004); and *Redfearn v. Dep't of Labor*, 58 MSPR 307 (1993) (circumstantial evidence can be used to prove intent, as a person's state of mind can seldom be proved directly).

It certainly may be said that the situations in the cases cited above do not expressly address an allegation of friendship between the superior and the subordinate. In my view, however, that is of no moment. I have no doubt that many superior/subordinate relationships throughout the federal government are marked by cordiality and friendship. If that fact alone can be used as a basis for allowing superiors to request personal benefits from subordinates, as in this case, then section 2635.702(a) will be stripped of any meaningful effect.

The majority also suggests that grievant was effectively mischarged, in that she was not charged with creating the appearance of impropriety. This observation misses the mark. Whatever additional charges may have been brought against her, the Misuse of Position charge was certainly sufficient to warrant imposing discipline. Further, the majority seems to labor under the misconception that an "appearance of impropriety" charge is separate and distinct from other ethics violations such as Misuse of Position. This is incorrect. 5 CFR § 2635.101(b)(14) provides as follows:

§ 2635.101 Basic obligation of public service

* * * * *

(b) *General Principles.* The following general principles apply to every employee and may form the basis for the standards contained in this part. . . .

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or the standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

This "general principle" of federal employment is expressly made applicable to all the standards of conduct, including section 2635.702. Indeed, this Board has recognized this fact. *See* FSGB

Case No. 2003-036 (Aug. 11, 2004) (in a misuse of position ethics case an employee's actions must be viewed from the vantage point of whether a "hypothetical reasonable person with knowledge of all the facts" could conclude that the employee's impartiality might be questioned).

The majority suggests that the Department has the burden of establishing that grievant and the RMS did not have a personal friendship outside the workplace, and that it failed to satisfy that burden. I believe that the Department rightly finds that the record does not support the conclusion that grievant's actions are proper based on a personal friendship with the RMS. Further, I find this suggestion to be wholly illogical. The idea that the Department should have the burden of making inquiries as to the personal relationship, if any, between grievant and the RMS outside the workplace strikes me as inappropriate. The Department acted properly in relying on the record before it, which was devoid of any evidence of a grievant/RMS friendship outside the workplace.

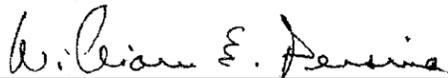
The majority also places considerable weight on the fact that the RMS stated that he viewed the request to be based on his friendship with grievant, and he did not feel coerced or induced to grant the requested favor. I believe there are obvious reasons to conclude that such statements should be given no weight in a case such as this one. For one thing, as noted above, this Board held in FSGB Case No. 2003-036 (Aug. 11, 2004) that the standard for determining whether an ethics rule has been breached is whether a "reasonable person" would conclude that an employee violated the rule. Subjective statements of intent by either the superior or the subordinate are not relevant. Second, given the nature of superior/subordinate dynamics in the workplace, it is simply too unreliable to take such statements at face value. An employee who

states candidly that he/she did feel induced or coerced to grant a personal favor requested by a superior could well place his/her career in jeopardy.

In sum, I believe that superiors that ask personal favors of subordinates necessarily create questions in the minds of employees as to whether personnel actions taken by the superior are based on merit, or on the level of cooperation of subordinates in acquiescing to the favor request. The corrosive effect of such a situation on office efficiency and effectiveness is obvious. The majority opinion goes a long way to encouraging these undesirable results.

For the foregoing reasons, I would sustain Charge 1 concerning Misuse of Office and remand to the Department for reconsideration of the appropriate penalty.

DISSENTING IN PART

A handwritten signature in cursive script, reading "William E. Persina". The signature is written in black ink and is positioned above a horizontal line.

William E. Persina
Presiding Member