

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between



Grievant

Record of Proceedings
FSGB Case No. 2015-023

And

Department of State

March 23, 2016

DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Cheryl M. Long

Board Members:

William J. Hudson
Nancy M. Serpa

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Dorian S. Henderson
Grievance Analyst, HR/G

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: The Board finds that the agency carried, by a preponderance of the evidence, its burden of proving that it properly imposed a five-day suspension for grievant's inappropriate comments and behavior. Grievant did not sustain his burden of proving that he was harmed by the delay of two years and eight months between the misconduct and the proposal of discipline and that he was entitled to relief from the suspension for that reason.

OVERVIEW

Grievant, a Senior Foreign Service Officer, served at U.S. Embassy [REDACTED] as Deputy Chief of Mission (DCM) from August 2010 to February 2012. During this tour, grievant was accused of misconduct that resulted in grievant being charged with Inappropriate Comments, Poor Judgment, and Inappropriate Conduct. The agency proposed to suspend grievant for 10 days. Grievant provided written and oral responses to the agency's proposal, which resulted in a reduction of charges and a reduced suspension of five days. Grievant subsequently appealed the five-day suspension, alleging that there were factual errors in the decision, that mitigating factors were not appropriately considered, and that the agency's actions were not timely. The Board upheld the agency's decision to suspend grievant for five days and denied grievant's claim that the decision was not timely under 3 FAM 4321.

DECISION

I. THE GRIEVANCE

Grievant, a now-retired Senior Foreign Service Officer, appeals the decision by the Department of State (Department, agency) to suspend him for five days for inappropriate conduct while he served as DCM at U.S. Embassy [REDACTED]. Grievant contests a charge by the agency that specifies that he had engaged in inappropriate conduct at a dinner he attended when he stared at a female dinner guest. Grievant also claims the agency committed several procedural errors in reaching its decision, including the timeliness of the proposal for discipline, the severity of the penalty, and the agency's failure to consider several mitigating factors.

II. BACKGROUND

At the time of the incident underlying this appeal, grievant was Deputy Chief of Mission in [REDACTED]. Grievant retired from the Foreign Service on September 30, 2015. Grievant served as Deputy Chief of Mission (DCM) at U.S. Embassy [REDACTED] from 2010 to 2012. In September 2014 the agency proposed to suspend grievant for 10 days without pay for conduct documented by a Report of Investigation (ROI) prepared by the Office of Civil Rights (OCR). The original charges emerged from two situations. One involved a series of incidents in August, September, and October 2010 in which grievant made lewd comments to fellow employees regarding his plans to seek out illicit relationships with women at post. The second involved a December 19, 2011 Christmas party, hosted by a Special Agent (SA) assigned to the Embassy.¹ The agency alleged three charges with several specifications, some of which (those from 2010) were overturned by the deciding official who reviewed the proposed disciplinary action.

¹ The Record of Proceedings is unclear as to whether the Special Agent was actually employed by Diplomatic Security or some other law enforcement agency.

Charges Subject to this Appeal.

The remaining charges at issue in this appeal are quoted from the Department's decision letter as follows:²

Charge 1: Inappropriate Comments

Specification 4:

On December 19, 2011, while posted at the U.S. Embassy [REDACTED] you attended a Christmas party SA [J.G.] hosted. In attendance was the Assistant Regional Security Officer (ARSO), [E.S.]. At one point, some of the party guests were going to the Jacuzzi. You asked ARSO [E.S.], "Why don't you join them" and she replied that she was not interested. You then stated, "It's too bad because you would look beautiful in a bathing suit and it would give me an image that I could fantasize about."

Charge 3: Inappropriate Conduct:

Specification 1:

In his sworn statement, SA [J.G.] recounted that he hosted a dinner party in which you sat across from his sister,³ who was wearing a low-cut dress. [J.G.] observed that you were "zoned-out and focused on her breasts." Consequently, [J.G.'s] visitor from Washington asked him to put a stop to your staring, so [J.G.] asked his sister to leave the table to prevent anything else from happening.

Post-Incident Timeline.

To better understand the context of the timeliness issue in this appeal, we pause to set forth the salient features of the discipline and grievance processes in the order in which they unfolded.

On September 3, 2014, the Director of the Department's Office of Employee Relations, Bureau of Human Resources, issued a letter to grievant, proposing to suspend grievant for 10 days without pay. He noted, "This proposal is based on a Report of Investigation (ROI) prepared by the Office of Civil Rights (OCR) concerning your conduct while serving at U.S. Embassy

² For reasons of employee privacy, we substitute initials for specific names in this decision.

³ In later correspondence both grievant and the agency agreed that the person grievant allegedly stared at was [J.G.]'s sister-in-law, not his sister.

██████████ ██████████ as Deputy Chief of Missions (DCM).” The disciplinary action was based upon four (4) specifications of a charge of “Inappropriate Comments,” one (1) specification of the charge of “Poor Judgment,” and one (1) specification of the charge of “Inappropriate Conduct.”⁴

Grievant responded to the proposal in a multi-page letter, taking “full responsibility for the inappropriate comments made to ARSO” E.S. but disputing the remaining allegations against him. He also complained that the proposal of discipline was untimely.⁵

On January 5, 2015, the then-Deputy Assistant Secretary for Human Resources issued her decision. She declined to sustain the charges of “Poor Judgment,” as well as the remaining, unadmitted specifications of “Inappropriate Comments.” However, she did sustain the charge of “Inappropriate Conduct.” In addition, she mitigated the penalty to a five-day suspension. She concluded, moreover, that the proposal of discipline was not untimely.⁶

On January 30, 2015, grievant initiated a grievance. He objected to the five-day suspension, alleging that the agency had made “several factual errors” and that a suspension is excessive, particularly “when compared with the principle of like penalty for like [*sic*] offense.” Grievant requested that any “proposed penalty be mitigated to an appropriate and fair penalty.” Grievant supplemented his grievance with more detailed arguments, submitted to the Department on February 25, 2015.⁷ Pending resolution of his grievance, he received interim relief from the placement of a suspension letter in his OPF and from serving the five-day suspension.

⁴ A copy of the letter proposing discipline is Attachment A, appended to grievant’s Appeal Submission.

⁵ A copy of grievant’s response letter is Attachment B to grievant’s Appeal Submission. It does not bear a date.

⁶ A copy of the decision letter is Attachment C to grievant’s Appeal Submission.

⁷ The grievance and its supplement are provided as Attachments D and E, appended to grievant’s Appeal Submission.

Proceedings on Appeal.

Grievant filed his grievance appeal with the Foreign Service Board on June 22, 2015, and he submitted supplemental material on September 18, 2015. The agency responded on October 13, 2015. Grievant filed his Rebuttal on November 2, 2015. The Record of Proceedings (ROP) was closed on November 13, 2015.

III. POSITIONS OF THE PARTIES

Since each side bears the burden of proof as to one issue – the grievant on the timeliness challenge and the agency on the discipline itself. The key matters in this appeal are best understood by first recapitulating the issues raised by grievant, followed by the responsive arguments of the Department. We begin with the threshold issue of timeliness, and proceed to outline the positions of the parties on the remaining questions.

A. GRIEVANT

The Timeliness Issue.

Grievant maintains that the agency failed in its responsibility to propose discipline in a timely manner. Grievant notes that the agency is unable to provide an exact date for the alleged incident of staring. Grievant finds the lack of a specific date “problematic” because it clearly demonstrates the agency’s failure to investigate his behavior in [REDACTED] and propose a penalty in a timely manner. As he stated when responding to the proposal of discipline, grievant claims that the investigation of his case began 15-18 months after the incident and that this lengthy gap calls into question the accuracy and reliability of the employee statements accusing him of misconduct.

Attacking the length of the delay in proposing discipline, grievant cites a number of cases where the Board found the proposal for discipline to be untimely. See FSGB Case No. 2013-040

(July 31, 2014) (three-year delay); FSGB Case No. 2000-006 (February 6, 2002) (15-month delay); FSGB Case No. 1998-011 (January 5, 1999) (four-year delay); FSGB Case No. 1991-071 (April 22, 1992) (19-month delay). Grievant implies that the delay of four years in the present case likewise should result in reversal of the discipline that was imposed.

Grievant acknowledges that the Board has held “that a Grievant must show a nexus between the delay and the prejudice caused to the Grievant in order to show that the charges are ‘too stale’ to warrant adverse action.”⁸ Grievant argues, “I submit that I have been significantly harmed by the undue delay in proposing discipline, and therefore the charges and specifications I mention above should be overturned.”

Challenge to the Merits of the Charges.

Grievant does not contest Charge 1, specification 4. He admits the error and that his behavior was inappropriate. Grievant does note, however, that he did apologize to ARSO E.S.

Grievant’s main complaint involves the original Charge 3 (Inappropriate Conduct). Grievant challenges the sufficiency of the evidence supporting this charge. He claims he does not recall staring at the breasts of J.G.’s sister-in-law during the dinner hosted by J.G. He notes that neither J.G. nor J.G.’s wife mentioned the incident to him or indicated that grievant had made the sister-in-law uncomfortable. Grievant points out that in his statement to investigators addressing the allegations, he did say that there was a “possibility” that he might have stared at others too long, but this is not an admission of guilt in this instance. Rather, it was a “reasonable statement of fact that it was possible that I [grievant] could have looked at someone for a longer time than needed.”⁹

⁸ Supplemental Appeal Submission at 3 (citing FSGB No. 2000-006) (February 6, 2002).

⁹ Supplemental Submission at 2.

Finally, grievant acknowledges that the Ambassador counseled him not to stare at others. Nonetheless, grievant claims that he was surprised by the Ambassador's statement and that it was the only time anyone at post had raised a question about this type of conduct with him. Although the Ambassador did not provide to him any specific information regarding either the time of the incident or who had been involved, grievant claims that he subsequently worked hard to avoid giving offense to anyone.

Challenge to the Severity of the Penalty.

Grievant argues that the five-day suspension was overly harsh and not justified when compared to penalties in similar misconduct cases. In addition, grievant asserts that the deciding official "focused exclusively on the aggravating factors without balanced consideration of several mitigating factors."¹⁰ As the following examples illustrate, he argues that the agency did not take into account a number of important mitigating factors.

Referring to the familiar "*Douglas* Factors,"¹¹ grievant listed in his Supplemental Submission a number of details about his career that he believes should have been considered in the choice of discipline. He emphasizes certain *Douglas* Factors, summarized as follows.

As to past history of conduct problems, he states that he worked for the agency for more than 30 years. During that time he had no conduct issues and was cited and awarded numerous times for leadership and exceptional service.

As to intent, grievant maintains that he never intended to act or speak in any way that might have offended his colleagues. In the one instance (Charge 1, Specification 4) where he failed in this regard he apologized for his misconduct.

¹⁰ Supplemental Appeal Submission at 5.

¹¹ This refers to a decision of the Merit Systems Protections Board, enumerating 12 classic factors that should be considered, where appropriate, in determining the choice of a penalty for employee misconduct. *Douglas v. Veterans Administration*, 5 MSPR 280 (1981). The Board adopted the *Douglas* analytical model years ago, and the Department uses the *Douglas* Factors routinely. See FSGB Case No. 2003-004 (June 17, 2005).

Regarding his position as an employee, grievant notes that, at the time of the agency's decision, he was teaching at the Eisenhower School of the National Defense University and was asked by the University to stay on an additional year due to his significant contributions to the institution.

With regard to his record of cooperation, grievant states that he has never denied "the one charge that did occur" and that he "expeditiously reviewed, edited and signed the statement resulting from" his DS interview.¹²

Under the topic of "other mitigating or extenuating circumstances," grievant maintains that he was hurt by these allegations because they were "circulated within the Department of State." He elaborated,

This has made it essentially impossible over the last two bidding cycles to secure an onward assignment overseas for which I was qualified this includes bids on non-supervisory positions in Afghanistan for which I was qualified, as well as numerous other potential assignments that I was qualified for and that the working level sought to assign me. Those working level contacts noted that they were told to not further pursue possible assignments because of the allegations. This made me less competitive for promotion and also deprived me the opportunity to further serve my country overseas. This alone I think was sufficient punishment for the December 2011 comments I made which I have consistently admitted, regretted and acknowledged was inappropriate and inexcusable.¹³

Grievant asks the Board to mitigate the penalty.

B. THE DEPARTMENT

The Timeliness Issue.

The Department makes three essential points on the subject of the timeliness of the proposal of discipline. One, the Department contends that the four Board decisions cited by grievant are factually distinguishable. For example, as to FSGB Case No. 2013-040, the delay between the date of the misconduct and the commencement of the investigation was much

¹² Supplemental Appeal Submission at 7.

¹³ *Id.*

longer. There, the agency was aware of the employee's misconduct the day after it occurred but did not open an investigation until 18 months later and then took approximately 11 months to complete the investigation. In the present case, by comparison, the Department states that it commenced the investigation of Charge 1 within two months of the incident and completed its investigation within five months.¹⁴

Two, the Department notes that grievant has not established that a specific date of the incident is "essential to Charge 3 as [J.G.] had no trouble recalling details of it being the 'first incident.'" ¹⁵

Three, the Department emphasized that in two respects grievant has failed to demonstrate that he was harmed by the delay in proposing discipline. One, "grievant retired from the Foreign Service on September 30, 2015, for expiration of his Time-in-Class. Accordingly, grievant's letter of discipline was never reviewed by a promotion board nor will it ever be."¹⁶ Two, as the deciding official noted in the January 5, 2015 decision letter, grievant has not shown that the delay compromised his ability to defend himself.¹⁷

The Merits of the Charges.

The Department notes that in his oral and written replies to the original allegations, grievant admitted that he had made the statements to ARSO E.S., as documented in the Office of Civil Rights (OCR) Report of Investigation (ROI). Grievant is not contesting Charge 1 specification 4. While grievant stated that he "deeply regretted" what he had said and did apologize to the ARSO, the agency notes that the apology only came after grievant was informed

¹⁴ Response to grievant's Supplemental Appeal Submission at 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 10.

that he had made an inappropriate comment. Moreover, the agency maintains that the apology in no way mitigates the inappropriate comments made in public.

Regarding Charge 3, the Department focuses on the lack of credibility in grievant's blanket denial that the charged misconduct took place. On one hand, grievant challenged J.G.'s credibility, pointing out that at social events hosted by J.G. there was "a lot of drinking" and that with the passage of time J.G. might have forgotten critical details of the events in question. The agency disagrees and notes that grievant, by his own admission, had a very close professional and personal relationship with SA J.G. Thus, the Department argues that it is unlikely, under these circumstances, that J.G. would have manufactured an accusation that grievant committed unethical or improper conduct.

The Department points to a number of factual details that undercut grievant's denial of the misconduct. For example, in his signed declaration given to OCR investigators, grievant acknowledged that "if [he] w[as] sitting at a party or a meeting, and someone was attractive, [he] may have stared at them too long."¹⁸ Also, the Department points out that grievant "does not now nor has he ever denied that he asked where [J.G.'s] [sister-in-law] went after she excused herself from the table during the dinner party [and that grievant] simply stated that he 'do[es] not recall'" the staring incident in question.¹⁹ Finally, grievant has admitted that prior to the incident in question the Ambassador had counseled him about employee complaints regarding his staring at other people.²⁰ The agency implies that the need for such counseling makes it more likely than not that the subsequent misconduct of the same nature was not fabricated by the accuser and that grievant had a predilection for such behavior. For all of these reasons, the agency maintains that grievant's denial is not believable and should be discounted.

¹⁸ Response to grievant's Supplemental Appeal Submission at 5 (quoting grievant's declaration).

¹⁹ *Id.* at 6.

²⁰ *Id.* at 5.

The Severity of the Penalty.

In deciding the penalty for these reduced charges, the agency maintains that it thoroughly reviewed and gave full consideration to all the materials in the case, as well as the relevant *Douglas* Factors. The agency decided that the mitigating factors²¹ grievant noted did not outweigh the seriousness of the offense. The agency concluded that the seriousness of the offense was more important because of grievant's position as DCM, the second most senior position in the Embassy. The agency noted that as a DCM, grievant had completed the Deputy Chief of Mission training which included a segment on "Support for Equal Employment Opportunity and Merit Principles." In other training,²² grievant was also exposed to this important subject and thus should have known that his statements and behavior toward his colleagues were inappropriate. The agency maintains grievant had the responsibility to lead by example and to ensure that the regulations applied to all personnel at post, including the most senior managers. Grievant's breach significantly compromised his ability to lead the post and to enforce agency standards of conduct and "evidenced an overall insensitivity to appropriate conduct and decorum in the Department of State workplace."

The agency contends that in considering the proposed disciplinary action, it considered the nature and seriousness of the offense as well as grievant's position at the time of the offense. It argues that grievant's misconduct was serious and that as a member of the Senior Foreign Service and as DCM, grievant had the responsibility to ensure that his actions were beyond reproach.

²¹ Lack of prior discipline, satisfactory or better performance during 33-plus years with the agency, and several Meritorious and Superior Honor awards.

²² Senior Executive Threshold Seminar and Sexual Harassment Prevention courses taken in April 2008 and March 2003, respectively.

The agency avers that the administrative grievance cases it used in determining grievant's penalty do support grievant's five-day suspension. In Department Case No. 2010-152 (September 15, 2010), an employee received a five-day suspension for, among other things, making inappropriate comments to his female subordinates. That case also involved a Senior Foreign Service Officer who was in a position of leadership and was therefore held to a higher standard of conduct, being responsible for setting an example of proper office decorum and professionalism in the workplace and for ensuring supervised employees are treated with respect. In that case, the mitigating factors were very similar to grievant's: no previous disciplinary action, with a work record that was satisfactory or better.

Department Case No. 2010-236 (December 1, 2010) involved another employee, a DS agent, who "made inappropriate comments to a colleague and touched her knee. That employee reportedly drank alcohol while on duty and asked women to give him a kiss before providing them with their passwords."²³ The DS agent was also held to the highest standards of conduct because of his law enforcement position. Because this FS-03 agent enrolled in EEO training after he was counseled about his behavior, the deciding official reduced his suspension from five days to two days.²⁴ When both administrative cases are seen together, they reflect that grievant's five-day suspension is consistent with the penalties imposed for substantially similar conduct of others.

IV. DISCUSSION AND FINDINGS

Based upon the following analysis of the facts and applicable law, the Board concludes that the suspension should be sustained. As to the timeliness issue, we find that the delay between the misconduct and the proposal of discipline was not excusable but that grievant did

²³ *Id.* at 9.

²⁴ *Id.* at 10.

not prove by a preponderance of the evidence that he suffered harm from the delay. For this reason, he cannot meet his burden of proving that he is entitled to relief from the suspension. As to the merits of the disciplinary charges, we find that the agency did satisfy its burden of proof as to the sufficiency of the evidence and as to the lack of any abuse of discretion regarding the choice of the penalty. We set forth our findings separately as to the threshold issue of timeliness and the other issues on the merits of the suspension.

Timeliness of Proposing Discipline.

In cases alleging timeliness, the burden of proof falls on grievant. This Board has relied on precedent of the Merits Systems Protection Board (MSPB), concluding that a grievant seeking relief from allegedly untimely discipline bears the burden of proving a nexus between the delay in proposing discipline and demonstrable prejudice or harm to the employee. FSGB Case No. 2006-057 (September 9, 2008).

There are no specific regulations or a statute laying out precisely what constitutes a delay. The Board has recognized that “the resolution of issues concerning allegedly untimely disciplinary action and resultant prejudice to an employee must be based upon the particular facts and circumstances of each case.” FSGB Case No 2006-012 (June 6, 2007). The method of calculating the delay, however, is clear. Both the FSGB and the MSPB customarily start the “timeliness clock” with the date that the alleged misconduct occurred and stop the clock at the time the agency’s adverse action was proposed.²⁵ The clock also can start when the agency actually becomes aware of the misconduct (if the misconduct had not been discovered or reported contemporaneously) or when the agency should have become aware of it. In its deliberations the Board takes a two-step approach and considers (1) whether there was an

²⁵ FSGB Case No. 2000-006 (February 6, 2002); *Mauro v. Dep’t of the Navy*, 35 M.S.P.R. 86, 94 (1987).

unreasonable or unexcused delay and (2) if so, whether prejudice or harm to the grievant resulted from the delay.

The Unexcused Delay. Even if the agency did take a particularly lengthy time to investigate grievant's behavior, it is important to focus on the real issue before the Board, *i.e.* whether the lapse of more than four years between the misconduct and the proposal of discipline was excusable. Here, the Department has offered no explanation for why it took several years to decide to suspend grievant, irrespective of how quickly it may have concluded the underlying investigation. The Department's response does not contain any explanation for the passage of time, but rather it contains only arguments concerning the lack of harm to grievant. As we have observed in another case involving unexcused delay, "when there is a clear and credible explanation for delay of discipline, the Department typically couches it in terms of revealing the 'necessity' for the delay. Here, there is no hint of 'necessity' at all." FSGB Case No. 2013-040 (July 31, 2014) at 16. The Board will not engage in speculation concerning why the agency was so slow to make a decision about imposing discipline. It suffices to say that the Department simply has failed to confront that issue. Thus, the Board concludes that the delay of four years was unexplained and unreasonable.

Lack of Harm to Grievant. The next question is whether there was harm to the grievant caused by the delay. The Board's finding that the proposal of discipline was untimely (*i.e.* inexcusably lengthy) does not preclude imposing the discipline unless grievant also shows that the delay has resulted in actual prejudice or harm. For the following reasons, the Board concludes that grievant has failed to satisfy his burden of proving that he was harmed by the delay. Thus, he is entitled to no relief from the suspension due to untimeliness. We are persuaded that this is the appropriate disposition of the issue for the following reasons.

We have scrutinized the record to consider exactly what grievant has presented in attempting to carry his burden of proof. His earliest contention about being harmed by the delay was on page five of his written response to the letter proposing discipline. There, he stated,

[S]ignificant time has passed since the 2010 incidents that largely make up the proposal for discipline and the day I received the discipline letter in September 2014. It is hard to now recall conversations, events, comments[,] and interactions with others It is impossible to defend myself given the passage of time and also that I was not initially interviewed about these comments and actions when I met with OCR.

Grievant did not add any further detail to the sweeping and conclusory complaint that it was “impossible” to defend himself. Notably, the grievant ultimately was not suspended because of the 2010 incidents. They are not subject to this appeal. Thus, the issue about not being able to recall facts regarding the 2010 incidents is not relevant in this appeal.

As to the 2011 incidents that are the basis for this appeal, grievant has readily admitted liability as to one of the two remaining charges. As to the other (Charge 3), he flatly denies the misconduct and does not say, for example, that he could have amassed relevant defense witnesses or other favorable evidence but for the delay. The most that he has articulated to the Board is another conclusory argument, *i.e.*, “I submit that I have been significantly harmed by the undue delay in proposing discipline” In his Supplemental Submission, grievant makes this statement immediately after acknowledging that “a Grievant must show a nexus between the delay and the prejudice caused to the Grievant in order to show that the charges are ‘too stale’ to warrant adverse action.” Yet, grievant has demonstrated no such nexus and has failed to carry his burden of proof on this issue.²⁶

²⁶ Grievant has never articulated any specific forms of “harm,” such as his file being withheld from Selection Board panels or the denial of awards, because of the lingering Report of Investigation. We see no evidence of such in the Record of Proceedings.

The Sufficiency of the Evidence of Misconduct.

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 CFR § 905.2. In this case the Board examines Charge 3 and the severity of the penalty. The Board finds the Department has met its burden of proof on Charge 3 and that the decision to give grievant a five-day suspension was reasonable.

Grievant asserts that his accuser for Charge 3, J.G., may have fabricated the charges and that during the many social events grievant attended at J.G.'s house there was heavy drinking on the part of J.G. and that his memory of events therefore may be tainted.

However, grievant admits in his statements that he had a close personal and professional relationship with J.G. The agency maintains that this relationship negates the suggestion that J.G. fabricated a story that would harm grievant. The Board finds that the evidence supporting Charge 3 is strengthened by grievant's own admission that the Ambassador counseled him concerning inappropriate staring. Moreover, in his own statement to investigators, grievant admitted that it was possible that he had stared at women too long. This Christmas party incident, coupled with the inappropriate comments grievant made to the ARSO (which grievant admits), clearly indicate to the Board grievant's pattern of inappropriate behavior. On the whole, the weight of the evidence and the logical inferences from the facts all support our conclusion that grievant did commit the offenses that are the subject of this appeal. The Board also finds that the agency established a clear nexus between grievant's misconduct and the efficiency of the Foreign Service. Grievant's actions did call into question his ability to implement Department of State standards of conduct. As the DCM, he was required to implement agency regulations

acting as the Mission's chief operating officer, ensuring employee concerns are heard and addressed as needed. Grievant's behavior seriously compromised his ability to adequately fulfill this key role.

The Penalty Imposed.

In considering the severity of the penalty, grievant complained in the supplement to his grievance, "[T]he deciding official chose to overturn a majority of the original charges and specifications, leaving only two specifications. It is highly egregious that the discipline was not mitigated accordingly." However, he fails to recognize that the deciding official did in fact reduce the duration of the suspension after eliminating some of the charges. The Board's role "is to determine whether the suspension imposed is a reasonable one; not whether it is the best penalty." FSGB Case No 2006-037 (September 28, 2007). What matters is whether the penalty was reasonable given the circumstances.

The Board has noted in the past that 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."²⁷

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

Grievant also complains that the deciding official relied solely on aggravating factors in the case and did not consider several mitigating factors. Grievant contends that the "proposed penalty is unreasonably and overly harsh" given the mitigating factors he outlined in his supplemental appeal. These included: (1) history of past conduct problems, (grievant had none); (2) intent (grievant claims he "in no way intended at any time to act or speak in . . . an offensive

²⁷ FSGB Case No. 2014-049 (November 3, 2015).

way”); (3) enticement or provocation (not applicable); (4) position of employee (grievant was on the faculty of the Eisenhower School of the National Defense University, a prestigious assignment at an important institution); (5) culpability of others (not applicable); (6) length of employee’s service, age (grievant notes he served with the State Department for over 33 years, “often seeking difficult assignments and working long hours,” (7) quality of employee’s work history (grievant received several awards for his work); (8) past contributions and achievements (grievant maintains he has a documented history of exceptional performance throughout his career); (9) record of cooperation (grievant maintains he never denied the one charge and cooperated with the OCR in investigating the other charges); (10) other mitigating or extenuating circumstances..

The deciding official, in her January 5, 2015 letter to grievant, noted that she had carefully and independently reviewed and given full consideration to all materials pertinent to grievant’s case, including grievant’s oral and written replies and the *Douglas* factors. The deciding official signed the *Douglas* Factors checklist. In addressing the *Douglas* Factors, the deciding official noted specifically that she considered the nature and seriousness of the offense; grievant’s position; and grievant’s lack of a prior disciplinary record as well as grievant's “satisfactory or better job performance.” She also considered the awards grievant had received over the years. These mitigating factors, however, did not outweigh the seriousness of the offense.

The deciding official noted that grievant was a member of the Senior Foreign Service and was serving as DCM at the time of the incidents. She pointed out that grievant “had a responsibility to lead by example and to ensure that [his] actions were above reproach.” In addition, grievant had a fundamental responsibility to demonstrate to his colleagues “that

Department regulations applied equally to you as they did to any other Department employee.” Grievant’s failure in this regard eroded his ability to ensure that embassy employees adhered to the agency’s code of conduct. The Board has previously 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 Case No. 2010-038 (November 23, 2011) quoting, *Luciano v. Department of Treasury*, 88 M.S.P.R. 335, 343 (2001).

In this case, the Board finds that the agency clearly documented the seriousness of the misconduct given the grievant’s position at the time. Grievant’s offenses in the two sustained charges were very serious misconduct. This is particularly so given grievant’s position as DCM in the embassy. The Board also finds strong evidence that this conduct was frequently repeated as evidenced by the two sustained charges, grievant’s counseling by the Ambassador, and grievant’s own statements. The Board has observed previously that “not all factors need be discussed in a given grievance, rather only those significant to the particular case.” FSGB Case No. 2002-029 (December 2, 2002) at 13 (citing *Kumpferman v. Navy*, 785 F.2d 286 (Fed. Cir. 1986)). We find the deciding official’s imposition of a five-day suspension reasonable given the position of grievant and his repeated offenses.

Grievant also challenges the comparator cases the agency used in determining his penalty. Grievant asserts that “the cases used by the Department in determining the appropriate penalty in [grievant’s] case are not similar or comparative [*sic*] given the information provided.”

Grievant is correct that the comparator cases are not exactly the same as grievant’s case. However, while they are clearly not mirror images of grievant’s case, they do have several key similarities. These similarities, in the Board’s view, make them appropriate in this instance.

Department Case No. 2010-0152 (September 15, 2010) involved an employee proposed for a five day suspension for making inappropriate comments to his female subordinates and for screaming at another employee. The charged employee was a Senior Foreign Service Officer and in a position of leadership as an Office Director. In Department Case No. 2010-0263 (December 1, 2010), a DS agent made inappropriate advances and comments to a colleague. The employee reportedly asked women to kiss him on the cheek before providing them with their passwords. The agent was proposed for a five-day suspension, and it was mitigated to two days. The agency found this case pertinent to grievant's case because DS agents are also held to a higher standard of conduct. The Board agrees that these two cases are relevant to grievant's case, particularly because they involve employees who, like grievant, are held to a higher standard of conduct because of their rank and/or their positions of responsibility. As the Board has noted in a previous appeal, "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. As to these comparators, the underlying conduct was certainly similar. The Department's application of the *Douglas* Factors was reasonable and supported by the evidence of record.

V. DECISION

The appeal is denied and the five-day suspension sustained.

For the Foreign Service Grievance Board:



Cheryl M. Long
Presiding Member



William J. Hudson
Member



Nancy M. Serpa
Member