

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between



Grievant

and

Department of State

Record of Proceedings  
FSGB Case No. 2015-028

April 29, 2016

**DECISION**

EXCISED

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For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Bernadette M. Allen

Harlan F. Rosacker

Special Assistant

Joseph J. Pastic

Representative for the Grievant:

*Pro se*

Representative for the Department:

Elizabeth A. Whitaker  
Grievance Analyst, HR/G

Employee Exclusive Representative:

Zlatana Badrich  
American Foreign Service Association

## OVERVIEW

**Held:** Grievant violated agency regulations by misusing his position for private gain, specifically by attempting to favorably influence the adjudication of a friend's nonimmigrant visa (NIV) applications. The Department has met its burden of proving that the proposed discipline of a four-day suspension is justified and reasonable. Grievant's appeal is denied.

**Summary:** The Department of State (Department, State) charged grievant, a tenured FP-03 Diplomatic Security (DS) Special Agent (SA), with Misuse of Position, on four specifications. The Department found that grievant's use of his official title as an SA, on the multiple occasions that he challenged various consular officers by telephone and via his State email account about their respective decisions to deny an NIV to his friend, equated to misuse of his position for personal gain.

Grievant claimed that his inquiries about his friend's NIV applications were not attempts to intercede in the visa adjudication process, but were merely efforts to provide "clarification in order to remove all uncertainty and get the visa processed." He surmised that national origin bias against himself might have been the reason the consular officers did not give sufficient weight to the invitation letter he provided to his friend for visa interviews. He also contended that the Department's proposed disciplinary action is not merited because the agency did not provide him clear or fair notice of what behavior constituted the misconduct, nor what rules/regulations his behavior violated. He challenged the level of discipline proposed as excessive compared to lesser discipline imposed on others for similar offenses. Further, he argued that a delay in imposing the proposed discipline might adversely affect his chance for promotion and his career. He also claimed that a hold on a Meritorious Step Increase for which he was recommended is unjustified. He requested that a senior consular officer outside of the chain of command of the Embassy Consular Section conduct an independent review of the NIV applications in which his friend was refused visas. Finally, he requested removal from his Official Performance File of all "inaccurate, inappropriate and biased" information that might negatively affect future applications made by his friend, other friends, or relatives.

The Board reviewed 3 FAM 4139.14, Grounds for Admonishment and Disciplinary Action, that references 5 CFR 2635, Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The Board concluded that the Department met its burden of proving that grievant was sufficiently on notice of the regulations proscribing use of his position to benefit his friend's visa applications. Thus, the Board found that the Department proved three of the four specifications and that the penalty is both justified and reasonable. Grievant's appeal is denied.

## DECISION

### I. THE GRIEVANCE

██████████ (grievant) challenges a charge by the Department of State (Department, State, agency) that he misused his position for personal gain and to benefit his friend, in violation of agency regulations and standards of conduct for federal employees. He contests a decision to suspend him for four days without pay, arguing that the penalty is excessive when compared to lesser penalties imposed on others for similar or more egregious offenses. He adds that a delay between his conduct and the proposed discipline violated agency regulations and might adversely affect his chance for promotion and his career. He also contends that a hold on the Meritorious Step Increase (MSI) for which he was recommended is unwarranted.

### II. BACKGROUND

Grievant, an FP-03 Special Agent (SA) assigned in the Diplomatic Security (DS) Bureau, has been employed with State since July 2004. He has served in DS assignments overseas and domestically, as well as several temporary duty assignments overseas. While serving in ██████████ grievant repeatedly communicated with the Consular Section (CONS) at the U.S. Embassy in ██████████ ██████████ both from his State email account and by telephone, identifying himself by his official title as a DS SA, and requesting assistance on behalf of a friend. Grievant characterized his friend as an “uncle” whom he wanted to visit him in the U.S. When the friend first applied for a visa in October 2010, the request was initially refused.

In Specification 1, the Department charged that on October 5, 2010, grievant sent an email message concerning his friend’s refused application from his official State email account to the Embassy Deputy Consular Section Chief, offering to provide information “which might be

needed to reconsider [the friend's] application in a positive manner.” Grievant identified himself as an SA with DS “who has worked at two overseas posts, worked closely with CONS colleagues, and investigated fraud both domestically and overseas.” Grievant expressed his surprise that his friend’s visa application had been refused and specifically asked the Deputy Consular Section Chief for her assistance with the “private matter.” The application was reviewed and grievant’s friend was re-interviewed. After the re-interview, the friend was issued a multiple-entry, twelve-month NIV for business and tourism (B1/B2) and he visited grievant in the U.S.

In Specification 2, the Department stated that the same friend applied for another visa in 2011 to visit grievant in the U.S. Prior to this application being submitted, grievant emailed the same Consular Section Chief (ConSec), asking whether he needed to provide his friend with a new letter invitation, or whether the email would suffice. Again, the email identified grievant as an SA with DS. Grievant was advised by the ConSec that his friend should bring with him to the visa interview all supporting documentation that he had concerning the purpose for his visit. She advised grievant to provide his invitation letter to his friend who should bring it with him for his interview.

In Specification 3, the Department charged that on December 1, 2011, grievant’s friend submitted his second visa application that was again initially refused. Grievant responded by sending email messages, on December 1 and 12, 2011 from his State email account to the Deputy Consular Section Chief, questioning why his letter, from a “DS employee,” was insufficient to support his friend’s NIV application. Grievant wrote: “Please look into this matter and have the interviewing consular officer call/email me if he has any concerns.” Grievant intimated that national origin bias against himself might be the reason why his invitation letter

was not deemed sufficient to support his friend's visa application. He wrote, "I would hate to think that my invitation was ignored or overlooked simply because [it] was signed by someone with a [REDACTED] name – frankly, this is the impression I am getting from my dealings with the NIV office...."

When the Section Chief did not respond, grievant re-sent the message on December 12, 2011, from his Department email account. He wrote: "Could you please let me know if this matter is being reviewed/reconsidered and, if so, what other steps will be necessary on my end." The next day, on December 13, 2011, the senior desk officer in the DS International Programs, Office of Regional Directors, European Affairs Division (DS/IP/RD/EUR) sent grievant an email message that warned him to "be careful" because the Bureau of Consular Affairs (CA) had "very strict rules" concerning any "attempts or perceived attempts to influence the visa process." He recommended that grievant contact a consular officer to learn what was permissible, adding: "I wouldn't want to see you accused of anything improper." This same officer suggested that grievant may have "ruffled feathers" in CA. Grievant replied in an email that there was nothing improper or illegal in his communications with consular officers and that "CA can have their feathers ruffled [sic] as much as they want, but they too should allow for transparency and accountability in their actions."

In Specification 4, the Department states that grievant's friend reapplied for a visa on October 25, 2012, listing grievant as his U.S. contact. After the visa was refused, grievant telephoned the ConSec on the same date, introduced himself as a DS agent and asked to discuss "something personal." Grievant explained some history about his friend and asked what he could do "to make this [the visa approval] happen." Grievant then advised the ConSec that he had handled visa fraud cases and had "sent people to jail," finishing that he did not see how there

could be anything improper about his friend's application. Grievant used his SA title to follow up with an email message from his State account, expressing a desire to provide "clarification in order to remove all uncertainty and get this visa processed."

Thereafter, on February 2, 2013, the DS Office of Investigations and Counterintelligence (DS/ICI) initiated an investigation of grievant's communications with CONS. On October 11, 2013, DS/ICI forwarded its report to the Office of Human Resources (HR) for possible disciplinary action. On December 2, 2014, the Director of the Bureau of Human Resources Office of Employee Relations (HR/ER/CSD) proposed that grievant receive a four-day suspension without pay for Misuse of Position, on four specifications. After considering grievant's written and oral responses, submitted in January 2015, the HR Deputy Director sustained the charge, all specifications and the penalty on March 3, 2015.

Grievant filed his agency-level grievance with the Department on April 3, 2015, which the Department denied on June 24. Grievant then appealed the Department's decision to this Board on July 7 and submitted a Supplemental Submission on December 20. Grievant seeks the following relief: (1) mitigation or rescission of the proposed penalty; (2) "withdrawal of any and all unsubstantiated allegations of inappropriate conduct, which might have lead [sic] to retaliatory actions by DS;" (3) withdrawal of a counseling certification; (4) removal of any holds on his promotion or reassignment that have been placed on him during administrative or criminal fraud investigations into his conduct; (5) an independent and bona fide review of all of his friend's visa applications<sup>1</sup> by a senior consular official outside of the chain of command at the Embassy; and (6) a review and purge of all inaccurate, inappropriate, or biased information in the consular records related to grievant and his friend.

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<sup>1</sup> The grievant's friend submitted four NIV applications during the period 2010 to 2012.

The Department responded on January 13 and grievant filed a rebuttal on February 8, 2016. The Board closed the Record of Proceedings on February 9, 2016.

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

#### **A. The Department:**

The Department acknowledges that grievant, like any private citizen, is permitted to offer letters of invitation or other support to friends and relatives who may apply for visas.

Nonetheless, it contends that grievant did not comport himself as a private citizen with regard to the visa applications of his friend. The Department argues that grievant failed to use a private email account to communicate with consular officers, but instead used his State email account and his position title to intercede on his friend's behalf. The Department states that grievant did not portray himself as "any other private citizen" would; rather, he deliberately highlighted his status as a DS SA when he weighed in on his friend's visa applications.

As for grievant's allegations that national origin bias may have influenced the consular officers' adjudications of his friend's NIV applications, the Department responded that it would not pass judgment on the actions of the consular officers because the focus of this case is grievant's actions. The agency argues that as an SA, grievant's intercession in the adjudication process was improper and his concern about a possible injustice "did not give [him] license to advocate the reversal of the visa denial."

In response to grievant's complaint that the proposed four-day suspension was excessive compared to lesser discipline imposed on others who committed similar offenses, the Department contends that the discipline proposed falls within the bounds of reasonableness.

With regard to the delay in taking disciplinary action and the potential adverse effects the delay may have on grievant's career advancement and assignment options, the agency notes that

grievant's behavior occurred in 2010, 2011 and [late October] 2012, while the investigation began in February 2013. The agency contends that there is no statute of limitations applicable to discipline and grievant does not prove that he suffered any harm by the time delay between his behavior and the proposed discipline.

The Department also argues that while grievant did not get the last assignment that he wanted, he was assigned to another overseas post in his career track. The agency rejected grievant's claim that the letter of suspension would remain in his Official Performance File (OPF) for three or four years. Instead, it cites 3 FAM 4355(d)<sup>2</sup> that directs that the suspension letter be kept in the OPF for two years. Moreover, the agency emphasizes, the cause for the suspension letter was grievant's own actions; therefore, he should experience the consequences of those actions.

The Department asserts that it applied the Douglas Factors,<sup>3</sup> considering the following mitigating factors: grievant's 2009 Meritorious Honor Award (MHA), his satisfactory or better performance over the 10 years of his federal service and the fact that the Deputy Consular Section Chief and ConSec did not immediately inform grievant in 2010 that his actions were improper. However, the agency also considered certain aggravating factors, including: grievant's prior two-day suspension in 2006 for poor judgment, the fact that law enforcement agents are held to a higher standard than other employees, and the fact that grievant, as a tenured SA who had previously worked on consular matters, should have recognized that his actions

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<sup>2</sup> 3 FAM 4355(d) provides that: "If an employee is suspended for 5 or fewer days, the letter of suspension must remain in an employee's file for a period of 2 years or until it is reviewed by ... all promotion boards (classwide and conal) that review the file for 2 years."

<sup>3</sup> See, 3 FAM 4137 and the decision of the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), that identifies both mitigating and aggravating factors that should be considered in disciplinary cases.

were in violation of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), 5 CFR § 2635.702(a).

**B. Grievant:**

Grievant argues that the Department failed to prove that he should be disciplined. He contends that the agency did not provide him with clear and fair notice of what behavior constituted misconduct, or what rules or regulations his behavior violated. He also argues that the agency failed to prove the charge or the specifications against him. He avers that the penalty far exceeds reasonable levels of discipline proposed for others who committed similar offenses. Finally, he opines that he has been prejudiced by the “inexcusable” delay and untimely imposition of discipline that will likely adversely affect his chance for promotion and his career.

Grievant rejects the Department’s argument that because he is a tenured SA who previously worked with CA, he should have known that his actions violated the Standards or any other regulation. He states his “email signatures were automatic, and also purely benign.” He also avers that his use of his official title and State email account in communicating with consular officers in [REDACTED] about his friend’s NIV applications was “solely ... a way to ensure transparency, accountability and veracity.” He contends that his communications were innocuous and intended to provide complete information about his friend, his friend’s ties to his own country, the nature of their relationship and details about his friend’s past and prospective visits to the U.S. Grievant states that he stands behind his communications with the consular officers because he did nothing improper or illegal. He argues that instead of challenging his conduct, the Department should instead address the “biased and ill-informed mistakes” of the consular officers. He acknowledges his “emotional involvement” with the applicant, but speculates that bias, based on his national origin, might be the reason why the consular officers

who adjudicated his friend's NIV applications did not give sufficient weight, if any, to his invitations.

With regard to the Department's application of the Douglas Factors, grievant acknowledges that he accepted disciplinary action in 2006 for an "unintentional mistake." Nonetheless, he maintains that his actions in this instance were well-intended and not a violation of any law or regulation. He rejects the Department's view that he should have known better because of his years of federal service and his past experience working with CA.

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

Under the provisions of the Board's regulations concerning grievances involving disciplinary actions, the burden rests with the Department to establish by a preponderance of the evidence that the proposed discipline is warranted and the penalty is reasonable. 22 CFR § 905.2. The Department must also present preponderant evidence establishing a nexus between the charged conduct and the efficiency of the Foreign Service as well as proof that the proposed penalty is appropriate and reasonable under the circumstances of the case. *Id.*

In analyzing this appeal, this Board considered two related regulations: 3 FAM 4139.14<sup>4</sup> and 5 CFR § 2635.702, Standards of Ethical Conduct for Employees of the Executive Branch.

##### **A. Standards of Ethical Conduct for Employees of the Executive Branch (Standards)**

The Standards outline the behavior that is expected of employees in public service, including the imperative that one should not use his/her public office for private gain, or in order to benefit friends, relatives, or others. The Standards also proscribe an employee's use of his/her

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<sup>4</sup> The Department specifically noted that it did not charge grievant with Notoriously Disgraceful Conduct under 3 FAM 4139.14. Nonetheless, the Board found language in that regulation relevant to the instant analysis. *See* discussion below.

government position to attempt to coerce or induce another person to provide a benefit to him/herself, friends, relatives, or associates. 5 CFR §2635.702 states:

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.

(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.

In addition to the proscriptions in 5 CFR §2635.702, the Foreign Affairs Manual (FAM) prohibits the use of one's public office for personal gain. Further, 3 FAM 4371 emphasizes the importance of the material found in 3 FAM 4370. It reads:

The purpose of this subchapter is to advise employees, supervisors, and managers of some of the types of employee conduct which can result in disciplinary action. It is intended that this material be required reading for new employees and that it be referred to during briefings on the behavior of employees, ethics, etc. It is believed that greater knowledge and understanding of employee responsibilities will lead to the avoidance of improper behavior and the need for disciplinary action. Disciplinary action is taken only after it has been determined that it, rather than less formal action, such as an admonishment, is necessary.

Moreover, 3 FAM 4374(2) provides:

In determining what [disciplinary] action should be taken, it should be established whether the employee knew, or could reasonably be expected to know, what standards of conduct or performance was [sic] expected of him or her. However, at a minimum, Federal employees must understand

that they are expected to abide by the law, the Department's regulations, and common-sense standards of conduct ....

The Board concludes that grievant's investigative experience over the course of his 10-year tenure with the Service, and especially his self-proclaimed knowledge of consular procedures, clearly suggests that he knew or should have known not to use his position or title for private gain, or for the benefit of a friend. The proscription is not arcane, but is a "common sense standard of conduct" that should be obvious to any federal employee and especially to an SA who is trained to investigate such violations and who has familiarity with the consular visa function.

While grievant insists that he acted only as a private person each time he made efforts to facilitate the NIV process for his friend, the record belies his assertions. On multiple occasions, he identified himself as an SA with DS whose purpose for communicating with CONS was to intercede on his friend's behalf. For example, in his October 5, 2010 email to the Consular Section, grievant not only identified himself as an experienced SA of DS, he specifically advised that he had worked in the past with consular officers in investigating fraud and asserted that he was "willing to stake [his] *professional* reputation" to vouch that no violation of NIV regulations would occur in his friend's case. These are not the kinds of assurances that would likely be offered by a private citizen; consequently, we are not persuaded by grievant's assertion that the use of his automatic email signature from his agency account was benign when he could have used a private email account to communicate with the ConSec. Thus, we conclude that grievant repeatedly violated the Standards each time that he presented his credentials as a public

employee law enforcement officer for the express purpose of attempting to procure a benefit for his friend and to induce the consular section to approve his friend's visa applications.<sup>5</sup>

The Board also considered the fact that grievant has more than a decade of federal service and he was specifically warned by a senior colleague in DS/IP/RD/EUR (his bureau) to consider the ethical implications of his actions and to take care when interacting with the consular section during its visa approval process. The senior colleague warned grievant that there were strict rules regarding attempts to influence the visa process and that, at a minimum, he should inquire about what actions were permissible. Grievant elected to eschew his colleague's advice and continued using his position to challenge the consular officers' judgments and to try to secure a reversal of those decisions. We conclude that grievant had clear and fair notice that his actions were a misuse of his position and, thus, violated agency regulations.

*B. Four Specifications.*

The Board concludes that the Department has proved by preponderant evidence Specifications 1, 3 and 4 that are all related to grievant's use of his official title as a DS SA in his communications with consular officers in his efforts to intercede in his friend's NIV applications. We conclude that the Department has not proved Specification 2.

In Specification 1, grievant concedes that on October 5, 2010, he utilized his State Department email account, identifying himself as a DS SA to ask the Consular Section Chief to reconsider his friend's application "in a positive manner." He also agrees that he advised the Section Chief that he had investigated fraud in the visa process. It is unclear to the Board whether the grievant meant this statement as a veiled threat that the consular officer might be investigated if grievant's friend's visa did not receive a positive outcome, or whether it was

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<sup>5</sup> 3 FAM 4374 (3) provides: "Repetition of the same offense will be considered in assessing any penalty; as such, repetition implies a disregard for authority ...."

instead an attempt to advise that he was familiar with the visa process to the point of knowing whether he had crossed the line. Grievant identified his concerns as a “private matter,” thereby making clear that he recognized that the issue was not part of his official duties. We find that grievant’s intrusion into the first review of his friend’s visa application was a clear, knowing and intentional use of grievant’s public office for the private gain of himself and his friend and to induce the consular officer to benefit his friend. This is, by definition, a violation of the Standards.

In Specification 2, we find that the only allegation is that grievant emailed the Consular Section Chief to ask whether he should send a new letter of invitation for his friend to visit him in the U.S., or whether the email could serve as the invitation. Although grievant’s email identified him as a DS SA, it does not appear that the email was sent for the purpose of obtaining a benefit for himself or his friend, or to induce the consular officer to act on a visa application. Instead it was limited to a procedural question.

In Specification 3, the Board concludes that grievant’s repeated use of his State email account in late 2011 to challenge the Consular Section Chief as to why a letter from “a DS employee” did not produce the results he and his friend wanted was a clear effort to induce the consular officer to approve the friend’s visa application. In fact, grievant demanded that the Section Chief “look into the matter” and have the consular officer call or email him with any concerns. On this occasion, grievant’s accusation that there might be national origin bias at play based on grievant’s last name was even more pressure applied to induce a favorable result. Grievant’s persistence in resending the same message and asking what more he needed to do to assist in securing an approval, proves that he was determined to get a certain result. This was clearly a repeated improper use of grievant’s public office for the express purpose of achieving a

personal gain for himself and his friend. His efforts appear also intended to coerce or induce a positive outcome from the visa office.

Lastly, in Specification 4, the Board concludes that despite clear warnings from a colleague that grievant's communications with CA could be interpreted as improper efforts to influence the visa review process, grievant nonetheless intervened once more on behalf of his friend. Grievant telephoned the Section Chief and identified himself as a DS agent who wanted to discuss a "personal matter." This time, grievant was no longer passively using his position as part of his electronic email signature to secure a benefit. He specifically informed the Section Chief of his position. He also acknowledged that his concerns were not official, but personal. And, he specifically asked what he could do to achieve a favorable result for his friend. Thus, he clearly intended to induce the consular officer to approve the visa. While the Board is uncertain about grievant's motive when he informed the Consular Section Chief that in his prior work on visa fraud cases he had "sent people to jail," it is certainly possible that the Consular Section Chief perceived grievant's comments as a veiled threat.

### *C. Bias*

Grievant alleges that bias may have played a role in the consular officers' respective adjudications of his friend's NIV applications. First, we find that he provides no proof that his, or his friend's, surnames had any bearing on the adjudication process, or that any consular officer violated any policy, rule, law, or applicable regulation.

The Department argues that the actions of the CONS officers are entitled to a “presumption of regularity.”<sup>6</sup> However, even without applying such a presumption, the Board finds no evidence that the consular officers treated this application any differently than any others due to the grievant’s surname. More importantly, it does not appear that bias toward grievant is at all relevant to the instant charges. That is, even if the consular officers improperly refused any of the visa applications submitted by grievant’s friend because of grievant’s national origin, the issue presented here is whether grievant properly or improperly responded to those refusals. The issue of bias on the part of consular officers is, as the Department argues, irrelevant to the issue of the propriety of grievant’s conduct.

*D. Timeliness*

3 FAM 4321 states: “Disciplinary procedures will be carried out in a fair, timely, and equitable manner.” In the instant case, the question presented is whether the discipline proposed was timely presented to the employee and, if not, whether the employee can establish that he has been harmed or prejudiced by the delay. In *Heffron v. United States*, 405 F.2d 1307 (Ct. Cl. 1969), the Court established a balancing test for determining the impact of a delay on agency discipline. The case suggests that three factors must be considered: (1) the staleness of the charge, (2) prejudice to the employee, and (3) the necessity of the delay. *See also, Krauthamer v. Dept. of Agriculture*, 5 MSPB 79 (1981); FSGB Case No. 2012-064 (May 13, 2013). In FSGB Case No. 2000-006 (February 6, 2002), this Board stated:

Over the years the MSPB has ruled that the length of the agency’s delay, *per se*, is not a sufficient reason to dismiss charges against employees. Its

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<sup>6</sup> *See, Brown v. Plata*, 563 U.S. 493, 575-576 (2011), citing, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *Postal Service v. Gregory*, 534 U.S. 1, 10 (2001) (“[A] presumption of regularity attaches to the actions of Government agencies.”))

decisions have consistently found that there must be a nexus between the delay and the prejudice it has caused the appellant.

To determine whether charges are too stale to support an adverse action by an agency, the MSPB ... suggested that the balancing approach ... be applied. ... [I]f the employee is to show that he was prejudiced by the delay, he should do so through some specific suggestions as to what he might have been able to show, or how his defense would have been improved, had the adverse action (*i.e.*, the disciplinary proposal in this grievance) been proposed earlier. ... The MSPB has affirmed agency actions in cases in which prejudice was not shown, even though delays ranged from two to six years ....

The conduct that has been proposed for discipline in this instance began in October 2010 and ended in October 2012. The investigation into grievant's conduct began in February 2013 and ended in October 2013, one year after the last of grievant's charged conduct. In addition, the proposal for discipline was not issued until December 2014, an additional 14 months after the conclusion of the investigation. The time between the last challenged conduct and the proposal for discipline was two years and two months. We note that the Department offers no explanation for the delay. Given the nature of the conduct and the scope of the investigation, we find that the Department's delay in proposing discipline in this case violated the requirement in 3 FAM 4321 to "carry out ... disciplinary procedures in a fair, timely, and equitable manner."

We have no information about the reason or necessity for the delay, but we find that grievant does not establish that he was harmed in any way by the delay. Grievant does not establish that the delay prejudiced his ability to defend himself against the charge in any manner. For example, he does not allege that he has lost any witnesses because of the delay, or that memories have faded, or that he has in any other way been prevented or hampered in the presentation of his defense. FSGB Case No. 2005-038 (June 29, 2006).

Despite grievant's argument that the letter of suspension would remain in his file for three or four years, and thus, would adversely affect his chance for promotion and, ultimately,

his career, we find that this is not accurate, under 3 FAM 4355(d). Under this regulation, the disciplinary letter will remain in grievant's file for a period of two years.

The Board is also not convinced that grievant was harmed in the assignment process because discipline has not yet been imposed. Grievant's request for interim relief has been granted and remains in effect, thus the suspension letter in question has not yet been placed in his file. Moreover, grievant was assigned to another overseas post that, although not his first choice, was nevertheless an overseas assignment in his career track. We conclude that there is no evidence of harm to the grievant based on the discipline proposal.

Grievant further avers that the Department's proposed disciplinary action has caused other collateral damage to his career. First, he contends that the timing for his security clearance update was advanced, leaving the impression that something must be amiss. Second, he contests the temporary removal of his name from the Meritorious Step Increase (MSI) list because of what he calls a "weak allegation of misconduct." Third, grievant questions what material might be included in his OPF. Finally, he expresses concern about his corridor reputation, alleging that there has been gossip about someone who is "on the beach" for helping a friend with a visa.

On the matter of grievant's security clearance update, the Board did not find in the record any evidence that the timing of his security clearance update was out of keeping with regulation. DS is currently charged to conduct investigations at five-year intervals to update security clearances for employees.<sup>7</sup> Grievant's most recent security clearance update was initiated in July 2015, which is within five years and two months of his prior security clearance update conducted in April 2010. The Board finds nothing unusual about the timing of the grievant's security clearance update and no evidence that the timing of the update caused damage to his career.

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<sup>7</sup> See 12 FAM 232.1(b) and 5 CFR 732.203.

With regard to the removal of grievant's name from the MSI list, the Department's action is in keeping with established procedure.<sup>8</sup> Upon final resolution of the issue and depending upon the outcome, the Department will ultimately resolve the issue of grievant's MSI nomination.

As for grievant's concerns about what may remain in his OPF, the Department correctly notes that it is bound by regulations that permit only the letter of discipline to be included in the OPF.<sup>9</sup> Lastly, with regard to grievant's complaint about the "rumor mill" and possible effects on his reputation, grievant has not provided specific information to support his concern that his corridor reputation has been impacted by the instant charges. In any event, we find that the Department is not responsible for the unintended consequences of grievant's misconduct.

#### *E. Consideration of Douglas Factors*

The Board reviewed the record to determine what mitigating factors the agency took into consideration when determining what disciplinary action, if any, to impose on the grievant. It is clear from the record that the agency exercised due diligence in this regard. First, the Deputy Assistant Secretary for Human Resources (DAS/HR) noted that he took into account grievant's 10 years of federal service, his record of satisfactory or better performance, his receipt in 2009 of a Meritorious Honor Award and the fact that the Deputy Consular Section Chief failed to correct grievant in 2010 when he first interceded in his friend's visa adjudication. The DAS/HR stated that he considered as an additional mitigating factor the fact that grievant discontinued his contacts with the Consular Section after the Consul General specifically informed him that his contacts were inappropriate.

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<sup>8</sup> See 3 FAM 2328 (1) and (2)(b).

<sup>9</sup> See 3 FAM 4355 (c).

The DAS/HR also considered aggravating factors, including grievant's two-day suspension in 2006 for exercising poor judgment, the high standard of conduct expected of law enforcement officers and the fact that grievant should have known the applicable standards of ethical conduct. The DAS/HR also considered grievant's decision to ignore the accurate advice offered by a colleague in his own functional bureau.

In the end, the agency determined that grievant's actions were intentional, committed for personal gain and had an adverse effect on the reputation of the Department because he gave the impression and operated on the assumption that he could influence the visa adjudication process.

*F. Severity of the Penalty*

Grievant contends that the proposed four-day suspension is excessive when compared to lesser penalties imposed on others for similar offenses. The record shows that neither the Department nor grievant found a case comparable to the instant case. The Director of the Office of Employee Relations (HR/ER) has the authority to suspend an employee and the DAS/HR has authority to decide whether to sustain the proposed discipline.<sup>10</sup> The disciplinary action proposed by HR/ER is a judgment call based on similar punishment meted out in similar cases, based on consideration of the severity and nature of the offense, the history of the employee's work and conduct, the employee's intent at the time a violation occurred, the employee's remorse or efforts to become rehabilitated, and any mitigating circumstances, among other things. In essence, there is no hard and fast rule on how much discipline is to be meted out for a given offense, though management is obligated to consider comparator cases to arrive at its disciplinary decisions. We are persuaded that the Department carefully considered appropriate mitigating and aggravating factors as well as comparator cases.

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<sup>10</sup> See 3 FAM 4351 and 4352.

While we did not sustain one specification of the four that were included in the charge against grievant, we conclude that the specification that was not sustained was *de minimus* and, therefore, the proposed four-day suspension for the three remaining specifications falls within the bounds of reasonableness. Notwithstanding this conclusion, the agency is certainly free to reconsider the proposed discipline and determine that because the one specification was not sustained, the penalty will be reduced.

We conclude that grievant is entitled to none of the requested relief.

1. The proposed disciplinary action for grievant's multiple violations of the FAM and the Standards is warranted and within the bounds of reasonableness.

2. With the exception of Specification 2, grievant has not established that he is entitled to a withdrawal of the allegations against him. He also does not establish that there has been any retaliation.

3. Grievant's request for withdrawal of a counseling certification is denied. Grievant did not establish why he is entitled to this relief. As noted on the Form DS-1974, Professional Development Form (also referred to as the Counseling Certification), "the form is a mandatory part of the performance management process." Its purpose is to identify the employee's strengths, as well as opportunities to improve effectiveness. Grievant provided no information that would justify removal of this form and no indication that it is included in his OPF.

4. Grievant's request for removal of the hold on the MSI nomination is denied. Department regulations require that an MSI be placed on hold "on the basis of notification by an appropriate office that a reason exists to believe such ... MSI would be inconsistent with the national interest or the efficiency of the Service." See 3 FAM 2328(1). Given that the

Department has presented preponderant evidence that grievant violated the FAM and the Standards, there is no basis to order the immediate removal of any hold placed on his MSI.

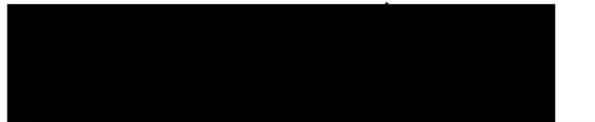
5. Grievant's request for another review of his friend's visa applications is beyond the authority of this Board to order. Accordingly, his request is denied.

6. Similarly, grievant's request for a review of all consular records related to himself and his friend who applied for the visas and a purge of all "inaccurate, inappropriate, or biased information" must be denied because there is no evidence presented that the consular records contain any such documents. Moreover, the request is beyond the authority of this Board to order.

**V. DECISION**

With the exception of Specification 2 related to grievant's inquiry about the visa process, all remaining specifications of the charge are sustained and the grievance appeal is denied in its entirety.

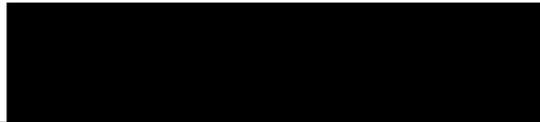
**For the Foreign Service Grievance Board:**



Susan R. Winfield  
Presiding Member



Bernadette M. Allen  
Member



Harlan F. Rosacker  
Member