

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

And

Department of State

Record of Proceedings
FSGB Case No. 2015-040

September 30, 2016

INTERIM DECISION

EXCISED

For the Foreign Service Grievance Board:

Presiding Member:

Arthur A. Horowitz

Board Members:

Harlan F. Rosacker

Nancy M. Serpa

Special Assistant

Andrew D. Large

Representative for the Grievant:

Sharon Papp
General Counsel, AFSA

Representative for the Department:

Melinda P. Chandler
Director, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

HELD: The agency met its burden of proof with respect to only one of the two charges levied against grievant in this case. Given that fact, the relative severity of the penalty imposed, and the Board's view that several Douglas factors were too harshly considered, the Board remanded the decision for penalty reconsideration, limiting the maximum reasonable penalty to a three-day suspension without pay based on results in comparable disciplinary cases.

CASE SUMMARY

The grievant in this appeal is a female FS-02 Diplomatic Security Agent who contested the Agency decision to suspend her for six workdays based on two charges: Inappropriate Relationship with Subordinates, based on the grievant's affair with a Marine Security Guard (MSG) watchstander assigned to Embassy ██████ while grievant was Regional Security Officer (RSO) there in 2007-2010; and Failure to Follow Policy with respect to her failure, under 3 FAM 1527 (f), to address the potential conflict of interest involved when she conducted an intimate relationship with her rating officer (her second-line supervisor) in ██████ in 2012. The Board did not sustain the first charge based on grievant's conduct in ██████, based largely on the fact that grievant was not on notice that such behavior violated any regulation. Grievant was not charged with violating the Department's Policy on Consensual Relationships, but rather with the vague charge of Inappropriate Relationships with Subordinates, supported by FAM provisions regarding RSO supervision of the Marine Guard program. While grievant had overall responsibility for the MSG program as RSO in ██████, the performance evaluations of the man with whom she conducted the affair were completed by US Marine Corps personnel, and an assistant RSO had day-to-day responsibility for supervision of the MSG detachment.

The Board sustained the second charge, that grievant failed to seek a "cut-out" arrangement to avoid potential conflict of interest issues when she began a relationship with her Reviewing Officer in ██████. However, with respect to this charge, the Board found that several Douglas factors were incorrectly evaluated to grievant's detriment. The Board also found that, while grievant's status as a DS Special Agent meant she is held to a higher standard, it was unfair to punish her more severely than two grievants in a comparator case who were both senior officers, and among the highest ranking officials in the Department.

In light of the above, the Board remanded the case to the agency for penalty reconsideration, noting its view that a three-day suspension was the maximum reasonable penalty, and resultant modification of the letter of discipline to be placed in grievant's performance file. The Board deferred consideration of grievant's request for attorney's fees pending receipt of a timely documented motion under Section 908.2 of the Board's governing regulations.

DECISION

I. THE GRIEVANCE

Grievant [REDACTED], an FS-02 Diplomatic Security (DS) Special Agent in the Department of State (Department, agency) challenges a six-day suspension without pay based on two charges: Inappropriate Relationship with Subordinates (for her relationship with a member of the Marine Security Guard Detachment when she was RSO in [REDACTED] in 2009-2010) and Failure to Follow Policy (when she had a relationship with her reviewing officer at Embassy [REDACTED] and failed to initiate arrangements to address the potential conflict of interest created by that liaison). She contends that the penalty is overly harsh in comparison to those imposed on more senior officers based on more egregious offenses

As relief grievant requests:

1. Continuation of her interim relief;
2. Mitigation of the six-day suspension;
3. Deletion of all inaccuracies and allegations that cannot be sustained from any final disciplinary letter that is placed in her file;
4. Attorney's fees and expenses; and
5. All other appropriate relief.

II. BACKGROUND

From July 2007 until June 2010, grievant served as the Regional Security Officer (RSO) at the U.S. Embassy in [REDACTED], generally supervising the Marine Security Guard detachment and a large local staff. Late in this assignment she began a sexually intimate relationship with [REDACTED] a Marine Security Guard (MSG), and after both had returned to the US, they were married and had a child. Grievant later volunteered for service in [REDACTED] and was assigned as a Supervisory Special Agent in the US. Embassy in [REDACTED] from August 2011

to August 2012. While serving in [REDACTED] she had an extramarital affair with the Deputy Regional Security Officer (DRSO), her supervisor and reviewing officer. These relationships at both posts came to light during a DS investigation (June 2012 - June 2013) of a possible breach of the Department's communications (email) systems.

Based on the DS Report of Investigation (ROI) dated August 7, 2013, Ambassador Hans Klemm, the then-Acting Director General (DG) of the Foreign Service, proposed on April 14, 2014, that grievant be separated from the service for cause based on charges of:

Inappropriate Relationships with Subordinates (two specifications), Failure to Follow Policy (one specification), Attempted Interference with an Official Investigation (one specification) and Lack of Candor (three specifications).

On April 9, 2015, after considering grievant's written and oral replies, Ambassador Klemm (by then the former Acting DG and the Principal Deputy Assistant Secretary for Human Resources) informed grievant that he had mitigated the proposed penalty to a 14-day suspension without pay based on his decision not to sustain two charges—Failure to Follow Policy (with respect to the conduct in [REDACTED]) and Lack of Candor—and one specification of Inappropriate Relationship. [REDACTED] filed a grievance with the Department on April 21 and on August 12, Linda S. Taglialatela, Deputy Assistant Secretary for Human Resources (DAS-HR), reduced the penalty to a six-day suspension and made changes in the suspension letter that grievant had requested.

Grievant appealed the Department's decision to the Foreign Service Grievance Board (Board) on August 21, 2015. She made a supplemental submission on February 15, 2016; the Department responded on March 1; and she submitted her rebuttal on April 6. The Board accepted the Department's April 13, 2016, supplemental response to grievant's supplemental

submission, and grievant's response thereto dated April 19, 2016. The Record of Proceedings was closed on May 4, 2016.

III. POSITIONS OF THE PARTIES

A. THE AGENCY

The Department points out that Board decisions have recognized that the Department has the primary responsibility for the discipline of its employees and that penalty determinations are made largely at the Department's discretion unless their severity appears totally unwarranted. *See* FSGB Case No. 2000-037 (November 3, 2000); FSGB Case No. 2002-039 (January 27, 2003). The Department notes that after careful consideration of this grievance, it mitigated the suspension from 14 days to six days. The Board should sustain this penalty as properly considered and reasonable.

In support of grievant's assertion that the penalty in her case is "overly harsh," she cites several cases involving inappropriate relationships within the chain of command in which the penalties were lower. However, in the agency's view, in making that assertion she fails to consider the fact that she had such relationships at two different posts. Despite her assertion that several cases involved multiple relationships, in all but one of these cases there was only a single relationship. Her violations at two different posts roughly two years apart suggest "a troubling indifference to her duty as a law enforcement officer to uphold Department regulations." 3 FAM 4374 states that such repetition will be considered in determining penalties. While grievant argues that there were no aggravating factors in her case, the deciding official found the following:

- That grievant's status as a law enforcement officer in a position of trust held her to the highest standard of conduct;
- That both her positions in [REDACTED] and [REDACTED] were highly sensitive and had some prominence;

- That she was a supervisor and as such was expected to model appropriate behavior for her staff and others in the Embassy community;
- That her actions were intentional;
- That she knew her misconduct was inappropriate;
- That one failure to follow policy took place in ██████████, one of the most dangerous postings in the Foreign Service;
- That she broke her onward, post-█████████ assignment in order to take a position to work for the officer with whom she had an affair in ██████████;
- That she engaged in conduct which resulted in the suspension of her security clearance and the loss of her law enforcement credentials, rendering her unable to fully perform her job; and
- That she is potentially *Giglio*-impaired.

Especially important was her role as a law enforcement officer in ensuring the security of the mission and its personnel in two high-threat environments. Employee 2007-078, who received a one-day suspension for engaging in a relationship with a member of locally employed staff, was clearly an outlier. In the other six cases, the Department imposed penalties of three to fourteen days, depending on the aggravating factors. Grievant cited several cases in which penalties between three and five days were imposed for one inappropriate relationship. Since grievant had two inappropriate relationships within the chain of command, it would be reasonable to impose a six-day suspension without even taking into account the aggravating factors in her case. Her conduct was more egregious than that in cases with five-day suspensions. Grievant's status as a law enforcement officer who is required to uphold and adhere to rules and regulations is a significant aggravating factor, as was her crucial role in the security of the mission and personnel at two posts in high threat environments. She also admitted that her relationship in ██████████ affected her professional life. The deciding official found that if it had been publicly confirmed, any indication that she had received preferential treatment could have had a long-term detrimental impact on morale. Grievant potentially compromised her ability to investigate crimes and to testify in federal criminal trials. The

deciding official also found that grievant had clearly been on notice that her conduct was unacceptable.

While grievant stated that the possibility that she may have suffered from postpartum depression during her tour in ██████ should have been treated as a mitigating factor, the Department finds that she has not cited anything but her own opinion in that regard as grounds for mitigation. Grievant also has failed to present any persuasive evidence that “extra marital affairs and consensual relationships within the chain of command were rampant in ██████.” Nor has she explained why the alleged misconduct of others should mitigate her own proven misconduct. While grievant claims that, because she exercised caution, her ██████ colleagues were unaware of her inappropriate relationships, the Department cites statements from several members of the Embassy ██████ staff who found it obvious that she was having an inappropriate relationship with her supervisor. And while her conduct was not found “notorious” on her Douglas Factors worksheet, the deciding official found that grievant’s acting in a manner which created such suspicions did not meet the expectation that law enforcement officers should model appropriate behavior for their staff and members of the Embassy community.

As a result of grievant’s misconduct, her Top Secret security clearance was suspended on December 31, 2012, and she has been unable to perform fully the responsibilities of her position.

The Department asserts that grievant has not presented sufficient evidence to support her claim that a clinical social worker in Embassy ██████ had encouraged employees to “have sex to relieve stress.” The vague, second-hand accounts she cites do not support a finding that the social worker or the Department were encouraging extra-marital affairs or inappropriate sexual relationships within the chain of command. This allegation should not be considered a mitigating factor in her case.

Although grievant argues that she would not be *Giglio*-impaired since her Lack of Candor charge was not sustained, the deciding official properly found that she would be impaired. Title 9 of the U.S. Attorney's Manual (USAM) provides for broad disclosures of potential impeachment information on agency witnesses to prosecutors. In FSGB Case No. 2006-028 (December 20, 2007), the Board held that the USAM requires disclosure of impeachment information even when it might not otherwise be material or admissible. The Department asserts that even though her misconduct did not reflect on her truthfulness, she may still be found potentially *Giglio* impaired, and that this potential impairment was properly considered as an aggravating factor.

The Department asserts that it has shown that her six-day suspension is within the zone of reasonableness, citing FSGB Case No. 2012-019 (January 31, 2013).

To meet the Department's burden in a discipline case of showing a nexus between the alleged misconduct and the efficiency of the service, the deciding official cited the significance of the "several additional work days" it took to find and panel a new candidate when grievant broke one domestic assignment in order to work for her [REDACTED] supervisor in another domestic assignment.

B. THE GRIEVANT

Grievant contends that the Department has not met its burden of proving that the penalty—a six-day suspension with the decision letter remaining in her official performance file until her next promotion—is justified. She asserts that the Department did not adequately consider whether her penalty was consistent with those imposed in similar cases, as is required in the sixth Douglas factor. The Board emphasized the importance of this requirement in FSGB Case No. 2000-042 (June 21, 2002).

In her agency-level grievance and her appeal to the Board, grievant cited numerous cases in which the Department had imposed suspensions of three to five days “for similar or more egregious conduct by some of the Department’s most senior leaders.” She contends that she should not be held to a higher stand than senior Department officials and a DCM. In two of those cases, very high-ranking officials were found to have been less than candid with the Deputy Secretary of State about their relationships and not to have followed his instructions to “knock it off.”

Grievant suggests that the Embassy in ██████████ condoned consensual sexual relationships. While she is confident that the RSO was aware of her relationship with her second-line supervisor, he did not order them to terminate the relationship or to arrange a cutout of their supervisory relationship. It was widely reported in the Embassy that a social worker assigned to ██████████ by State’s Medical Division encouraged employees at several briefings to have sex to relieve stress. Grievant provides several affidavits to corroborate her recollection in this regard. While grievant was aware of numerous Embassy employees having affairs within their chain of command, it appears that she is the only one to have been disciplined. This is unfair and violates the precept of similar penalties for like offenses.

Grievant also challenged the manner in which DS’s Special Investigations Division (DS/ICI/SID) had conducted its investigation into grievant’s alleged misconduct and cited the 2013 Office of Inspector General Report concerning the Division. The report found that DS/ICI/SID investigated other DS agents excessively and unjustifiably.

While the Department has emphasized the “crucial role” that grievant played in the security of two posts, the Ambassadors with whom she worked closely at those posts and several colleagues have emphasized that her consensual relationships had no impact whatsoever on the

high level of her performance. The Department has cited no facts or law to support its intimation that her relationships jeopardized the safety of the mission or its employees.

Grievant claims that the deciding official failed to recognize strong mitigating factors. She served in a very difficult unaccompanied post and left behind her one-year-old son. She believes that she may have suffered from postpartum depression. Extra-marital affairs and consensual relations within the chain of command were rampant in [REDACTED]

As an indication of the extraordinary stresses and widespread inappropriate behavior in the Embassy and the manner in which staff members reacted to them, grievant submits a statement from [REDACTED] [REDACTED] who served twice in [REDACTED] as DCM, Charge, and Ambassador, including the period when grievant was assigned there:

The [REDACTED] environment was unlike any other I have ever seen, including other warzones. Stress levels were off-the-charts, everything was well-nigh impossible, and our great volunteers had to struggle with all sorts of problems. Drinking, drug use, intimate personal relations of all sorts, and severe psychological problems were endemic. We had programs but they served only to 'manage' the most extreme cases. Most of my people performed superbly. But almost all, however, based on my knowledge and extensive sampling, had to deal with multiple problems of the sort listed above. If we don't want our people to sometimes lapse, then we should not put them in this sort of situation. I have seen the best of my folks do stupid things.

Grievant contends that the Department has erred by repeatedly citing the challenges at the post as an aggravating factor rather than a mitigating factor. Grievant emphasizes that her relationships were very discreet at both posts. She was also candid and forthcoming during the DS investigation and cooperated in two lengthy interviews.

She disputes the Department's assertion that she is *Giglio*-impaired and avers that she would never be called by a prosecutor to testify in federal court about a case involving inappropriate relationships with subordinates or failure to follow policy as these offenses are administrative issues, not criminal offenses. Grievant challenges the Department's assertion that

IV. DISCUSSION AND FINDINGS

In all cases involving the imposition of discipline, the agency has the burden of proving, by preponderant evidence, the charges against the grievant. 22 CFR 905.2. It must also prove that the relevant conduct had a nexus to the efficiency of the Foreign Service and that the penalty imposed is reasonable and comports with the precept of similar penalty for like offense. We find in this case that the Department has only met this burden with respect to one of the two charges remaining against the grievant in this appeal, and that some of the Douglas factors deemed to be aggravating were ill-considered, resulting in the imposition of overly harsh discipline.

Charge 1 – Inappropriate Relationships with Subordinates

Under this charge, the Department alleges that grievant conducted an inappropriate relationship within her chain of command while she was RSO in [REDACTED]. Grievant does not deny that she engaged in an intimate relationship with [REDACTED] to whom she is now married, when [REDACTED] was a watchstander in the MSG Detachment in [REDACTED] and she was RSO at the same post. The record reveals that this relationship did not come to light at post, but came to DS's attention when grievant reported it to DS investigators several years later in an interview on November 26, 2012.

The charge of Inappropriate Relationships with Subordinates is not, as such, the subject of a FAM provision or Department policy. Rather, the Department cites 12 FAM 430, the regulations concerning the Marine Security Guard (MSG) program, which outline the supervisory and managerial responsibility Regional Security Officers (RSOs) have over that program, as the basis for the charge. The charge quotes pertinent parts of that regulation:

12 FAM 432.2 Regional Security Officer (RSO)

- a. Under the authority of the chief of mission or principal officer, or designee, the RSO is the immediate operational supervisor of the MSG detachment for the

Bureau of Diplomatic Security. This officer determines specific guard requirements and coordinates them with the Marine detachment and company commanders and with the chief of mission or principal officer.

12 FAM 433.1 Program Supervision

RSOs are responsible for the operational success of the MSG program abroad. They must actively support and supervise the MSG program by:

- (1) Attending and participating in the MSG's guard school;
- (2) Leading and supervising all contingency drills;
- (3) Conducting unannounced inspections of MSG posts;
- (4) Involving themselves in all inspections and official visits by Marine Corps officers to include acting as joint control officer for the visit, briefing the visiting officers, and attending all meetings with post officials;
- (5) Ensuring the detachment commander has familiarized newly assigned MSGs with the equipment and duties of a post prior to their standing watch alone;

*

*

*

Grievant was not charged with a violation of the Department's Policy on Consensual Relationships contained in 3 FAM 1527. That policy, in paragraph (d), describes the possible harm caused by "consensual relations between supervisor and subordinate within a direct supervisory chain." The prohibited relationships in 3 FAM 1527 are very specifically described.

As the Board has stated:

It is important to isolate exactly who is covered by the policy and what proscriptions and prescriptions the policy contains. Not all, even sexual, relationships among embassy employees are prohibited. Only relationships "between supervisors and subordinates within the same supervisory chain" are covered because only those relationships, according to the policy, have "the potential for creating harm." FSGB Case No. 2008-029 (June 23, 2009, page 21)

Furthermore, that policy is not a flat proscription of the prohibited relations; rather, paragraph (f) of the same FAM section directs those employees for whom conflicts are the most overt, i.e., "in which one employee serves as the first- or second-line supervisor of the other," to initiate arrangements to address such potential conflicts of interest.

The Board must assume, since the Department did not charge grievant under this policy, that it believed her conduct did not fit within its prohibitions. There is good reason to doubt that it would. The policy only applies to supervisors and subordinates within the same supervisory chain. In this case, although grievant exercised some supervisory responsibility over the Marine Security Guard program as a whole, and thus ■■■ that supervision was limited to operational and logistical matters. Even at that, day-to-day operational supervision was exercised by her Assistant RSO. It is clear from the Memorandum of Understanding between the State Department and the Marine Corps, from which the FAM regulations cited are derived, that for all other purposes the Marine Guards remained in the chain of command of the Marine Detachment to which they were assigned, and the Detachment Commander retained personnel responsibility for them, including for evaluations and discipline. Grievant did not serve as rating or reviewing officer for ■■■ or in the same capacity for anyone in his chain-of-command.

Department Case No. 2004-140, cited by the agency, further supports the conclusion that grievant's relationship with ■■■ did not fall within the proscriptions of 3 FAM 1527. In that case, there was confusion about whether an employee had conducted relationships with one or two LES employees in his chain of command. The agency concluded that "there was insufficient evidence to substantiate that an inappropriate relationship within the chain of command took place between Employee 2004-140 and the second LES," when the employee was neither rater nor reviewer of that LES. Although the Board does not rely heavily on this case in reaching its conclusions, it does support a strict reading of the prohibitions set forth in the Department's Consensual Relationship Policy.

The Department has considerable flexibility in defining charges in disciplinary actions. However, the Board is not aware of, nor has the Department cited, any other

cases in which an employee was charged with an inappropriate consensual relationship under any provisions other than its Policy on Consensual Relationships. As the Board stated in the case cited above, “It is axiomatic that an employee may not be disciplined for misconduct where the underlying proscription is vague and where the employee had no reason to be aware of the fact that particular activity would be deemed by the Department to be prohibited.” FSGB Case No. 2008-029 (June 23, 2009, page 23)

In this case, the Department has a specific regulation directed at prohibited consensual relationships, which it did not cite in charging grievant, nor under which did it attempt to prove her conduct was prohibited. The FAM regulation which it did cite, describing the RSO’s responsibilities with respect to the Marine Guard program, makes no reference to consensual relationships. Under these circumstances, we conclude that neither of the two regulations would have given grievant sufficient notice that her relationship with JS violated agency policy and could be subject to disciplinary action.

The Board does not sustain Charge 1.

Charge 2 – Failure to Follow Policy

The facts of this charge are not in dispute, in that grievant has admitted to having conducted an intimate relationship with her reviewing officer in [REDACTED] and with the fact that she “failed to follow policy when [she] did not initiate arrangements to address the potential conflict of interest created by [her] relationship with [REDACTED] [her] reviewing officer at Embassy [REDACTED]

[REDACTED] The parties disagree, however, on what constitute mitigating and aggravating factors, as well as how the penalty in this case compares to other cases involving similar conduct.

Aggravating and Mitigating Factors

We begin our discussion with an analysis of the aggravating factors cited by the Department with which the grievant takes issue. For clarity's sake, we list here the factors the agency deemed aggravating:

1. That grievant's status as a law enforcement officer in a position of trust held her to the highest standard of conduct;
2. That both her positions in [REDACTED] and [REDACTED] were highly sensitive and had some prominence;
3. That she was a supervisor and as such was expected to model appropriate behavior for her staff and others in the Embassy community;
4. That her actions were intentional;
5. That she knew her misconduct was inappropriate;
6. That her failure to follow policy took place in [REDACTED] one of the most dangerous postings in the Foreign Service;
7. That she broke her forward assignment in order to take a position to work for [REDACTED] [REDACTED];
8. That she engaged in conduct which resulted in the suspension of her security clearance and the loss of her enforcement credentials, rendering her unable to fully perform her job; and
9. That she is potentially *Giglio*-impaired.

With respect to the first aggravating factor, we agree that grievant's status as a DS Special Agent means she is held to a higher standard of conduct than some others in the Foreign Service. However, we find it difficult to conclude that she should be held to a standard higher than that imposed on two of the Department's most senior managers (Employees 2005-103 and 2005-104), who were both charged, unlike grievant, with lack of candor; who failed to heed direct instructions from the Deputy Secretary of State; and whose conduct led to several complaints being lodged with the Director General of the Foreign Service, as well as curtailments from the office in which they worked. Likewise, we do not agree that grievant, an FS-02, should be punished more harshly than the employee charged in FSGB Case No. 2003-045, who was, at least during part of the conduct at issue, a Deputy Chief of Mission and thus presumably senior to grievant in the instant case, in both rank and responsibility.

We agree that aggravating factors 2 through 5 listed above all apply in this case.

With respect to factor 6, that her failure to follow policy took place in [REDACTED] one of the most dangerous posts in the Service, the Board concludes, without condoning or minimizing grievant's behavior, that grievant has shown that intimate affairs, among other inappropriate behaviors, seem to have been rampant at that post during the time she was there. Statements by her co-workers, colleagues, and even the then-serving Ambassador, make it clear that grievant was not the only officer at post engaging in inappropriate behavior, which may have clouded her judgment. Certainly the repeated reference to the fact that free and unlimited birth control was available in the health unit at an unaccompanied post might be seen to indicate at least tacit condoning of intimate relationships among unmarried people. While we would stop short of labelling the danger of the post, and the resulting stress levels there, as mitigating factors, given the apparent prevalence of inappropriate behavior, we decline to view it as aggravating.

The Board carefully considered Factor 7, *i.e.*, that grievant broke her onward (post-[REDACTED] assignment in order to work in Washington with the man with whom she had an affair in [REDACTED]. On one hand, grievant did request that her onward assignment to the [REDACTED] be broken, but unspoken in the record is the fact that the Department's HR Bureau, and an assignments panel, agreed to the breaking of that assignment. An assignments panel also agreed to assign grievant to a position wherein she would again be working for [REDACTED]. If this situation caused extra work, and thus a nexus to the efficiency of the Service, it begs the question why the Department agreed to both breaking the onward assignment and assigning grievant to a different position. Moreover, the record evidence does not support the Department's arguments that grievant's actions caused her would-be supervisor to spend a

“significant amount of time” replacing her, or that the ██████ endured a long vacancy in grievant’s would-be position.

The Board agrees that factor 8 is aggravating, but notes that grievant appears to have worked effectively and performed extraordinarily well in important, if non-law-enforcement, positions during the pendency of this grievance and appeal.

With respect to factor 9, grievant’s potential *Giglio*-impairment, this Board recognizes that it is agency policy to report broadly to the Department of Justice about the employment record of any potential witness in a criminal case. While we are unable to predict whether, and for what reasons, grievant might be called to testify in a future criminal case, we find it extremely unlikely that her inappropriate affair, handled as an administrative matter within the Department, would ever be cause for her impeachment as a criminal witness.

Additionally, with respect to penalty consideration in this appeal, grievant’s having had two relationships is cited as “repetitive” behavior and thus more serious than the misconduct in other cases. The Department relies on 3 FAM 4374, section 3, which states that “[r]epetition of the same offense will be considered in assessing any penalty; as such, repetition implies a disregard for authority.” Given that the first charge of misconduct has not been sustained, the penalty must be reduced not only by the amount of the penalty directly attributable to that charge, but also to the increased weight given to the seriousness of the charges because of repetitive conduct.

The Appropriate Penalty

Having considered the Department’s imposition of a six-day suspension for grievant’s misconduct in this case in light of our decision to set aside charge 1 as unsustainable, and having analyzed the application of the aggravating and mitigating factors in the *Douglas* case as well as

the facts and circumstances of the comparator cases discussed above, we conclude that the level of discipline imposed by the Department in this case should be reconsidered. Accordingly, the Board remands this appeal to the agency for consideration of the appropriate penalty in view of our decision, and we find—based on an analysis of discipline imposed in comparable cases (*supra*, at 15)—that the maximum reasonable penalty for the remaining charge against grievant is not more than three days’ suspension.² We further direct the Department to modify the letter of discipline by deleting any reference to Charge 1.

Finally, we find it premature to consider and therefore do not address grievant’s request for attorney’s fees. Rather, pursuant to the provisions of section 908.2 of the Board’s rules, 22 CFR 908.2, any such request must be made in writing and accompanied by the documentation specified in that rule within 30 days of this decision.

V. DECISION

Charge 1 is not sustained and any reference to it shall be deleted from the agency’s records and the previously imposed letter of discipline. Charge 2 is sustained. This appeal is remanded to the agency for consideration of an appropriate level of discipline in light of our decision herein. Given that more senior officers have received suspensions of three days or less for similar or more serious violations, we order that whatever discipline is imposed on remand shall not exceed a suspension of three days. The agency shall report to this Board within 30 days from the date of this decision as to the steps have been taken to implement the foregoing matters.

² The Board acknowledges the agency’s broad discretion to determine an appropriate level of discipline in any given case, subject to the limitations of reasonableness and consistency with discipline imposed in similar cases. Nevertheless, we note that grievant has an exceptional performance record and that the six-day suspension imposed herein would virtually guarantee an early end to grievant’s career in the Foreign Service.

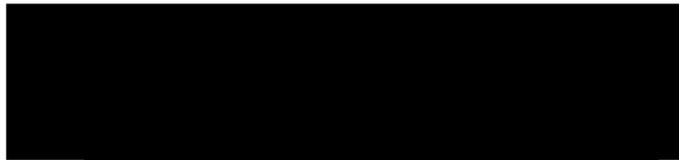
For the Foreign Service Grievance Board:



Arthur A. Horowitz
Presiding Member



Harlan F. Rosacker
Member



Nancy M. Serpa
Member