

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16 - 012

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 21, 2016

Issue: *Failure to Meet TSO Annual Certification Requirements*

OPINION AND DECISION

On December 30, 2015, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Failure to Meet TSO Annual Certification Requirements*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol in remediating and testing the appellant and provided him with a fair opportunity to demonstrate proficiency.

Management supported the Charge with one specification. The Charge specified that on October 28, 2015, the appellant failed to meet his Annual Performance Review (APR) Certification Requirements. Specifically, on or about October 8, 2015, the appellant attempted and did not qualify on the APR Image Mastery Assessment (IMA). On or about October 15, 2015, the appellant was remediated at least one hour and engaged in self-study. On October 15, 2015, the appellant completed an APR IMA retest and was unsuccessful a second time. As required, on or about October 20, 22 and 27, 2015, the appellant was remediated at least one hour and engaged in self-study prior to the final retest. On October 28, 2015, the appellant took a final APR IMA retest

and was unsuccessful a third time. By failing the APR IMA test a third time, the appellant failed to meet his TSO APR Certification Requirements.

On October 8, 2015, the appellant was administered the IMA and failed this assessment. On October 15, 2015, the appellant was remediated for 1.5 hours with an instructor and signed the applicable Annual Proficiency Review (APR) Technical Proficiency Assessment Remediation Acknowledgement-IMA form indicating that he accepted and participated in the opportunity for self-study. The appellant also acknowledged that he received remediation in accordance with the APR program policy on the IMA, and was ready to take the IMA reassessment. On October 15, 2015, the appellant was given a second attempt to take the IMA. The appellant failed to successfully perform the assessment for the IMA on his second attempt. On October 20, 2015, the appellant was remediated for 4.5 hours with an instructor. On October 22, 2015, the appellant participated in remediation and self-study for 3.5 hours. On October 27, 2015, the appellant participated in additional remediation and self-study for 4 hours and signed the APR Technical Proficiency Assessment Remediation Acknowledgement-IMA form for the failed IMA assessment, indicating that he accepted and participated in the opportunity for self-study. On October 28, 2015, the appellant acknowledged that he was ready for retesting. On October 28, 2015, the appellant was administered the IMA. The appellant was unsuccessful on the third attempt to pass the IMA.

The IMA is part of a larger annual proficiency review that TSA administers to all employees who occupy TSO positions. TSA administers the annual proficiency review pursuant to the legal requirements imposed on it by the Aviation and Transportation Security Act (ATSA). ATSA specifically requires that every TSO undergo an annual proficiency review, and that any individual employed as a TSO “may not continue to be employed in that capacity unless the evaluations establish that the individual...demonstrates the current knowledge and skills necessary to...effectively perform screening functions.” 49 U.S.C. § 44935(f) (5).

The TSA FY15 Annual Proficiency Review User’s Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2 of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officers (TSO); Lead TSOs (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Section 5. states that all APR assessments are scored on a pass/fail basis and that employees are provided up to two attempts to pass the scored PSE assessment and up to three attempts to pass all other APR assessments. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgment – IMA forms, signed and dated by the appellant on October 15, 2015, October 22 2015, and October 27, 2015 and; APR Supplemental Remediation Record and Acknowledgment – Supplemental forms, signed and dated by the appellant on October 22, 2015, and October 27, 2015.

On appeal, the appellant referred to his November 20, 2015, response to the Notice of Proposed Removal wherein he argued that he was not certified in the Advanced Technology (AT) 2 X-Ray Full Configuration and therefore, he can only operate the AT 2 alternate. The appellant argued that he had not been on the checkpoint X-ray for most of 2015. He also argued that that IMA is not similar to what is seen live in the checkpoint and that the images in the TRX practice session are not the same as the actual APR IMA. Further, the appellant stated that he had made an appointment to check his eyes and it was determined that he has a condition that affects his eyesight. He argued that removing him would result in the loss of a valuable, lauded employee and a waste of years of training. He stated that although he failed to successfully pass the most recent IMA, he stated that he has never had any performance related problems in his more than 13 years with TSA and that he has always received successful performance ratings. The appellant also stated that he took practice tests multiple times and received a perfect 100% score or close to it. He argued that his record establishes a pattern of competence that warrants another opportunity to continue in his position. The appellant argued that retaining and adequately retraining him in X-ray screening would more likely promote the efficiency of the service than removing him. He also stated that he was dual certified in both screening and baggage for the near-entirety of his employment with TSA and that he only recently relinquished his baggage certification in order to work in Playbook.

Management responded and argued that every effort was made to assist the appellant to be successful in his recertification testing to include requesting a fourth retest upon receipt of the appellant's November 20, 2015, written response, which was denied by the program office. Management argued that the appellant took full advantage of his remediation and engaged in ample self-study. Management cited TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A, which states that the failure of a TSO to maintain TSO certification requirements is an offense for which removal is required. Management also referenced the 2015 Annual Proficiency Review (APR) User's Guidance which states that Federal Security Directors (FSDs) are prohibited from converting an employee who fails the APR assessment to a single function officer and are strictly prohibited from retaining an employee who fails an APR assessment for any reason.

On February 25, 2016, the Board issued an Order requiring management to provide an explanation as to the difference between an AT Full Certified Screener and an AT Alternative Certified Screener. Management responded and explained that the difference referred to a software enhancement on the X-ray machines and the fact that officers needed to be specifically trained on the new software enhancements prior to being allowed to operate the X-ray machines in AT-Full mode. Management stated that the appellant did not complete the AT-Full training. Management stated that the appellant was certified on the X-ray and operating the x-ray machine and reviewed bag images on a weekly basis, and that during APR testing all of the machines used the exact setting and mode that the appellant was trained to operate. Management concluded that the appellant was assessed and evaluated on his ability to perform screening functions that he regularly conducted on duty.

The appellant responded to management's response to the Order and argued that because he was not certified on the AT 2 Full X-ray, he was not able to assist with bag checks in the Standard Lane. He stated that the checkpoint staff saw it as a hindrance and argued that they would assign him to positions that had nothing to do with the X-ray. The appellant reiterated many of the points he argued in his appeal, and concluded that he failed because he was not trained to operate all facets of the checkpoint.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the IMA on October 8, 2015, October 15, 2015, and October 28, 2015. The Board also found that on October 15, 2015, prior to his second IMA assessment, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgement-IMA form acknowledging that he chose to participate in self-study; that he received remediation in accordance with APR program and policy requirements; and that he was ready to take his second IMA assessment. Additionally, the Board found that on October 27, 2015, prior to his third IMA, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgement-IMA form, acknowledging that he chose to participate in self-study; that he received remediation in accordance with the APR program and policy requirements; and that the appellant made a notation and initialed the form on October 28, 2015, stating that he was ready to take the applicable IMA assessment. The Board found that the appellant was properly tested in accordance with the 2015 Annual Proficiency Review User's Guidance. Additionally, the Board found that the evidence establishes that the appellant participated in proper and sufficient remediation after his first and second test failures and that he was retested within the timeframe defined in the guidelines. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is failure to maintain required certification and certification is a condition of continued employment as a TSO.

Pursuant to the 2015 Annual Proficiency Review User's Guidance, each employee who conducts screening functions must complete and pass all recertification requirements on all applicable APR assessments in order to meet the basic conditions of employment with TSA. Consequently, the Board finds that the appellant's non-disciplinary removal based on his failure to maintain his certification was appropriate and consistent with TSA policy.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08760
87875.TSA
Date: 2016.03.21 10:56:52 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-013

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 2, 2016

Issue: Refusal to Submit to TSA-Ordered Drug Testing

OPINION AND DECISION

On December 24, 2015, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Refusal to Submit to TSA-Ordered Drug Test*. The appellant filed a timely appeal with the TSA Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is substantial evidence. Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. It is a lower standard than preponderance of the evidence. If the evidence establishes the charge, management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Refusal to Submit to TSA-Ordered Drug Test*, on one (1) specification alleging that on December 2, 2015, at approximately 11:37 a.m., while in a duty status, the appellant was subject to random drug and alcohol testing pursuant to the TSA Drug and Alcohol-free Workplace Program (DAFWP). Specifically, the appellant attempted to provide a urine sample for the drug test but was unable to provide a sufficient amount. The appellant was offered the opportunity to drink up to 40 ounces of water and continue trying for up to three hours. After another attempt where she did not provide a sufficient amount, the appellant refused to continue the testing process and departed at 13:35 p.m., prior to the full three hours allowed to provide a sufficient urine sample.

The DAFWP, Office of Human Capital (OHC), determined that the incomplete test was a refusal to submit to TSA ordered drug and alcohol testing: "The refusal to test is based upon the employee's failure to remain at the collection site to complete the urine collection process for the random drug test. There is no opportunity for rehabilitation for refusal to test." The Medical Review Officer (MRO) certified the results on December 18, 2015, and determined that "a refusal to test is handled the same as a verified positive."

The Aviation and Transportation Security Act (ATSA), Public Law No. 107-71, requires screeners to have the ability to demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication or alcohol. Additionally, the Handbook to TSA Management Directive (MD) No. 1100.73-5, *Employees Responsibilities and Code of Conduct*, Section O. (2) (a), prohibits employees from using illegal drugs. The TSA Drug and Alcohol Policy states that individuals in Testing Designated Positions (TDPs) are subject to random drug or drug and alcohol testing which is unannounced and can occur on any workday and that refusal to submit to such testing, failing to appear for a test, refusal to provide a urine specimen or adequate breath sample, failure to cooperate with the collection process or tampering/adulterating/substituting the specimen is grounds for removal from the Federal Service.

The issue before the Board is whether the appellant was properly removed from her TSO position for refusing to submit to TSA-ordered drug testing. On December 2, 2015, the appellant was selected for random drug and alcohol testing while on duty. The appellant signed TSA Form 1156A, *Drug and Alcohol Testing- Employee Instructions*, prior to beginning drug and alcohol testing. The Instructions specifically state: "Any refusal to follow collection procedures at any time during the testing process will result in a "Refusal to Test." The consequence of a "Refusal to Test" is removal from Federal Service. The DOT Order guidance states that failure to remain at the testing site until the testing process is completed requires removal.

At the test site, the appellant attempted to provide a urine sample for the drug test but was unable to provide a sufficient amount. The appellant was offered the opportunity to drink up to 40 ounces of water and continue trying to provide a urine sample for up to three hours. After another attempt, where the appellant did not provide a sufficient urine sample, the appellant refused to continue the testing process and left at 13:35 p.m.

A pre-decisional meeting was held on December 8, 2015. The appellant provided a written reply on December 8, 2015. Specifically, she wrote, "I arrived for work not feeling my best...as the day progressed I felt worse but pushed on." She acknowledged that she drank 40 ounces of water and attempted to give urine samples but they were insufficient amounts. She also stated that she had to take her daughter to an appointment, which she was required to attend, so she could not continue to stay for the final 1 ½ hours allowed. On December 14, 2015, the appellant submitted to management results from an external drug test. These results were forwarded to the OHC DAFWP for review by the MRO. The DAFWP advised that per DOT Order 3910.1.D, Chapter VII, 5.a.; the MRO is prohibited from considering "any evidence from tests that are not collected or tested in accordance with this Order."

Management provided as evidence: DAFWP determination email, dated December 21, 2015; MRO Final Report, dated December 18, 2015; TSA Form 1156A, *Drug and Alcohol Testing – Employee Instructions*, dated December 2, 2015; Federal Drug Testing Custody and Control Form, dated

December 2, 2015; appellant's email to an HR Assistant, dated December 4, 2015; appellant's statement, dated December 8, 2015; and a Pre-Decision discussion memo, dated December 8, 2015.

In her appeal, the appellant disputed the charge of refusal to submit. She stated that she attempted to give a sample twice but both samples were insufficient. The appellant argued that she stated that she was unable to stay for the full 3 hours due to a medical appointment for her daughter. She stated that the medical appointment was made in October, that she was required to attend, and that she had made the appointment after work hours per Family and Medical Leave Act (FMLA) guidelines. The appellant argued that the medical appointment was covered under FMLA. She argued that the fact that she is currently on FMLA and that she has been for the past 4 years was omitted during the fact finding. The appellant stated that management was aware that she was on FMLA and argued that they should have taken that into consideration when sending her down for the drug test one hour before she was due to be off duty. As part of her appeal, the appellant submitted results from a controlled substance test she had taken on December 8, 2015, at a private testing facility.

Management responded and noted that the TSA Handbook to MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, states that employees requesting leave due to emergency situations must advise their immediate supervisor or other management official from whom they are requesting leave that they have been selected for random testing contemporaneous with the leave request, and prior to leaving the testing site. Management argued that the appellant admitted that she was told by her supervisors that she must stay to complete the test but that she left anyway. With regard to the appellant's argument that she had to leave to attend an appointment with her child, management argued that she never provided proof that she had an appointment with her daughter. Management also noted that the appointment would not have been sufficient to excuse her from her testing requirement, as she did not receive approval for her absence and did not obtain permission to leave the drug testing area before providing a sample. Management argued that the appellant was notified and signed form 1156A, which states that any refusal to follow collection procedures at any time during the testing will result in a "Refusal to Test," and that the consequences of a refusal to test is removal from Federal Service. With regard to the drug testing results from a private drug testing company submitted by the appellant as part of her appeal, management argued that the test was conducted six days after her TSA scheduled test. Additionally, management argued that the Agency does not accept third party tests and noted specifically that DOT 39101.1D states that the Agency may not consider any evidence from tests that are not collected or tested in accordance with the order. Management argued that because the testing was done outside the purview of the testing order, it may not be considered.

The Board considered the evidence and arguments submitted by the appellant and management. The record shows that the appellant was subjected to a random drug test, but failed to provide a sufficient amount of urine after two attempts and that she left the testing area prior to the three hour allotted timeframe. The appellant does not dispute that she did not remain in the testing area as required and the evidence in the record shows that prior to leaving the testing site; the appellant signed the Federal Drug Testing Custody and Control Form on which the collector indicated the appellant's status would be reverted to a refusal to test. Additionally, the appellant signed the Drug and Alcohol Testing – Employee Instructions form which states that the consequence of a "Refusal to Test" is removal from Federal service. The Board finds that management has proven by substantial evidence that the appellant failed to remain at the testing site until the collection/testing

process was completed resulting in a "Refusal to Test" determination by the MRO. The Board therefore SUSTAINS the charge of *Refusal to Submit to TSA-Ordered Drug Testing*.

Section C.3 of the TSA *Table of Offenses and Penalties* states that removal is required for the offense of refusal or failure to submit to a TSA-ordered drug test. Additionally, Appendix A.1 (d) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal for certain TSO offenses, including refusal to test. Therefore, the Board determined that management's decision to remove the appellant was reasonable and consistent with TSA policy.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA
S ENGEL

Digitally signed by DEBRA S
ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=0876
087875.TSA
Date: 2016.03.02 11:37:20 -05'00'

Debra S. Engel
Chair
OPR Appellate Board



Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-014

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 3, 2016

Issue: Absence Without Leave (AWOL); Tardy

OPINION AND DECISION

On December 22, 2015, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two Charges: (1) *Absence without Leave (AWOL)* and (2) *Tardiness*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge(s), management then bears the burden of showing that the penalty imposed was reasonable.

Management based Charge 1, *Absence Without Leave (AWOL)*, on two specifications. Specification 1 alleged that for the period of June 21, 2015, through June 27, 2015, the appellant was recorded as a no call/no show for his scheduled shift. The appellant failed to request prior approval as required for his awarded vacation bid; upon his return to duty, he was charged as AWOL for the following dates: June 21, 2015, for eight hours; June 24, 2015, for eight hours; June 25, 2015, for eight hours; June 26, 2015, for eight hours; and June 27, 2015, for eight hours. Specification 2 alleged that during the period January 22, 2015, through September 29, 2015, the appellant's leave requests were not approved based upon his pattern of excessive tardiness and he was subsequently charged as AWOL on eleven occasions, specifically: February 7, 2015, for 3 hours and 30 minutes; March 8, 2015, for 30 minutes; April 3, 2015, for 30 minutes; April 9, 2015, for 3 hours; June 12, 2015, for 30 minutes; July 16, 2015, for 15 minutes; July 17, 2015,

for 1 hour and 15 minutes; August 7, 2015, for 30 minutes; August 8, 2015; for 30 minutes; August 22, 2015, for 30 minutes; August 22, 2015, for 30 minutes; and September 20, 2015, for 15 minutes.

Management based Charge 2, *Tardiness*, on one specification alleging that during the period of January 22, 2015, through September 29, 2015, the appellant failed to report for his scheduled shift on time and was documented as tardy on twenty-five (25) occasions, specifically: January 30, 2015, for 11 minutes; January 31, 2015, for 6 minutes; March 25, 2015, for 5 minutes; March 27, 2015, for 6 minutes; March 28, 2015, for 6 minutes; April 2, 2015, for 5 minutes; April 4, 2015, for 5 minutes; April 5, 2015, for 11 minutes; April 10, 2015, for 7 minutes; April 16, 2015, for 11 minutes; April 17, 2015, for 9 minutes; April 23, 2015, for 10 minutes; May 31, 2015, for 8 minutes; July 24, 2015, for 14 minutes; July 25, 2015, for 11 minutes; July 26, 2015, for 12 minutes; July 29, 2015, for 12 minutes; July 30, 2015, for 14 minutes; August 1, 2015, for 12 minutes; August 3, 2015, for 14 minutes; August 5, 2015, for 14 minutes; August 6, 2015, for 14 minutes; August 19, 2015, for 6 minutes; September 11, 2015, for 6 minutes; and September 13, 2015, for 14 minutes.

Management alleged that the appellant was in violation of TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5. A. (7) which states that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Management also alleged that the appellant's conduct was in violation of the Handbook to MD 1100.73-5, Section BB. (1), which states, in part: "Employees are expected to schedule and use earned leave in accordance with established procedures. Repeated unscheduled absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including removal from TSA." Section BB. (2) of the Handbook states: "Tardiness includes delay in reporting to work at the employee's scheduled starting time, returning from lunch or scheduled break periods, or returning late to the employee's work site after leaving the workstation on official business or leave. Unexplained and/or unauthorized tardiness shall be charged as AWOL."

Additionally, management alleged that the appellant's conducted violated TSA MD 1100.63-1, *Absence and Leave*, dated October 14, 2010, and the TSA Handbook to MD 1100.63-1, dated October 5, 2011. Section 5. C of the MD states: "Employees are responsible for: (1) following established leave procedures and policies; (2) managing their leave; and (3) minimizing requests for unscheduled leave." Section B. 4. of the corresponding Handbook states that employees are expected to report for work on time and fit for duty and are expected to be on duty at all times during their tour except during meal breaks and approved absences. Section B. 8. (d) states that habitual tardiness is a basis for disciplinary action and that supervisors should document such tardiness and take the necessary action to address the problem. Section D. 1. (f) states that designated management officials may place an employee in an AWOL status if the employee is required to substantiate an absence with administratively acceptable documentation and failed to do so. Section L. 1 (a) states that an employee's time may be charged as absence without leave (AWOL) when an employee fails to report for duty without prior approval, has an unauthorized absence from the workplace during the workday, or does not give proper notification for an absence.

Management conducted a review of the appellant's electronic time and attendance (eTAS) and WebTA summaries and determined that the appellant showed a pattern of unscheduled leave and tardiness. Management alleged that the appellant had 11 separate charges of AWOL occurring between February and September 2015. Management also alleged that the appellant failed to report for his scheduled shift on time on 25 occasions between January and September 2015. On each of the specified occasions, the appellant arrived to work between 5 and 14 minutes after the start of his assigned shift. On October 22, 2014, management stated that the appellant participated in the 2015 Annual Bid where he requested a week of leave for June 21, 2015, through June 27, 2015. The appellant submitted the request to the scheduling department on a receipt that he signed and dated October 22, 2014. The signed receipt submitted by the appellant states that all Bargaining Unit Employees are required to provide an OPM-71, *Request for Leave or Approved Absence*, at least 2 weeks prior to the first day of vacation and that all bargaining employees should notify the Scheduling Department at least 2 weeks prior of any cancelled vacations. On November 25, 2014, the appellant received an email via his TSA email account from the Scheduling Operations Officer advising him of the 2015 Vacation – OPM 71 Submission Process for TSOs. The email stated: "The TSO will submit to Scheduling an OPM-71 two weeks prior to the awarded leave week indicating the dates of leave the TSO is requesting off and the type of leave being used." The appellant failed to submit an OPM-71 requesting leave in advance for his awarded vacation bid as required, for the period of June 21, 2015, through June 27, 2015.

The appellant was issued a Notice of Proposed Removal on October 14, 2015, and gave an oral reply on October 28, 2015. During the oral reply, the appellant brought up several issues which prompted the Deciding Official to request additional information from the scheduling department. The additional information obtained was sent to the appellant on November 5, 2015. On November 19, 2015, the appellant submitted a written response to the additional information.

Management provided as evidence: 2015 Annual Bid Receipt, dated October 22, 2014; eTAS reports; Call-Out Reports; an email to all employees from the Scheduling Operations Officer, dated November 25, 2014, regarding the annual leave bid process; WebTA Summaries; and Airport Information Management (AIM) Employee Absence Lists.

On appeal, the appellant argued that management inaccurately portrayed his attendance issues as willful. He argued that his failure to submit the required OPM 71 form resulted from an honest mistake. The appellant stated that he participated in the annual bid and requested vacation for the period of June 21 and June 24 – 27, 2015, and argued that he honestly believed that he had subsequently submitted the necessary forms for the leave. He stated that his absence from work was due to an oversight and not from a deliberate decision to be absent from work without approval. The appellant stated that he understands how failing to follow call-out procedures is detrimental to TSA's administration of airport security and that he acknowledged that failure to follow leave procedures is a serious concern to management. He stated that he never intentionally failed to do so. The appellant stated that he has been a loyal and dedicated employee for TSA for more than 13 years and that he has always made great efforts to arrive at work on time, but added that arriving to work on time was not always possible due to his daily commute of 40 miles and frequent confrontations with traffic from construction. He argued that he took a significant step to cure his attendance problem by moving his family into his girlfriend's home on October 15, 2015, so that he could live closer to the airport. The appellant

stated that his two children often struggle with academics and that it was a high detrimental risk to move his family during the middle of the school year, but stated that he is committed to TSA and has demonstrated the sacrifices he has made to improve as an employee.

Management responded and pointed out that the appellant does not dispute the relevant facts of the Removal Decision. Management stated that it clearly established that the appellant was aware of the requirement to submit a leave request based upon his past practices along with the fact that he was reminded by his supervisor to do so. Management also argued that the evidence clearly demonstrates that the appellant has not always made great efforts to arrive to work on time as the appellant claimed. Management stated that in a period of 10 months, the appellant arrived late for his scheduled shift a total of 36 times, 11 of which he was charged as AWOL. Management argued that despite the fact that the appellant moved his family closer to work in October 2015, in order to improve his attendance; his disciplinary record clearly indicates that he had numerous opportunities to improve his attendance as evident by management's use of progressive discipline in an attempt to correct his attendance deficiencies. Management argued that a preponderance of the evidence demonstrates that the appellant failed to receive prior approval for his vacation week bid and that he had a demonstrated pattern of arriving late for his scheduled shift even after numerous warnings.

The appellant responded to management's reply and stated that he does not dispute management's assertion that an OPM-71 form was not submitted prior to his leave for vacation during the time period of June 21-27, 2015, as required by the Agency. The appellant also stated that he does not dispute management's assertions that he had taken approved vacations in the past. The appellant argued; however, that his failure to follow proper leave procedures for the specific instance in June 2015 resulted from a genuine mistake, not from an act committed willfully. He stated that he honestly believed that the necessary forms were submitted prior to his leave.

With regard to Charge 1, specification 1, the Board finds that management provided documentation to show that the appellant was AWOL during the dates specified, as well as documentation to show that the appellant was made aware that he was required to submit an OPM-71 form to Scheduling for awarded leave bids. Therefore, Charge 1, specification 1 is SUSTAINED. With regard to specification 2, the Board finds that management provided documentation to show that the appellant was AWOL during the dates and times specified. Therefore, specification 2 is SUSTAINED. Having sustained both specifications, the Board SUSTAINS Charge 1, *Absence Without Leave (AWOL)*.

With regard to Charge 2, the Board finds that management provided documentation to show that the appellant failed to report for his scheduled shift on 25 occasions.¹ Therefore, Charge 2, *Tardiness*, is SUSTAINED.

Having sustained both Charges, the question becomes whether management has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is

¹ The Board noted that management cited August 3, 2015, in error. The documentation provided shows that the date information referenced refers to the appellant's shift on August 2, 2015. The Board found that it was simply a typographical error and that appellant did not argue against any of dates listed by management.

reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been properly considered by the Deciding Official.

In his appeal, the appellant argued that management failed to prove that removal is a reasonable penalty. He argued that since 2002, he has committed himself to upholding the oath as a TSO. He also argued that the agency has invested a large amount of time and resources to train and maintain him. The appellant argued that to remove an employee like him due to an honest oversight would not further promote the efficiency of the Federal service. The appellant stated that he is a hard-working and competent employee who deserves a chance to continue his career with TSA. He stated that “[h]e exhibits a high potential for rehabilitation and has shown that he is capable of commitment in a difficult situation regarding his residence and the care of his two children.” The appellant stated that five supervisors praised his work performance and highlighted his commitment to uphold his oath as a TSO. He reiterated that his failure to submit a leave slip for his vacation in June 2015 was due to an oversight, and stated that he has made a major life change by moving his residence to prevent late arrival at work in the future.

Management responded and argued that the appellant’s removal was justified and appropriate. Management argued that the appellant’s disciplinary record clearly indicates that he had numerous opportunities to improve his attendance as evident by management’s use of progressive discipline in an attempt to correct his attendance deficiencies. Management pointed out that the appellant was reprimanded, and served three suspensions of escalating degrees, along with being placed on leave restriction numerous times in the hopes that he would correct his attendance behavior. Management also noted that it was not until a few days prior to him receiving the proposed removal that he decided to change his living arrangements. Management argued that the appellant was given ample opportunity to make any necessary changes prior to his proposed removal.

In the appellant’s response to management’s response to his appeal, he argued that management relied on a LOR dated August 11, 2005, in justifying the appropriateness of his removal. The appellant argued that pursuant to TSA MD 1100.75-3, an LOR may only be retained in an employee’s electronic Official Personnel File (eOPF) for a maximum time period of two years. He also argued that an LOR cannot be considered for the purposes of progressive discipline. Additionally, the appellant argued that management further justified the appropriateness of his removal based on Letters of Leave Restrictions (LLRs). He argued that an LLR is not a formal disciplinary action and that it is not filed in an employee’s eOPF and therefore, cannot be used when considering progressive discipline. The appellant stated that he did receive opportunities to correct his alleged attendance issues but argued that none of them proved effective until he made a residential move to be located closer to work. He argued that since his move, management failed to provide any record that indicates that his alleged attendance issues persisted.

The Deciding Official stated that he considered the fact that the appellant told him that his leave was approved by someone in the Scheduling Department, and that the appellant told him it should serve as mitigation in his case. However, the Deciding Official stated that the appellant’s conversation with the Scheduling Department occurred after the appellant officially submitted his signed annual bid receipt which clearly put him on notice that he was required to submit an

OPM-71 requesting leave for his vacation bid. The Deciding Official took into consideration the nature and seriousness of the misconduct and its relation to his duties and noted that when an officer fails to report for their scheduled shift it creates an undue burden on the screening staff. The Deciding Official considered that repeated unscheduled absences negatively reflect on the officer's dependability and reliability and adversely affect the TSA mission. The Deciding Official considered that the appellant's repeated misconduct, as it pertains to his attendance over the course of several years, caused management to call into question the appellant's ability to effectively perform his duties as a TSA officer. The Deciding Official also considered the appellant's record of corrective and disciplinary actions. The Deciding Official noted that the appellant's disciplinary record shows a pattern of failure to follow proper leave procedures and a disregard for established TSA policies and procedures, as well as a failure to correct his behavior. The Deciding Official noted that the actions taken against the appellant include: a Letter of Reprimand (LOR) for AWOL, dated August 11, 2005; a 3-day Suspension for AWOL, dated October 2, 2006; a 7-day Suspension for AWOL, dated April 2, 2014; and a 14-day Suspension for AWOL, dated January 21, 2015. The Deciding Official also noted that the appellant was issued a Letter of Leave Restriction (LLR) or had a LLR extended on the following dates: April 1, 2009; September 23, 2009; August 16, 2010; August 30, 2011; May 22, 2012; March 5, 2014; August 4, 2014; December 31, 2014; and May 23, 2015.

As mitigating factors, the Deciding Official considered the appellant's employment with TSA, since September 15, 2002, the fact that he was promoted to the E Band on May 5, 2014, and that he had an otherwise satisfactory performance rating. The Deciding Official stated that he considered and is sympathetic to the appellant's family situation; however, he found that the nature and seriousness of the appellant's misconduct outweighed the mitigating factors and warranted imposing the disciplinary action. The Deciding Official considered that the appellant occupied a position that management needs to be filled by someone that can be relied upon to be in attendance on a regular and recurring basis and by someone who reports for their scheduled shift on time. The Deciding Official stated that the appellant's inability to report to work disrupted the mission of the agency by preventing management from being able to rely on the appellant for his regular tour of duty. The Deciding Official stated that the appellant placed an undue burden on the supervisors who had to make adjustments to ensure appropriate coverage for security duties during the appellant's absences and late arrivals.

Under Section A.3 of the Table, pertaining to AWOL for a period of 1 to 5 workdays, the recommended penalty range is a 2-day to 10-day suspension and the aggravated penalty range is a 6-day suspension to removal. Under Section A. 1 of the Table, pertaining to Tardy, the recommended penalty is an LOR and an aggravated penalty range is a 1-day to 5-day suspension. The Deciding Official found that the appellant's actions fall within the aggravated penalty range due to his extensive disciplinary history. The Guidelines of the Table state that for second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range" column, and may often include removal. In addition, the Guidelines state that an employee may be charged with several offenses none of which alone would result in removal, but when combined may support such a penalty. The Guidelines also state that examples of aggravating factors include prior disciplinary record and prior warning/advisement not to commit misconduct.

The Board finds that the appellant's removal, given the appellant's disciplinary history, is in accordance with TSA policy and within the bounds of reasonableness, and therefore SUSTAINS the penalty decision.

Decision. Based on the above, the appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08760
87875.TSA
Date: 2016.03.03 15:40:47 -05'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

**DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD**

(b)(6)

Expert Transportation Security Officer – Behavior
Detection Officer
Appellant,

DOCKET NUMBER
OAB—16 -015

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 15, 2016

Issue: Suitability

OPINION AND DECISION

On December 29, 2015, management removed the appellant from his position as an Expert Transportation Security Officer - Behavior Detection Officer (ETSO-BDO) with the Transportation Security Administration (TSA) based on one non-disciplinary Charge: *Failure to Meet a Condition of Employment*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge(s), management then bears the burden of showing that the penalty imposed was reasonable.

Management based the Charge: *Failure to Meet a Condition of Employment*, on one specification. Management stated that as an ETSO-BDO, the appellant is required to maintain a security clearance. Management alleged that in a letter dated January 7, 2013, the TSA Personnel Security Division (PERSEC) notified the appellant that due to his personal conduct, alcohol consumption and criminal conduct, the Determination was made to deny him access to classified information. The appellant was advised in a letter that he had the right to request a review of the Determination. The appellant provided a written response to the January 7, 2013,

Notice of Determination to Deny Access to Classified Information. The appellant was notified by PERSEC regarding a Notice of Review of his case. The Notice of Review informed the appellant that the decision to deny him access to classified information was upheld and the appellant was advised that he could appeal to the Department of Homeland Security (DHS) Personnel Security Division. The appellant appealed to the DHS Appeals Board and it sustained TSA's decision in a letter dated December 20, 2013. As a result, the appellant no longer met the condition of his employment to maintain a security clearance.

The TSA Office of Security sent the appellant a Notice of Determination to Deny Access to Classified Information, dated January 7, 2013. The Determination cited the reasons for the decision as Personal Conduct, Alcohol Consumption and Criminal Conduct. The Notice advised the appellant of his right to reply to the Chief Security Officer (CSO) with the Office of Security Services and Assessments to request a review of the Determination. The appellant submitted a written request for review of the Determination, postmarked January 29, 2013. In his written response, the appellant stated that while he recognized that he exercised poor judgment in allowing himself to become involved in an altercation, he is not a threat to himself or to others he protects. He stated that he made one mistake and that he learned from the mistake and would not do anything to jeopardize his life again. The appellant stated that he enjoyed his position with TSA and worked hard to be a model employee not just for himself, but for those around him. He argued that one huge mistake should not cause him to lose his entire career nor should it define his life. He added that he is still a reliable and trustworthy person and stated that he is not a threat to the traveling public or the organization. The appellant received a Notice of Review from the CSO stating that she decided to uphold the initial Determination to deny the appellant access to classified information. In the Notice of Review, the CSO referenced the appellant's response and noted that he acknowledged that he exercised poor judgment when he was involved in a physical altercation in June 2011, which resulted in his arrest for Aggravated Assault, False Imprisonment and Aggravated Battery, but pointed out that the appellant failed to provide any explanation to overcome or refute his conduct that resulted in his arrest for Prowling and Loitering in 2012, which he pled guilty to Disorderly Conduct; and his 2001 arrest for Terroristic Threatening – Threat to Commit Crime Likely to Result Death/Serious Injury. The CSO concluded that the appellant's response failed to mitigate the security concerns to an acceptable risk level and therefore she decided not to grant him access to classified information. The Notice of Review advised the appellant of his right to appeal the decision to the DHS Security Appeals Board (SAB). The appellant submitted a written appeal to the DHS SAB on September 12, 2013. In his letter to the SAB, the appellant provided details on his 2001 arrest for Terroristic Threatening/Threat to Commit a Crime Likely to Result Death/Serious Injury; his arrest for Prowling and Loitering in March 2012; and his alcohol consumption at the time of his arrest for Aggravated Assault in June 2011. The appellant also provided a statement from the individual involved in the altercation at the time of his June 2011 arrest, as well as two character references from individuals in supervisory positions with whom he stated he worked closely with during the course of his career. The CSO sent the appellant a letter, dated December 20, 2013, stating that the DHS SAB concluded that he does not meet the standard for access as it pertains to judgment, reliability or stability that is required to indicate affirmatively that he could be entrusted with and properly safeguard classified information and that the SAB affirmed the decision made by TSA. The December 20, 2013, letter notified the appellant that his eligibility for access to classified information had been revoked and that he had been afforded all of the procedural rights put forth

under Executive Order 12968 (E.O. 12968) and therefore, the decision to revoke his access was final. Management was notified on January 7, 2013, that the appellant was denied access to classified information. On November 6, 2015, the appellant received a written Notice of Proposed Removal, dated November 5, 2015, from the Deputy Assistant Federal Security Director for Screening (DAFSD-S).

Management provided as evidence: Notice of Determination to Deny Access to Classified Information from the TSA Office of Security, dated January 7, 2013; the appellant's response to the Notice of Determination, undated; Notice of Review from the TSA Office of Security, undated; a copy of the envelope addressed to the appellant from the TSA Personnel Security returned by United States Postal Service (USPS) in June 2013 as unable to forward; Decision Memorandum from Personnel Security Section to Office of Security, dated April 22, 2013; Letter from the appellant to the DHS SAB, dated September 12, 2013; SAB Decision Memorandum, dated December 2, 2013, addressed to the Personnel Security Division Chief; Letter to the appellant from the Office of the CSO regarding the SAB Decision, dated December 20, 2013; the Job Analysis Tool (JAT) for the BDO position disclosing the requirement for a security clearance in effect in 2013; and the JAT for the BDO position disclosing the requirement for a security clearance in effect in 2014 through the present.

On appeal, the appellant argued that the timeframe of the incidents date back as far as 2001, and that the case against him in 2001, when he was just 18 years old, was dismissed. He stated that the second incident 10 years later involved him being charged with Aggravated Assault, False Imprisonment and Aggravated Battery and argued that the case was placed on a dead docket. He stated that the third incident resulted from him being arrested for Prowling and Loitering, which was reduced to Disorderly Conduct for which he pleaded "nolo contendere." The appellant argued that while he had been in situations that raised the eyebrows of PERSEC, he has not done anything more than the majority of the population and the TSA workforce at the airport where he works. He stated that he just had the unfortunate situation of having the law involved; but argued that he has proven that not only is he rehabilitated but that he is a positive asset to TSA. The appellant stated that he has been employed with TSA for fourteen years and that during that time he served as a model employee on the job. He pointed out that he successfully passed a 10 year background check that is required for the regular workforce and that it was not until his promotion to the BDO program that a security clearance was required. The appellant also pointed out that he worked as a BDO for nine months before his access was denied and that after he received notification on December 20, 2013, that the DHS SAB upheld the decision; he was allowed to continue working as a BDO for one year and eleven months. He argued that during that time and throughout his tenure as a TSA employee, he consistently received "Level 5, Exceed Expectations" on his performance evaluations. He stated that he performed exceptionally well under the direction of his superiors and that he received many accolades from his coworkers in character letters to attest to his work ethic and credibility as a hardworking officer at TSA. The appellant stated that he received an email from PERSEC informing him that he could not refile for a security clearance and that his agency would have to refile it for him. The appellant also stated that an email, dated November 18, 2015, from PERSEC, stated that they did not have a recent clearance upgrade for him. The appellant argued that the agency never refiled his security clearance documentation and therefore, it is not known whether or not he would have a received a security clearance had the agency refiled it. The appellant argued that

the Deciding Official did not look into other options, such as returning him back to the regular operation where a security clearance is not required. The appellant stated that he began his tenure with TSA as a young man at the age of 19 and that although he encountered a few run-ins with the law, there is nothing credible to deem him a criminal. He stated that he has expressed remorse and has taken steps to improve himself. He stated that he has adopted a positive attitude towards life and was climbing the ladder of success with TSA, as evidenced by his two promotions within the same year, before he was presented with the decision to remove him. The appellant argued that he did not fail the agency; instead the agency failed him by denouncing him as a dependable, efficient employee. The appellant argued that his actions were not publicized and therefore, no embarrassment was brought upon the agency. The appellant also argued that he never allowed the incidents to interfere with his work ethic.

Management responded and argued that the record demonstrates that as an ETSO-BDO, the appellant was required to maintain a security clearance. Management argued that the Appellant was notified in a letter dated December 20, 2013, that the DHS SAB affirmed the decision made by TSA to revoke his access to classified information. Management concluded that the appellant had exhausted all available administrative processes regarding his eligibility for access to classified information including appealing to the DHS SAB.

The appellant responded to management's response. In his response, he included a timeline of the events alleging that 570 days had passed between the date he was promoted to Master Transportation Security Officer-BDO (MTSO-BDO) and the date of the "Request from [the airport] to complete Secret Security Clearance (2809)." The appellant argued: "Given the time frame of 570 days and the fact that no one offered me a remedy (return to former position, enroll in job search process, etc.) after having been notified of the final denial. I would believe the burden falls on [airport] management and/or PerSec, if they were informed of the denial of my security clearance." The appellant argued that PERSEC continued to use the event from 2001 against him as a basis for eligibility even though the determination of the court was nolle prosequi. He argued that he had provided a letter from the other accused defendant in the case and that the defendant had explained that the appellant was not part of the incident in the manner in which he was accused. The appellant stated that PERSEC confirmed that the event in 2011 was dead docketed in November 2011, and that he requested the charges be expunged in September 2012. He argued that it was approved and that the updated information was sent to PERSEC in September 2012 and in March 2013. He argued that PERSEC never updated his information or contacted him after he sent the notice of approved expungement in September 2012 or March 2013. The appellant argued that since expungement is a process by which a record (or portion thereof) is officially erased/removed after the defendant is not convicted, PERSEC should not hold him accountable. The appellant also argued that PERSEC claimed that he pled guilty to Disorderly Conduct for the 2012 incident, when he pled nolo contendere. The appellant argued that there is fault on the agency/PERSEC for a failure to follow through after the determination was made to deny his Secret clearance. He argued that the matters outlined as reasons for the denial were not listed correctly and should have been corrected before an accurate assessment of his character was made.

The Board finds that the evidence in the record shows that PERSEC denied the appellant access to classified information and that the DHS SAB upheld the decision on appeal. The Board found

that the appellant had been afforded all procedural rights to appeal and that the Determination by the DHS SAB was a final Determination. The JAT for the appellant's position of record shows that a Secret Security Clearance is required. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary charge of *Failure to Meet a Condition of Employment*.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland Security,
ou=TSA, ou=People, cn=DEBRA S
ENGEL,
0.9.2342.19200300.100.1.1=087608787
5.TSA
Date: 2016.03.15 22:34:28 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-016

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 4, 2016

Issue: Unauthorized Possession; Failure to Follow Directions

OPINION AND DECISION

On January 10, 2016, management removed the appellant from her position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two charges: *Unauthorized Possession and Failure to Follow Directions*. The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charges, management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Unauthorized Possession*, on one specification. The specification alleged that on November 3, 2015, while on duty at the checkpoint, the appellant placed a lighter, which was left at the checkpoint, in her break room locker. Management based Charge 2, *Failure to Follow Directions*, on one specification. The specification alleged that on November 3, 2015, while on duty at the checkpoint, a Supervisory Transportation Security Officer (STSO) instructed the appellant to place a lighter, which was left on the Alternate Viewing Station (AVS) table into the Hazardous Material (HAZMAT) bin for proper disposal as per lost property procedures. The appellant did not place the lighter in the HAZMAT bin as directed, but instead placed the lighter in her break room locker.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*¹, Section 5.D. (2), which states that employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management official. Management also alleged that the appellant's conduct violated Section 5.D. (7), which states that employees are responsible for observing and abiding by all laws, rules, regulations, and other authoritative policies and guidance.² Additionally, management alleged that the appellant violated local procedures for handling lost and abandoned property at screening locations.

An STSO provided a written statement dated November 3, 2015, and said that at approximately 1705 hours he informed the appellant to dispose of the BIC lighter that was on the AVS. He stated that the appellant asked him if she could keep the lighter, to which he replied "no" and that the lighter needed to be disposed of. The STSO stated that the appellant said "okay" and he watched her walk away with the lighter. The STSO stated that the appellant stopped at the trash can, removed her gloves placing them in the trashcan, and proceeded into the break room. He stated that he followed the appellant into the break room and asked her if she had kept the lighter, to which the appellant replied "yes." The STSO stated that the appellant gave him the lighter after he directed her to do so and that he put the lighter inside of a blue glove and placed it in the HAZMAT bin. In an email dated November 17, 2015, the STSO added that he told the appellant to put the lighter in the HAZMAT bin; that the lighter was in her locker; and that he watched the appellant remove the lighter from her locker.

A Lead Transportation Security Officer (LTSO) provided a written statement dated November 3, 2015, in which she stated that at approximately 1705 hours the appellant walked into the break room; passed her; and put something into her locker. The LTSO stated that the STSO rushed in quickly and asked the appellant why she did not put the lighter in the HAZMAT bin. The LTSO also stated that the STSO told the appellant to give the lighter back, so the appellant turned around, reached into her locker, and gave the STSO the blue BIC lighter.

The appellant provided a written statement dated November 4, 2015. In her statement, the appellant said that she was clearing the table after just completing a bag check and there was a blue lighter by the keyboard. The appellant stated that the STSO was near her so she asked him if she could have the lighter as her lighter was not working and she was going on break. The appellant stated that she just wanted to borrow it until her break was over and then would give the lighter back. She stated that she went into the break room to get a can of pop and that the STSO came into the break room and asked her for the lighter, so she gave the lighter back to him. The appellant stated that there was a lot of traffic around them and she did not know what his reply to her question was.

On December 9, 2015, the appellant received a Notice of Proposed Removal. On December 22, 2015, the appellant provided an oral reply. During her oral reply, the appellant apologized for the miscommunication between the STSO and herself and acknowledged coming across the

¹ The Board notes that management incorrectly cited the name of TSA MD 1100.73-5 as *Employee Responsibilities and Conduct*.

² The Board notes that management incorrectly cited this section of TSA MD 1100.73.5 by adding the words "written and unwritten."

disposable lighter and asking the STSO if she could have it to use to light a cigarette while she was on break. The appellant stated that she was planning to bring the lighter back. The appellant stated that the STSO did not respond to her question, so she brought the lighter to her locker. The appellant also stated that the STSO came to the locker area and told her that she had taken the lighter, which was prohibited. The appellant stated that the lighter never left the checkpoint area. She added that the following day, another STSO asked her to write a statement about the incident, and that she asked the STSO where the lighter was to have been placed. The appellant stated that the STSO told her the lighter was to be placed in the HAZMAT bin. The appellant further stated that she has been with TSA for 13 years, received previous awards, takes pride in her job, and does not have any previous discipline. Lastly, the appellant stated that she did not hear the STSO say “no” in response to her question regarding the lighter and said that she was sorry.

Management provided the following evidence to support the Charge: the appellant’s statement, dated November 4, 2015; an STSO’s statement, dated November 3, 2015; an email from an STSO, dated November 17, 2015; an LTSSO’s statement, dated November 3, 2015; the appellant’s OLC History Report; and an email regarding Employee Responsibilities Regarding Lost and Found, dated August 13, 2015.

On appeal, the appellant argued that she found a blue fluid lighter while cleaning up from a bag check and asked the STSO if she could borrow the lighter with the intention of giving the lighter back immediately. The appellant contends that the STSO did not hear her question and asked her to repeat herself. The appellant argued that she did repeat herself; however, another TSO approached the table and she was forced to step out of the way, as more passengers were quickly approaching the area where the conversation was taking place. The appellant argued that the STSO never responded to her inquiry in regards to the lighter.

As to Charge 1, the appellant admits that following this conversation with the STSO, she walked away from the AVS table with the lighter and entered the break room. The appellant admits that she placed the lighter into her locker and left it open as she went to the refrigerator, and that the STSO entered the break room and asked her for the lighter. The appellant admits that she removed the lighter from her opened locker and placed it in the STSO’s hands.

As to Charge 2, the appellant argued that management failed to prove by preponderant evidence that she failed to follow the directions of the STSO to discard the lighter into the HAZMAT bin. She denied that the STSO advised her to place the lighter in the HAZMAT bin, and argued that the lighter never left the checkpoint. The appellant argued that the day following the incident, she asked another STSO about the proper procedures for lost property. The appellant argued that it was this STSO who informed her to use the HAZMAT bin. She argued that the Agency failed to interview this STSO, and thus failed to pursue the investigation properly.

In response, management argued that there is no reason to doubt the credibility of the two witnesses whose statements are more likely to be true than untrue.

As to Charge 1, management argued that by her own admission in her written statement dated November 4, 2015, the appellant admitted to seeing a lighter, which did not belong to her, at the checkpoint keyboard. Management argued that the appellant admitted to asking the STSO if she could have the lighter and telling the STSO that she was going to borrow the lighter and give it

back. Additionally, management argued that the appellant admitted to going from the checkpoint into the employee break room; having possession of the same lighter in the break room; and giving the lighter back to the STSO in the break room. Management also argued that the appellant admits that she placed the lighter in her personal locker. Management argued that in addition to the appellant's own admission, they provided two written statements from very credible witnesses as further evidence. Management contends that the preponderant evidence supports that the lighter did not belong to the appellant. Further, the preponderant evidence supports that she took possession of the lighter at the checkpoint and then removed the lighter from the checkpoint to her personal locker in the employee break room. Thus, management contends that the appellant had unauthorized possession of the lighter.

As to Charge 2, management argued that the appellant offered no evidence on appeal or to the Deciding Official to support her claim that miscommunication caused her to walk into the break room with the lighter. Management also argued that based on the statements of two very credible witnesses, the STSO instructed the appellant to dispose of the lighter at the checkpoint when asked if she could keep the lighter. Management argued that the witness' statement supports this as she saw the STSO follow the appellant into the employee break room, overheard the STSO inquire about the status of the lighter, and saw the appellant give the lighter to the STSO. Management argued that if the STSO did not give instructions to the appellant, it is highly unlikely that the STSO would have quickly followed the appellant into the employee break room and inquired as to why the lighter was not placed in the HAZMAT bin. Additionally, it is also highly unlikely that that the witness would have heard the STSO ask the appellant if she had disposed of the lighter in the HAZMAT bin as per his instructions. In regards to the appellant's assertion that management failed to pursue a proper investigation by not interviewing the other STSO, management responded by stating that this STSO was not a direct witness to the checkpoint conversation regarding the lighter between the STSO on duty and the appellant. Additionally, management argued that the other STSO was not present in the break room to provide direct testimony. Therefore, management argued that because the other STSO was not a direct witness to the events that transpired on November 3, 2015, he could not provide direct, factual evidence.

As to Charge 1, the Board finds that the appellant was advised via an email dated August 13, 2015, of the local policies and procedures concerning abandoned property. The Board also finds that the evidence in the record, to include the witness statements and the appellant's admission, is preponderant evidence to show that the appellant took possession of an abandoned lighter that she found on the checkpoint, left the checkpoint to go to the employee break room, and placed the lighter into her personal locker without authorization. Therefore, Charge 1, *Unauthorized Possession*, is SUSTAINED.

As to Charge 2, the Board considered the appellant's argument that she asked the STSO if she could borrow the lighter during her break and received no response. The Board finds that the appellant's request to borrow the lighter indicates that it is more likely than not that the appellant understood that borrowing the lighter would be outside of the established procedures. The Board also finds that the appellant had a responsibility to follow proper procedures. The Board also finds the STSO's actions of locating the appellant and requesting the lighter after the appellant took the lighter from the checkpoint to be consistent with his statement that he advised the appellant to place the lighter in the HAZMAT bin. The Board finds that the evidence in the record is preponderant evidence to support that the appellant was advised that she could not

borrow or take personal possession of the lighter; was told to dispose of the lighter in the HAZMAT bin; and failed to do so. Therefore, Charge 2, *Failure to Follow Directions*, is SUSTAINED.

Having sustained the Charges, the remaining question is whether the appellant's removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly by the Deciding Official.

On appeal, the appellant argued that she has been employed with the Agency since September 2002, and has served as a loyal and dedicated employee, as demonstrated by the high praise and accolades she received from management. She argued that she was awarded a Certificate of Appreciation honoring her for the success she achieved with the Performance Management Information System (PMIS) Administration Team. The appellant also argued that she was presented with two trinket awards for her commendable work performance, and that she was chosen to mentor new officers several times due to her ability to serve as a role model within the Agency. The appellant argued that the Agency failed to establish that her removal is reasonable and failed to demonstrate that her removal is consistent with progressive discipline. She also argued that management failed to properly weigh the mitigating factors in its decision to remove her; and that when all the factors are considered it becomes clear that her removal is an unreasonable penalty. The appellant argued that her loyalty and commitment to the Agency are consistently demonstrated by the recognition she has received from management for her work performance. She argued that a Master Transportation Security Instructor (MTSI) stated that he placed her in an acting lead position on his PMIS Administration Team because of her honesty, dedication, trustworthiness, and skills, and because she is the one person that he trusts and depends on to do the work correctly and professionally. Additionally, the appellant argued that she was praised in an email for managing a large crowd of passengers when screening equipment was disabled. She argued that due to her vigilance and ability to handle stressful situations, she helped the Agency defuse a hectic situation without delaying a single flight. The appellant argued that she was awarded with a Certificate of Appreciation and a \$350.00 bonus for the sacrifices she made to improve the efficiency of the PMIS operating process. The appellant argued that these accolades clearly demonstrate her commitment to the Agency for the past 13 years as well as management's appreciation of her work performance. The appellant acknowledged that she holds a position of authority, trust, and respect, and recognized that failure to follow directions is of serious concern for management. The appellant also acknowledged that she understands how detrimental this can potentially be to the Agency's effective administration of airport security. As such, the appellant argued that she would never intentionally commit an act that goes against the oath she vowed to uphold as an officer. The appellant argued that management has trusted her and often selected her to mentor new employees because they believe she is a model candidate for the Agency and personifies the Agency's ideals and mission. Further, the appellant argued that if management had considered these factors, it is clear that removal would not have been the appropriate action. The appellant argued that the disciplinary action process should start at the least severe form of punishment. The appellant argued that the incident arose from miscommunication and misunderstanding, and that management's penalty was excessive. The appellant further argued that management failed to take into consideration that there was a great deal of traffic at the time she was asking the STSO for the lighter. The appellant also argued that during the past 13 years she has continued

to demonstrate her competency and fitness as an employee, as well as her potential for growth and improvement within the Agency. She argued that in light of her work performance and 13 years of experience and dedication that a mitigated penalty at the lower end of the Table range would be the more appropriate penalty to cure her alleged misconduct. Additionally, the appellant argued that this range of the Table would comport with the spirit and letter of the doctrine of progressive discipline and management would retain a loyal employee in whom they have invested a large amount of time and resources to train and maintain. The appellant argued that in spite of this, management failed to consider a mitigated penalty and only considered the recommended and aggravated ranges before determining that removal was the best course of disciplinary action. The appellant argued that management also failed to show that a lesser penalty would not adequately address her alleged misconduct and had at its disposal many less severe options such as counseling, reprimand, and suspension; yet ignored these more appropriate options. Additionally, the appellant argued that the efficiency of the Federal service is not promoted by removing her, and that she continually seeks to improve herself for the betterment of the Agency. She argued that she deserves another opportunity to continue her career with the Agency based on her longevity of service, work experience, and diligent performance history. The appellant argued that removing her would result in years of wasted training and the loss of a loyal employee that has been committed to upholding her oath as a TSO for over a decade. She also argued that there is only a Letter of Counseling (LOC) in her file, which is not considered discipline.

Management responded and argued that the local policy for the handling of lost or abandoned property at the checkpoint, which is considered government controlled property, is disseminated via email annually, briefed upon hire, and briefed regularly at supervisory employee meetings. Management argued that the policy clearly states that items found at screening locations must be turned in to the supervisor immediately and every item is recorded on TSA Form 252. Management argued that after 13 years of service as a TSO and working almost daily with items belonging to the traveling public, the appellant was regularly reminded of these procedures and worked with abandoned property on a daily basis. Management further argued that taking the personal possessions of any passenger, no matter if they were abandoned or lost at a checkpoint, undermines the trust and confidence of the traveling public, who often return to retrieve their property. Management argued that both the Proposing and Deciding Officials considered the penalty determination factors. Management argued that throughout her appeal, the appellant argued her commitment to the Agency by providing examples from 2004 and 2006 to demonstrate her outstanding work history with the Agency and claimed a mitigated penalty was more appropriate due to her exceptional performance. Management acknowledged that the appellant demonstrated examples of good performance 10-12 years ago; however, argued that her performance ratings show a very different picture. Management argued that in a five-point performance rating scale with a level 5 as the best performance, the appellant rated a level 2 in her 2012 performance rating, a level 3 in her 2013 performance rating, a level 3.5 in her 2014 performance rating, and a level 3.3 in her 2015 performance rating. Management further argued that these ratings are not considered outstanding performance that personifies the ideals and mission of the Agency. Additionally, management argued that in Exhibit 9, the appellant states that she received level 5 performance scores in the competency of honesty and integrity, yet her attached performance rating sheets show she actually scored a level 3 in 2013, a level 4 in 2014, and a level 3 in 2015 for this competency. Management argued that the appellant stated that she has never received a significant disciplinary action, and that she only has an LOC in her file, which is not considered discipline. However, she later admitted that she received a Letter of

Reprimand (LOR) in May 2014, which she considers insignificant. Management argued that the May 2014 LOR for *Inappropriate Conduct* was significant as the appellant was on duty at the checkpoint, became rude and yelled at a passenger, and broke the passenger's fingernail. Additionally, management argued that the January 2014 LOC for *Failure to Follow Instructions* led to a security breach and she received a mitigated penalty due to her lack of discipline in 2014. Management also argued that these prior actions did not prevent the appellant's misconduct from reoccurring and escalating. Management pointed out that TSOs work extensively with the traveling public and handle passenger's personal property throughout their workday. Management argued that despite 13 years of TSO training and reading/hearing the policy related to abandoned and lost property, the appellant violated a fundamental Agency policy with the potential to undermine the trust and confidence of the traveling public.

The Deciding Official considered both mitigating and aggravating factors. As mitigating factors, the Deciding Official considered the appellant's 13 years of service and acceptable performance ratings during her employment. However, the Deciding Official determined that the aggravating factors outweigh the mitigating factors in this case. The Deciding Official considered the seriousness of the appellant's actions and their relationship to her duties as a TSO. He considered that the appellant was aware of Agency policy in regards to TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, as demonstrated by her acknowledgement dated October 27, 2014, as well as her additional acknowledgements throughout her career. The Deciding Official also considered that the appellant was on notice regarding Agency policies and procedures as they relate to the proper handling of lost and abandoned property at the checkpoint, as evidenced by a review of emails sent to all employees on August 13, 2015, from the Customer Service Manager regarding lost and found procedures. He also considered that the appellant received an LOR for inappropriate conduct on May 18, 2014. Lastly, the Deciding Official concluded that given the appellant's length of service, it is not believable that the appellant was unaware that TSOs are not authorized to retain abandoned property from the checkpoint.

Under Section N.1 of the Table, the recommended penalty range for *Unauthorized Possession* is a fourteen (14)-day suspension to removal and the aggravated penalty is removal. Under Section D.2 of the Table, the recommended penalty range for *Failure to Follow Directions* is a Letter of Reprimand to a ten (10) day suspension and the aggravated penalty range is an eleven (11) day suspension to removal. The Deciding Official stated that since both Charges stem from the same event, he did not consider them as two separate Charges for the sake of using the aggravated penalty range. However, the Deciding Official did consider the aggravated range as this was the appellant's second offense within the last year and a half. The Table states that for second and/or successive offenses, the penalty should generally fall within the aggravated penalty range and may often include removal. The Board agrees with the Deciding Official's conclusions and finds no merit to the appellant's claim that management did not properly assess the penalty factors. The Board also finds it reasonable to believe that given the appellant's training and certification as a TSO that the appellant was aware of proper procedures and chose not to exercise them.

The Board finds that management's decision to remove the appellant from her position as a TSO was within the bounds of reasonableness.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S
ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=087
6087875.TSA
Date: 2016.03.04 17:02:14
-05'00'

Debra S. Engel
Chair
OPR Appellate Board



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Lead Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-017

V.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 22, 2016

Issue: Failure to Maintain Certification

OPINION AND DECISION

On January 11, 2016, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol by providing proper return to duty training, testing, remediation and retesting, if applicable, for the appellant, with a fair opportunity to demonstrate proficiency.

Management supported the charge with one specification. The charge specified that the appellant served as a Lead Transportation Security Officer and that a requirement of the position is that he maintain his screening certification by successfully passing his Annual Proficiency Review (APR). On December 7, 2015, the appellant failed the Practical Skills Evaluation (PSE) – Individuals With Disabilities (IWD) component of the APR for a second time, and thus failed to successfully pass his APR. Consequently, the appellant lost his screening certification and was not able to meet a requirement of his position.

On November 24, 2015, the appellant was tested for the first time on the PSE-IWD and failed the test. The appellant was then out of work due to regularly scheduled days off and Family and

Medical Leave Act (FMLA) leave until December 7, 2015. On December 7, 2015, the appellant returned to work and was provided remediation. He signed TSA Form 1176-5, APR Technical Proficiency Assessment Remediation Acknowledgement – PSE, acknowledging that he had been provided with remediation and training from 1400 – 1500 hours. The appellant did not select an applicable self-study checkbox on the acknowledgment form. The appellant checked the box stating: “By signing below I verify and acknowledge that I have received remediation in accordance with the APR program policy on the above-noted security screening procedures, and I am not ready to take the applicable PSE reassessment(s).” In the explanation portion of the form, the appellant wrote, “I have not had a[n] opportunity to do self study!” The appellant was given his second and final scored assessment for the PSE-IWD on December 7, 2015, and failed to meet the required standards.

The PSE-IWD is part of a larger annual proficiency review that TSA administers to all employees who occupy TSO positions. TSA administers the annual proficiency review pursuant to the legal requirements imposed on it by the Aviation and Transportation Security Act (ATSA). ATSA specifically requires that every TSO undergo an annual proficiency review, and that any individual employed as a TSO “may not continue to be employed in that capacity unless the evaluations establish that the individual...demonstrates the current knowledge and skills necessary to . . . effectively perform screening functions.” 49 U.S.C. § 44935(f) (5).

The TSA FY15 Annual Proficiency Review User’s Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2. of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MSTO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

Management provided as evidence: APR Technical Proficiency Assessment Remediation Acknowledgement – PSE, dated December 7, 2015; 2015 PSE Feedback Report, IWD First Assessment; 2015 PSE Feedback Report, IWD Second Assessment; Statement from a Supervisory Transportation Security Officer (STSO)/Quality Standards and Evaluation Assessor (QSEA), dated December 7, 2015; Statement from an Expert Security Training Instructor (ESTI), dated December 8, 2015; Statement from a Master Security Training Instruction (MSTI), dated December 8, 2015; and Online Learning Center (OLC) Completion Reports.

On appeal, the appellant stated that on or about November 24, 2015, he took his first scored assessment, which he did not pass. The appellant stated that he was then out of work due to regularly scheduled days off and FMLA leave until December 7, 2015. He stated that when he returned to work on December 7, 2015, management provided remediation immediately after he had checked in for work and directed him to retake the PSE-IWD assessment. The appellant argued that management’s remediation was insufficient with respect to the requirements provided by the

APR Guidance. He argued that he did not receive the full hour of remediation mandated as a minimum by the APR Guidelines. The appellant stated that the APR Technical Proficiency Assessment Remediation Acknowledgement form states that he was trained on “SC 9.1; 9.2; Chapter 4/SC 9B; Chapter 9/SC 4; 9” from 1400 to 1500. He stated that the original time notation had been completely scribbled out and changed, and argued that there is no record of what time the remediation actually began or what the form originally notated. The appellant further argued that there is no indication of how much time was spent covering each remediation activity, so it is difficult to determine whether each topic received full and appropriate remediation coverage. Additionally, the appellant argued that management failed to consider his explanation that for the first 15 minutes of the remediation hour, he and a Security Training Instruction (STI) were attempting to log into the checkpoint computer’s TSA iShare platform, which meant that no remediation was being conducted at the time even though the STI included the time in her remediation inventory. The appellant also argued that his remediation for the PSE-IWD was conducted on an individual seated in a desk chair, not a wheelchair, and cited the 2015 APR User’s Guidance, Section 6.2. (B) which states that “remediation is provided to employees who demonstrate deficiencies in any part of an APR assessment to ensure that they understand where weaknesses occurred and to review the entire screening procedure within them.” The appellant argued that he should have been permitted to conduct the proper screening procedure using the proper tools, such as a wheelchair, during his remediation. He argued that management denied his ability to properly train and remediate on a wheelchair. The appellant also argued that despite the fact that he checked the box stating that he was not ready for reassessment and the fact that he wrote “I have not had a[n] opportunity to do self study!” in the explanation section, he was sent to take his second assessment immediately following his remediation. The appellant stated that management relied on a statement of an STSO who stated that the appellant “felt confident to take the test” but argued that since the remediation form is the official TSA document to track all remediation activities and is signed by both the appellant and management, the remediation form carries more weight than the STSO’s statement that only shows the STSO’s signature. The appellant argued that he was entitled to self-study; and cited the 2015 APR User’s Guidance, Section 6. 2. H. (3) (d), which states that the airport must provide remediation to all employees, which includes “provid[ing] the opportunity for self-study, in addition to the minimum one hour of remediation, if the employee feels he/she needs to better study the screening procedures.” The appellant argued that it is clearly evident on the remediation form that he felt he needed to better study the screening procedures. He argued that management denied him by refusing him the opportunity for self-study.

Management responded and argued that the appellant received a full hour of remediation, as evidenced by his signature and initials on the APR Technical Proficiency Assessment Remediation Acknowledgment – PSE form. With regard to the appellant’s contention that the original time notation had been scribbled out and changed, management argued that the appellant neglected to point out that both he and the person remediating him, initialed the changes to the remediation start and end time. Management also noted that the MSTI listed the chapters and sections of each topic that was covered during the remediation session and pointed out that the appellant does not dispute that the topics were covered. Management argued that there is no requirement that the time be notated on each section being covered; only that management provide the remediation and divide remediation activity reasonably within the hour, as applicable. Management argued that the MSTI met her obligations under the 2015 APR User’s Guidance when she both provided the remediation and recorded the sections addressed on the Remediation form. Management stated that the MSTI went further and provided a written statement of her remediation activities with the appellant. With regard to the appellant’s issue with the use of a desk chair as a training prop during his remediation,

management noted that the appellant raised the issue even though his critical errors on the second scored assessment had nothing to do with any part of the wheelchair itself. Management stated that as a routine matter, prior to constituting the TSO National Training Academy, TSA trains its new hires, reinstatement TSOs, and return to duty TSOs using suitable substitutions when the “real thing” was not readily available. Management also argued that the actual PSE wheelchair to which the appellant alluded to in his appeal was part of a PSE test kit and prohibited for use for anything other than PSE practice observations or scored assessments. Management stated that the prohibition is governed by the PSE Standard Operating Procedure for Quality Standards and Evaluation Assessors (QSEAs) and Standards and Evaluation Assessors (SEAs), Section 6.2. Management also argued that an office chair was provided to the appellant consistent with APR testing guidelines and consistent with the other 14 individuals at the airport who were remediated on the same PSE component. Management argued that while the appellant missed a critical component during the actual wheelchair screening during the first scored assessment; he did not miss a critical component during the actual wheelchair screening during the second scored assessment. Management stated that during the second scored assessment, the appellant made two critical errors while performing the pat-down of the body of the IWD role-player. Management argued that because the appellant’s errors were not linked to the wheelchair itself, failing the two critical elements was independent of the wheelchair. Management acknowledged that the appellant wrote on the Remediation form “I have not had a[n] opportunity to do self study!” but argued that per the 2015 APR User’s Guidance, management was not required to compel the appellant to engage in self-study or create self-study opportunities for the appellant prior to announcing the second scored assessment for the PSE-IWD. Management stated that they were only required to “. . . [afford] the [appellant] time to do so within the 7-day remediation window, consistent with operational needs.” Management argued that this was predicated upon the appellant asserting his request within the 7-day remediation window; something that did not occur until the second scored assessment was announced. Management claimed that the appellant had opportunities for self-study between the first and second failed scored assessments, even if he did not take advantage of the opportunities. Management noted that there is no record that the appellant requested time for self-study prior to being told that it was time for the second scored assessment. Management noted that just 12 days prior to taking the first scored assessment for the PSE-IWD, the appellant completed a Level II TSO return to duty process and argued that therefore, the appellant was considered a certified TSO who was fully qualified to perform the full range of TSO duties at the time of the scored assessment. Management argued that the appellant’s assertion that he was not ready to be evaluated for PSE purposes at the time of either scored assessment is controverted by the return to duty training he had just completed, and the screening certifications he held at the time of both scored assessments for the PSE-IWD.

The appellant responded to management’s response and argued that management ignored the purpose of remediation and the practical observations. The appellant argued that even in management’s own words, the PSE wheelchair may be used for practice observations and therefore, management’s argument is directly contradicted by the prohibition of its use for the appellant’s remediation. Further, the appellant argued that management completely missed the mark on his protest of the use of a desk chair. He stated that it was not argued in the appeal that the actual PSE wheelchair be provided for his practice observations, but rather that any wheelchair that was not being used in the airport would have been a more suitable substitute for the desk chair. The appellant also argued that management completely missed the purpose of providing remediation to employees who were not successful on their first scored assessment. The appellant noted that Section 6.2.F of the 2015 APR User’s Guidance states that “Remedial training is designed to

address and correct deficiencies for those employees who perform screening functions.” The appellant further noted that the APR User’s Guidance provides that remedial training is to ensure that employees understand how to properly perform any deficient tasks noted during the first scored assessment. The appellant stated that in this case, he did not properly pat down the armrests of the wheelchair in his first scored assessment, which then resulted in his failure of the assessment. He argued that management had an obligation to properly address this deficiency in his remediation and failed to do so when he was not provided a suitable substitute during his practice observation. The appellant argued that management cannot justify the improper remediation in hindsight because the wheelchair pat down was not a factor in his failure on his second scored assessment. Additionally, the appellant argued that management unilaterally created an “element” to the opportunity for self-study that is not required anywhere in the APR User’s Guidance. The appellant argued that nowhere in the APR User’s Guidance does it state that he must have requested self-study prior to being told that he was to take the second scored assessment. Additionally, the appellant argued that, even though there is no requirement, he did request the opportunity for self-study before taking the second scored remediation and before taking the second assessment. The appellant argued that he explicitly explained on his Remediation form that he was denied the opportunity for self-study. Finally, the appellant argued that while management is not required to compel him to engage in self-study opportunities; management must provide him with the opportunity for self-study, “if the employee feels he/she needs to better study the screening procedures” per the 2015 APR User’s Guidance, Section 6.2. H. (3) (d).

The Board found that the preponderance of the evidence establishes that the appellant took and failed the PSE-IWD on November 24, 2015, and December 7, 2015. The evidence also establishes that Section IV., Self-Study Opportunity, on the appellant’s APR Technical Proficiency Assessment Remediation Acknowledgment – PSE, is incomplete as both checkbox options were left unchecked. Additionally, the evidence establishes that the appellant checked the box in Section V. of the Remediation form indicating that “By signing below I verify and acknowledge that I have received remediation in accordance with the APR program policy on the above-noted security screening procedures, and I am not ready to take the applicable PSE reassessment(s).” Further, the evidence shows that the appellant wrote, “I have not had a[n] opportunity to do self study!” under the section of the Remediation form that states “Explain the reason why you are not ready to take the reassessment(s).” The Board found that the Remediation form clearly states, “In accordance with the Annual Proficiency Review (APR) program and policy requirements, the FSD designee (“instructor”) shall provide the employee with the opportunity for self-study so he/she may strengthen his/her practical security screening skills. Self-study is independent of the minimum one (1) hour of remediation that must be provided.” The record established that the appellant was absent from the workplace either due to RDOs or FMLA leave between the first assessment and the second assessment, and was remediated and reassessed upon returning to work. The Board agrees that the appellant requested the opportunity for self-study, and that management was obligated to provide him with the opportunity for self-study per the 2015 APR User’s Guidance. The Board also agrees with the appellant in that the APR Guidance does not state that employees must request self-study prior to being told that they are to take the second scored assessment and finds no evidence to support management’s contention that the appellant must demonstrate critical elements with regard to the request for self-study.

The Board determined that management made critical errors by failing to ensure that the Remediation form, an official APR record, was properly completed, and by failing to provide the appellant with time to participate in self-study after he notified Management via his notation on the

form that he wanted more time for self-study. It is management's responsibility to ensure that the official APR records are properly completed. Section 6.2. G. (5) of the 2015 APR User's Guidance states in part, "The remediation activities shall also be noted on the APR Technical Proficiency Assessment Remediation Acknowledgement Form" and Section 6.2. G. (6) states "The employee and the FSD designee shall sign the applicable APR Technical Proficiency Assessment Remediation Acknowledgement Form at the conclusion of remediation activities." Additionally, Section 6.2. H. (3) (d) states that remediation includes, but is not limited to, providing the opportunity for self-study, in addition to the minimum one hour of remediation, if the employees feels he/she needs to better study the screening procedures.

Accordingly, the Board finds that management failed to follow agency policy.

Decision. The appeal is, therefore, GRANTED. Management shall reinstate the appellant and provide the necessary return to duty training, if required, as well as the PSE-IWD remedial training and assessment. The appellant will be in paid duty status during training. If the appellant meets the minimum standards for the PSE-IWD, the appellant will be entitled to receive back pay from the removal date in accordance with TSA policy. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=0876087
875.TSA
Date: 2016.03.22 10:47:25 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer,
Appellant.

DOCKET NUMBER
OAB—16-018

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Respondent.

March 23, 2016

Issue: Jurisdiction (Termination in Trial Period)

OPINION AND DECISION

On January 13, 2016, TSA management terminated the appellant's employment as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DISMISSES the appeal.

The appellant filed an appeal on February 11, 2016. Based on TSA Management Directive 1100.31, *Trial Periods*, management terminated the appellant during his trial period. The appellant commenced employment as a TSO on September 7, 2014. The preponderance of evidence indicates that the appellant was subject to a two-year trial period pursuant to Section 6.A (2) of the MD, and was still serving in his two-year trial period at the time of his termination. The **Note** to Section 7.B (1) of the MD provides that “[a]n employee who is terminated during his or her basic trial period does not have appeal, grievance, or peer review rights with regard to this termination.”

The appellant argued that that he completed a trial period while employed with the United States Postal Service from August 15, 2013 until September 2, 2014. The appellant has admitted that the Postal Service only requires a 90 calendar day probationary period. The Board also notes that the appellant had a break in service of more than 3 calendar days between the date he left the Postal Service and the date he was appointed to TSA. TSA MD 1100.31-1, *Trial Periods*, Section 6.A.2 (e), states “Employees appointed to TSA who have previously completed one (1) year of permanent, continuous federal employment with another federal agency, that requires a one-year (1) probationary or trial period, are considered to have met the requirement for serving a basic trial period and will not be required to serve another basic trial period with TSA.” In

addition, a break in service is defined in the MD as separation from Federal Employment of more than three calendar days.

Based on the foregoing facts, the Board lacks authority to decide the appellant's appeal because he was, at the time of termination, serving in a trial period.

Decision. Because the Board lacks jurisdiction to decide this appeal, it is DISMISSED.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08760
87875.TSA
Date: 2016.03.23 13:05:35 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Lead Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16 - 019

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 21, 2016

Issue: *Being Under the Influence of Alcohol While on Duty*

OPINION AND DECISION

On November 6, 2015, management removed the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on one Charge: *Being Under the Influence of Alcohol While on Duty*. The appellant filed a timely appeal with TSA's Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is substantial evidence. Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. It is a lower standard than preponderance of the evidence. If the evidence establishes the charge, management then bears the burden of showing that the penalty imposed was reasonable.

The issue before the Board is whether the appellant was properly removed from his LTSO position for testing positive for alcohol. Management based the Charge, *Being Under the Influence of Alcohol While on Duty*, on one specification alleging that on Friday, October 30, 2015, while in a duty status, the appellant tested positive for alcohol indicating that he may have been under the influence of alcohol. Specifically, the appellant was required to have a drug test, alcohol test, or both drug and alcohol tests monthly, as scheduled through TSA's Drug and Alcohol Program, due to his self-referral of alcohol misuse in June 2014. As a result, the appellant was administered a

Breathalyzer test. At approximately 08:55:53 a.m., the appellant was given the first of two Breathalyzer tests. The result of the first test was a positive influence with a reading of 0.034. Pursuant to Department of Transportation (DOT) Order 3910.1C and Interim Policy on Screeners' Daily Fitness for Duty under the Aviation and Transportation Security Act (ATSA), Human Resources Management (HRM) Letter 339-1, paragraph 4. a.¹, a threshold of .02 establishes sufficient cause to render the appellant not fit for duty. A second test was administered at 08:59:40 as confirmation and the result was a positive influence with a reading of 0.025.

A pre-decisional meeting was held with the appellant on October 30, 2015. The appellant presented an oral reply stating, "I was not allowed to pick my own mouth piece for the first test." An email in the record, dated November 2, 2015, sent to management from the test collector stated: "I picked up a mouth piece opened it and installed it in device. I realized my mistake and told him that He [sic] could chose [sic] another mouth piece, he said no that one was fine."

Management submitted as evidence: Pre-Decisional notes, dated October 30, 2015; Breath Alcohol Testing (BAT) Form, dated October 30, 2015; Alcohol Screening Results; a statement from a Transportation Security Manager (TSM), dated November 2, 2015; an email to management from the test collector, dated November 2, 2015; an email from the Drug and Alcohol-Free Workplace Program (DAFWP) regarding Positive Follow-up Alcohol Test, dated November 3, 2015; and an email from HRAccess, dated November 10, 2015.

On appeal, the appellant argued that he was not allowed to pick his own mouth piece for the test as allowed, and thus the test was not administered properly and the proper procedure was not followed. The appellant stated that the incorrect procedure was acknowledged by the test administrator and witnessed by the Transportation Security Manager (TSM). The appellant also argued that he submitted his resignation from his position on October 30, 2015, prior to receiving the written Notice of Removal dated November 6, 2015. The appellant stated that he had 13 years and 3 months of employment with TSA and 10 years of prior government service in the U.S. Army. The appellant stated that he submitted retirement paperwork upon resigning his position. The appellant requested acknowledgment and acceptance of the resignation that he alleged he submitted prior to notification of his removal.

Management did not provide a response to the appellant's appeal.

The Board considered all of the evidence and arguments submitted by the appellant. The record shows that on October 30, 2015, the appellant was scheduled for a random alcohol test. The first breath alcohol test administered to the appellant registered a positive influence with a reading of 0.034. The second breath alcohol test administered to the appellant registered a positive influence with a reading of 0.025. TSA MD 1100.33-1, *TSA Daily Fitness for Duty*, states, "Impairment due to the presence of alcohol occurs when a TSO has a blood alcohol concentration level of 0.020 or higher." The evidence in the record proves that the appellant tested positive for alcohol on October 30, 2015.

¹¹ Management referenced an HCM Letter that was cancelled and superseded by TSA Management Directive No. 1100.33-1, *TSA Daily Fitness for Duty*, on October 28, 2010, and then updated on August 14, 2014. The language in the HCM cited by management and the MD are the same; MD 1100.33-1 states: "Impairment due to the presence of alcohol occurs when a TSO has a blood alcohol concentration level of 0.020 or higher."

With regard to the appellant's argument that he did not get to choose a mouthpiece for the BAT, the Board found that the November 2, 2015, email from the test collector in the record acknowledged that the tester initially chose the mouthpiece for the appellant's test. However, the tester also wrote in his email to management, that he told the appellant that he could choose another mouthpiece as soon as he realized his mistake, but the appellant declined. There is no evidence in the record to show that the TSM was present when the appellant took his initial breath test, as alleged by the appellant. The TSM's statement in the record states: "In all previous tests, [the appellant] would text me after the alcohol portion with the results of 0.00. After approximately 10 minutes passed with no text, I suspected something was different. I went into the designated testing room to make sure all was ok. [The test collector] advised me the first test was positive and they were waiting on the required 15 minutes to elapse so a second test could be administered." While not at issue before the Board, the Board did look into the appellant's contention that he resigned from his position, but found that there is no evidence to suggest that the appellant submitted his resignation on October 30, 2015. The TSM's statement notes that during the pre-decisional meeting the appellant asked if resigning was an option. The TSM stated that he confirmed that resigning was an option and that the appellant indicated he wanted to discuss it with his wife and that he would call the TSM later. The TSM stated that the appellant called him at approximately 1500 on Friday, October 30, 2015, and advised him that he had contacted HRAccess to initiate his immediate retirement. Additionally, an email from HRAccess, dated November 10, 2015, states: "[The appellant] applied to retire effective 10/30/2015. His application was received by HRAccess on 11/5/15. [The appellant] is not eligible to retire as he does not meet the minimum age and service requirements for Voluntary Retirement. [The appellant] has been notified that he is not eligible and advised to contact the airport to resign from service." The evidence in the record shows that the appellant applied for retirement; however there is no evidence that he submitted a letter of resignation. The Board finds that the one-step removal process was within policy as noted in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable performance and Conduct*, Section D. (1) (b) (iv) (b), which provides for the use of a one-step action when there is a validated failure of an alcohol test while on duty. The Board finds that the evidence supports that the appellant tested positive for alcohol while on duty on October 30, 2015, and that the breath alcohol test was conducted in accordance with policy. Therefore, the Board SUSTAINS the Charge, *Being Under the Influence of Alcohol While on Duty*.

The Aviation and Transportation Security Act, Public Law 107-71, requires screeners to have the ability to demonstrate a daily fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication or alcohol. TSA has defined "Fit for Duty" in its Management Directive (MD) No. 1100.33-1, *TSO Daily Fitness for Duty*, as "A statutory requirement that mandates that a TSO cannot be impaired while on duty due to illegal drugs, sleep deprivation, medication, or alcohol." The MD further states that, "employees occupying Testing Designated Positions, which includes TSOs, are prohibited from consuming or being under the influence of alcohol while on duty or consuming alcohol for a minimum of eight (8) hours preceding performance of security-related functions." Appendix A.1. (c) of the TSA Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal for certain TSO offenses, including a validated failure of alcohol test (on duty).

The Board has sustained the Charge, *Being Under the Influence of Alcohol While on Duty*, and removal for the sustained charge is required.

Decision. The appeal is, therefore, DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland Security,
ou=TSA, ou=People, cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=0876087875.T
SA
Date: 2016.03.21 12:58:33 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Supervisory Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—16-020

March 21, 2016

Issue: Sleeping on Duty

OPINION AND DECISION

On January 7, 2016, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on the Charge: *Sleeping on Duty*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charges, management then bears the burden of showing that the penalty imposed was reasonable.

Management based the Charge, *Sleeping on Duty*, on seven specifications. Specification 1 alleged that on October 2, 2015, the appellant was observed asleep in the TSA break room area while on duty. The appellant had to be woken up by a Lead Transportation Security Officer (LTSO). The appellant was observed dozing off throughout the day and stated to the LTSO that he did not get enough sleep. Specification 2 alleged that on October 6, 2015, the appellant was observed asleep in a chair in the TSA break room area while on duty. The appellant had his eyes closed. A pen was tossed to get his attention, which woke him up. The appellant got up from the chair and went downstairs to the screening checkpoint. Specification 3 alleged that on October 28, 2015, at approximately 1430 hours, the appellant was observed by two LTSOs asleep in the TSA break room while on duty. Specification 4 alleged that on October 29, 2015, at approximately 1415 hours, the appellant was observed by two LTSOs asleep in a chair in the TSA break room while on duty. The LTSO was attempting to talk with the appellant about a text message she received from a TSO regarding her arrival back to work. The appellant had to be woken up by the LTSO and she

reminded the appellant later of her conversation with him, to which he responded, "Oh that must have been when I was napping." Specification 5 alleged that on November 5, 2015, the appellant was leaning over with his hand holding up his head in the break room. An LTSO asked the appellant if he was okay. The appellant stated that he was okay. Later that day while waiting for the flight to depart the runway, the appellant was observed asleep standing up at the x-ray machine at the checkpoint. An LTSO tapped on the x-ray machine to wake the appellant up. Specification 6 alleged that on November 6, 2015, the appellant was observed to be struggling to stay awake with his hands on his head at his desk in the break room area. The employees left the appellant at his desk to screen a flight. The appellant later came to the checkpoint after three passengers had already processed through screening and stated, "you all left me." Specification 7 alleged that on November 11, 2015, the appellant was observed by a TSO asleep in the TSA break room. The TSO reported this incident to an LTSO.

Management alleged that the appellant's actions violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 6.B, which provides that employees conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. It also states that employees must perform their duties in a professional and business-like manner throughout the workday. Additionally, management alleged that the appellant's actions violated TSA MD 1100.33-1, *TSO Daily Fitness for Duty*, Section 6.A, which provides that TSOs shall be able to demonstrate daily fitness for duty without any impairment due to illegal drugs, sleep deprivations, medication, or alcohol.

A Transportation Security Manager (TSM) provided a written statement and stated that she spoke with the appellant on September 2, 2015, regarding a report from an LTSO who said it was possible that the appellant was closing his eyes and apparently sleeping during work hours. The TSM stated that she told the appellant that although she did not know if this was true, he needed to be aware of this. The appellant told the TSM that at times he takes off his glasses and closes his eyes. The TSM stated that she stressed with the appellant that in his position as STSO he leads by example, and that the appellant understood. She also stated that she spoke with the appellant about his schedule. She stated that the appellant was working a schedule that flexed from AM shift to PM shift and she asked the appellant if he needed to schedule himself in a more consistent schedule to avoid sleep deprivation. The TSM stated that the appellant said he would look at the schedule.

The TSM provided an additional statement, in which she stated that she met with the appellant on November 10, 2015, concerning reports of him falling asleep. The TSM stated that she told the appellant that she thought they had taken care of this issue as the appellant assured her on September 2, 2015, that it would not happen again. The TSM stated that she asked the appellant if he had talked to his physician about falling asleep, to which the appellant stated he had not. The TSM advised the appellant to talk with his physician and reminded him that he is an STSO and a role model and this behavior could not continue. The TSM stated that she explained to the appellant that he needed to ensure that he was fit for duty prior to coming to work and that if he failed to get enough sleep, he should call in if he was not fit for duty. The TSM also stated that the appellant said he was going to several physicians regarding his health. The TSM stated that she observed the appellant on the checkpoint that day and he operated the x-ray without any issues.

An LTSO provided a written statement dated October 6, 2015. He stated that on October 6, 2015, at approximately 0715 hours, the appellant called him to report to work in order to take his place because he was not feeling well. The LTSO stated that upon arrival, he was told by another LTSO that the appellant was having trouble walking and was dozing off. The LTSO stated that after the

flight, they were all upstairs where the appellant kept dozing off and had to be awakened. He also stated that the LTSO had told the appellant many times to call for a replacement or she would do it for him, and that a Transportation Security Officer (TSO) was present when this took place. The LTSO stated that the other LTSO said she had trouble on Friday, October 2 with the appellant not feeling well and dozing off; however, he would not call anyone to take his place so he could go home. The LTSO stated that he and the other LTSO agreed that the appellant needed to get help before something happened and called a TSM to report this. This LTSO provided another written statement, in which he stated that he had a meeting with a TSM regarding the appellant falling asleep while on duty. The LTSO stated that the appellant was on leave to correct this and that everything was going well once the appellant returned to duty until Wednesday, October 28, 2015. The LTSO stated that on this date, the appellant had fallen asleep in the break room and a TSO had to wake him up. The LTSO further stated that on Thursday, October 29, 2015, he was on one of the training computers and saw that the appellant had fallen asleep while another LTSO was talking to him, and that the LTSO had to get up from her computer to wake the appellant in order to finish talking with him. The LTSO stated that other employees have told him of other incidents, and that they had hoped there would be an improvement; however, things were deteriorating. The LTSO also stated that on Thursday, November 5, 2015, the appellant fell asleep while standing up at the checkpoint, and that he tapped on the x-ray to wake him up. The LTSO expressed the need to report this again to the TSM before the appellant or someone else gets hurt as the appellant was still having trouble and needs help.

Another LTSO provided a written statement dated October 6, 2015. The LTSO stated that several officers along with herself and the appellant were sitting in the break area and she observed the appellant with his eyes closed. She stated that the appellant did not open his eyes for a while, so she tossed her pen over to him to get his attention and he sat up. The LTSO stated that another officer told the appellant that it looked as if he did not get much sleep the previous night. At that point, the LTSO stated that the appellant got up and went downstairs to walk. The LTSO stated that on Friday, October 2, 2015, the appellant said he did not get much sleep and worked from 0600-0800 hours. The LTSO stated that she witnessed the appellant falling asleep before she went downstairs to check on bags for the second flight and asked if he was ok. The LTSO stated that she told the appellant that he should walk around and that maybe it would help to take his coat off as he was getting too comfortable with it on. She stated that she thought the appellant would be ok so she went downstairs. The LTSO stated that a while later, as she was screening bags, a TSO approached her and told her that she would take over screening the bags so she could "go wake our supervisor up." The LTSO further stated that she went upstairs and found the appellant asleep. She stated that she tapped the appellant on the shoulder and told him that a TSO had informed her that he was sleeping and said that it was not her job to wake him up. The LTSO stated that the appellant got up and went downstairs to work the flight. She further stated that throughout the day, the appellant continued to doze off; however, would open his eyes when she purposely made noise around him. She stated that she asked the appellant several times if he was ok and he said yes, that he just did not sleep much the night before. The LTSO stated that on Tuesday, October 6, 2015, she saw the appellant walking into the building upon her arrival and asked him if he was ok before starting the shift because he did not appear to be doing well. The LTSO stated that she asked the appellant if he was sick, having a diabetic issue, or did not sleep well again, to which the appellant replied "all of the above." The LTSO stated that the appellant said he was going to stay until another LTSO arrived at 1000 hours. The LTSO stated that after the first flight, they came back upstairs and the appellant sat down and got very quiet. She stated that she did not look at him but spoke with him to see if he was awake and that he responded. The LTSO further stated that after she finished the paperwork she saw that the appellant was turned sideways in the chair with his arms crossed and

eyes closed. She told the appellant that he could not go on like this and offered to call another LTSO if the appellant needed her to. At that point, the LTSO stated that the appellant called another LTSO at approximately 0715 hours to come in to work and cover the remainder of his shift, and that the LTSO arrived at 0815 hours. The two LTSOs conferred and decided that the correct course of action was to notify the TSM of these events and did so. This LTSO provided an additional statement dated November 7, 2015, and stated that she and another LTSO were working at the STSO/LTSO computers on October 28, 2015, when she looked over towards the break room and saw the appellant with his head hanging downward. She stated that she watched the appellant for a moment to see if he was truly asleep and his head rolled backwards. The LTSO stated that she told the other LTSO that the appellant was asleep again and the other LTSO said "Oh God," finished what he was working on, and saw the appellant asleep. She stated that she saw a TSO nudge the appellant and that both the TSO and the appellant got up and walked out of the room. The LTSO stated that she did not see the appellant fall asleep again that day. The LTSO also stated that on October 29, 2015, she advised the appellant about a text she had received from a TSO saying she was returning to the work location and the appellant did not respond. The LTSO stated that she continued to work on paperwork for approximately 10-15 minutes and was thinking that it was odd that she had not heard from the appellant in a while. The LTSO stated that she stood up from her computer and the appellant was asleep so she woke him and asked if he was ok, to which the appellant replied yes. She further stated that later that day, the appellant told her that the TSO that was returning to the work location should arrive soon. The LTSO stated that she told the appellant that she already told him that the TSO would be arriving soon. She said the appellant replied, "Oh that must have been when I was napping." The LTSO stated that on November 5, 2015, she was sitting at her computer and once again, the appellant became very quiet. She stated that she saw him leaning over with his hand holding up his head, and that she stood up and tapped on the copy machine and asked him if he was ok, to which he replied yes. The LTSO stated that on November 6, 2015, the appellant was at his desk and had his coat on. She stated that the appellant seemed to be struggling to stay awake, and that his head was in his hands with his chair turned sideways. The LTSO stated that the appellant then turned to the window and put his elbows on the heater vent and his head down in his hands. She stated that she did not bother him and that they had a flight to do so she went downstairs and other TSOs soon followed. The LTSO stated that after they had screened three people, the appellant came down and said, "you all left without me." She stated that later than day, she and other TSOs went downstairs to do another flight, and that they were downstairs almost 45 minutes before the appellant arrived. She advised the appellant when he started to put on gloves not to bother as they had already screened the flight. The LTSO stated that a TSO told her that she was not going to lie for the appellant if she was asked by anyone about him sleeping. In an email dated November 12, 2015, the LTSO stated that a TSO told her that the appellant was asleep when she and the TSO were at the training computer discussing the Standard Operating Procedures (SOP) after the noon flight on November 11, 2015. Additionally, the LTSO stated that she read an email and asked the appellant and another LTSO three times, if they had any input regarding the email. She stated that the LTSO replied to her question; however, the appellant did not respond except for a few sounds. She said that she mentioned the SOP topic discussion to the appellant later in the day and was unaware of why he had not responded to her earlier. She explained that the TSO informed her of the appellant's actions and that she did not personally see anything that day.

On November 23, 2015, a TSM met with the appellant for a pre-decisional meeting. During this meeting, the appellant stated that he did not know why he was falling asleep; however, he was working with his primary care physician to get a referral to see a sleep specialist. The appellant mentioned that he was diagnosed with sleep apnea earlier this year and was using a CPAP machine.

The appellant stated that he had some congestion recently and had to take off his mask to be able to breathe, which resulted in poor sleep. The appellant also stated that he had experienced some sleep episodes outside of work where he had fallen asleep unexpectedly from minutes to hours. The appellant also stated he had another medical condition that can trigger sleep episodes, and that these happen infrequently and his condition is getting worse.

On December 10, 2015, the appellant received a Notice of Proposed Removal and provided an oral reply on December 22, 2015. During his oral reply, the appellant stated that he suffers from a combination of things from sleep apnea to narcolepsy. The appellant stated that he was undergoing additional tests and had scheduled appointments with his physician and was now taking medication. The appellant stated that the medication has helped to reduce his drowsiness at work and he is feeling more alert. The appellant also stated that he understands that sleeping on duty is not acceptable. Additionally, the appellant provided a note from his physician to support his medical condition and use of medication as a means to improve his condition.

Additionally, by letter dated December 31, 2015, the Federal Security Director (FSD) stated that he met with the appellant at his request via Microsoft Video Communicator. The FSD stated that the appellant related that he understands that sleeping on duty is not acceptable, and that he has sought out medical care to determine the cause. The FSD stated that the appellant's physician advised that the appellant may have a combination of things going on from sleep apnea to narcolepsy, and that the appellant has additional tests and physician appointments scheduled and is now taking medication. The FSD stated that the appellant advised that the medication has helped to reduce his drowsiness at work, and that he feels more alert and will continue to seek treatment for his condition.

The Board considered all of the evidence and arguments presented by both parties. Management provided as evidence: statements of a TSM, dated September 2, 2015, and October 10, 2015; statements from two LTSOs, dated October 6, 2015, November 7, 2015, October 16, 2015, and November 7, 2015; an LTSO's email, dated November 12, 2015; a physician's note, dated December 14, 2015; and the FSD's letter, dated December 31, 2015.

On appeal, the appellant stated that he did not dispute the Charge; however, argued that this was due to a medical condition beyond his control at the time of the occurrences. The appellant argued that being new to the area with limited care, available appointments were not immediately available. He argued that after finding a medical specialist qualified in the area of his condition, he had to wait for the first available appointment, which was usually a two-month waiting period. Additionally, the appellant argued that he had to inquire several times with his primary care physician to learn of his appointment scheduled for January 20, 2015. The appellant argued that upon receiving the Notice of Decision to Remove on December 10, 2015, he had to reach out to his network and ask his daughter who is a nurse in another area if she knew of any physicians who specialized in his condition. The appellant argued that his daughter advised him of a physician that was located two-hours away from him. The appellant argued that he called the physician's office and set up an appointment for December 14, 2015. He argued that the physician prescribed medication and that since taking the medication, he is a changed person. The appellant argued that he is now fully awake, alert, and able to concentrate on his duties.

Management responded and argued that the appellant was an STSO at a very small Category IV airport with only eight employees, which the appellant was responsible to supervise. Management argued that the airport has approximately five flights per day on weekdays and only two flights on

the weekends that must be screened by an average of five employees. Management further argued that the appellant was the most senior employee present at the airport. Management argued that according to the appellant he was using a CPAP to treat sleep apnea for more than a year. Management argued that an LTSO reported to a TSM that the appellant was having instances of falling asleep at work in August 2015. The TSM met with the appellant on September 2, 2015, and confronted him about the reports of him falling asleep; making it very clear to the appellant that this was not acceptable. Management argued that the TSM offered to work with the appellant on adjusting his schedule if he was suffering from sleep deprivation; however, the appellant did not accept the TSM's offer. Management further argued that a week after this discussion, the appellant's subordinates again noticed him falling asleep, to which the appellant stated that he did not get much sleep. Management argued that on October 6, 2015, the appellant was again observed walking into the airport at the beginning of his shift looking tired and sick. Management argued that when the appellant was asked if he was sick or did not sleep well, the appellant replied that all of those things were true, yet failed to contact an LTSO to cover his shift even when another LTSO offered to do so for him. It was not until after the appellant fell asleep again, that the appellant contacted an LTSO to cover his remaining shift. Management contends that it should have been very clear to the appellant that his repeated instances of sleep deprivation were affecting his fitness for duty and that if he believed that this was due to his medical issues, it was incumbent upon him to request leave when he was not fit and seek treatment. Management argued that the appellant failed to do so and continued to fall asleep while on duty on several more occasions, which were reported to the TSM. Management argued that the TSM spoke with the appellant again after receiving numerous reports that he was falling asleep. The appellant told the TSM that he had not yet spoken to his physician regarding falling asleep after meeting with the TSM on September 2, 2015. Management argued that it appears that the first time the appellant took the issue seriously enough to consult his physicians was when he received the proposed removal on December 10, 2015. Additionally, while the appellant claims it took two months to get an appointment, he was able to see a physician on December 14, 2015, just four days after receiving the proposed removal.

The Board considered the appellant's claim that his sleeping on duty was a result of a medical condition. However, the Board agrees with management's conclusion that it was incumbent upon the appellant to seek medical attention for his condition in a timely manner, yet failed to do so. As to specifications 1 through 7, the Board finds that the statements provided, coupled with the admission of the appellant that he was sleeping while on duty, are preponderant evidence to establish that the appellant was sleeping while on duty. Therefore, all specifications are SUSTAINED. Having sustained all specifications, the Charge, *Sleeping on Duty*, is SUSTAINED.

Having sustained the Charge, the question is whether management has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly.

On appeal, the appellant argued that the penalty of removal is too harsh, and that at the time he received the decision letter he was already seeking medical attention with appointments to diagnose the problem. The appellant also argued that he had been an outstanding LTSO since being hired on August 25, 2002, rolling out the Hub airport with over 800 officers. During that time, the appellant argued that he mentored most of the senior staff now assigned to the Hub airport. The appellant argued that he also volunteered for the National Screening Force (NSF) and was a part of the NSF for five years as a Team Lead or Point of Contact (POC). Additionally, the appellant argued that he

has been an assistant team leader for two National Deployment Force (NDF) Academies, and that he was tasked with instructing field officers deployed to airports who had not received the training. The appellant further argued that he was also on a small team attached to the NDF Headquarters for their payroll changeover, and tasked with auditing documents and data entry into a new system over a two-month period. The appellant also argued that during his service he has received several letters from FSDs thanking him for the support of the airports while deployed. The appellant also provided statements from four officers who have witnessed the difference in him since taking his medication. The appellant requested to either be reinstated to his position or be permitted to medically retire from Federal service due to his long and previously unblemished career with the Agency.

Management argued that sleeping on duty while performing a security activity is identified as an offense for which removal is permitted for the first offense under TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct, Appendix A*. Management argued that as the only STSO at the airport; the SOP required his presence whenever the checkpoint was open. Management further argued that while empathetic to the appellant's ongoing health issues, the removal was based on his repeated failure to ensure that he was fit for duty and for placing the operation at risk by falling asleep while on duty. Management contends that as the senior employee and only STSO on duty at the airport, the appellant showed a complete lack of responsibility by repeatedly falling asleep on the job. Management argued that the appellant knew he was not fit for duty due to lack of sleep, yet came to work repeatedly, and that the appellant engaged in this behavior so often that his subordinates finally contacted the TSM at the Hub airport to report that the appellant had not taken steps to change his behavior. Management argued that the appellant's failure to seek any medical attention to address his falling asleep until after his proposed removal is unacceptable. Specifically, management argued that the appellant asserts that the mitigating factor of his improvements after beginning new medication was not considered and should result in a lesser penalty; however, the appellant was aware on September 2, 2015, of the need to address this issue, yet he did not. Management argued that even after the appellant was confronted multiple times in October 2015, he failed to address the problem and still chose not to seek medical attention. Management argued that the appellant continued to report to work sleep deprived in November 2015, without addressing the issue with his physicians, and only when he received a Notice of Proposed Removal on December 10, 2015, did the appellant seek an immediate appointment to address his repeated episodes of falling asleep while on duty. Lastly, management argued that the penalty of removal is reasonable and consistent with MD 1100.75-3, *Addressing Unacceptable Performance and Conduct, Appendix A*.

The Deciding Official considered that sleeping on duty is a serious offense and is directly related to the basic duty requirements of the appellant's position. While the offense was not viewed as being intentional, malicious, or for personal gain, the Deciding Official did consider that the offense was frequently repeated. The Deciding Official considered that the appellant is a full-time STSO and expected to adhere to all TSA rules, regulations, policies, and directives. Additionally, the Deciding Official considered that the appellant is in daily contact with the public, held to a higher standard, and expected to be a role model for his subordinates. As mitigating factors, the Deciding Official considered that the appellant has no prior disciplinary actions, has been employed with the Agency since August 25, 2002, and has maintained an above average work record and an acceptable relationship with his co-workers. The Deciding Official considered that the appellant's dependability during his employment has not been an issue from a standpoint of maintaining predictable attendance; however, his repeated instances of falling asleep on duty have affected his dependability in fulfilling the responsibilities of his position. The Deciding Official considered that

on at least one occasion the offense occurred while at a screening checkpoint location. He concluded that management has lost confidence in the appellant's ability to perform his assigned duties at a satisfactory level based on the number of instances that have taken place, and his failure to recognize his sleep deprivation and remove himself from the workplace. Management considered that the appellant was on clear notice of policies and procedures, as evidenced by his acknowledgement that he read and understood TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, via the annual course within the Online Learning Center (OLC). Additionally, the Deciding Official considered that the appellant was approached by the TSM on two different occasions. First, on September 2, 2015, the TSM spoke with the appellant regarding sleeping on duty, for which the appellant apologized and stated that he was taking steps to avoid falling asleep after realizing that he was struggling to stay awake. Additionally, the TSM reminded the appellant of the expectation that he would lead by example. The Deciding Official also considered the appellant's various medical conditions, and that on November 10, 2015, the appellant told the TSM that he had not taken steps to see his physician about falling asleep while on duty. The Deciding Official also considered that as a tenured employee the appellant was fully aware that sleeping while on duty is not acceptable.

Under Section M.5 of the TSA Table of Offenses and Penalties (Table), the recommended penalty for sleeping on duty while engaged in security duties is removal. Moreover, Appendix A.(1)(f) of the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, states that sleeping on duty is an offense for which removal is required. The Deciding Official considered that the penalty is consistent with Agency guidelines listed in the Table and falls within the recommended penalty range under Section M.5. The Deciding Official also considered demotion as an alternative action; however, concluded that it was not deemed an effective alternative action because sleeping on duty is not acceptable at any level of employment with the Agency. Therefore, the Deciding Official deemed that removal is appropriate in order to promote the efficiency of the Federal service.

The Board finds that the Deciding Official showed that he properly considered all the relevant penalty factors as well as the Table before making the decision to remove the appellant. Therefore, the Board finds that the penalty of Removal was within the bounds of reasonableness.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S
ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=0876
087875.TSA
Date: 2016.03.21 17:45:46 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-021

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 23, 2016

Issue: Failure to Successfully Complete Return to Duty Training

OPINION AND DECISION

On January 27, 2016, management removed the appellant from her position as Supervisory Transportation Security Officer (STSO), with the Transportation Security Administration (TSA) based on one Charge: *Failure to Successfully Complete Return to Duty Training*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol in remediating and testing the appellant and provided her with a fair opportunity to certify for her position.

Management supported the Charge with one specification. The specification alleged that on October 14, 2015¹, the appellant failed to pass the Advanced Imagery Technology (AIT)/Advanced Technology Resolution (ATR) Equipment Job Knowledge Certification (JKC), which was administered as part of her passenger Return to Duty Training.

The evidence shows that the appellant was removed from her position for failing to maintain certification requirements because of her failure to pass the 2014 Practical Skills Evaluation

¹The Board notes the date of the second test failure was October 13, 2015.

Assessment (PSE), Individual With Disabilities (IWD) remedial training and assessment. The appellant filed a grievance with the Office of Professional Responsibility Appellate Board (OAB) and as a result, the OAB issued a decision on March 6, 2015, granting the appeal due to a procedural error regarding her IWD PSE. The Board ordered the appellant to be reinstated and to be provided the necessary return to duty training along with another opportunity to take the IWD PSE. The appellant was reinstated to her previous position and was administered and passed the IWD PSE on May 4, 2015.

On May 6, 2015, the training department interviewed the appellant for a Level II Return-to-Duty Training program as a baggage officer. The appellant was provided the required training for certification as a baggage officer, and was administered the Computer Tomography X-ray (CTX) 9000 Job Knowledge Test (JKT) on May 22, 2015, which the appellant was unsuccessful in passing. The appellant was provided 4 hours of remediation and on May 27, 2015, and again was administered the CTX 9000 JKT, which she was unsuccessful in passing. After management was advised that the appellant had not been in baggage operations for over a year, management made the decision to allow the appellant to participate in a Level III Return-to-Duty program for baggage certification. From June 2, 2015 through June 4, 2015, the appellant attended Explosive Detection System (EDS)/On Screen Alarm Resolution Protocol (OSARP) training, which was required for baggage screening certification. On June 5, 2015, the appellant was administered the Operator Qualification Test (OQT) and was unsuccessful in passing the OQT. The appellant received the required remediation and was retested on the OQT on June 10, 2015, and was unsuccessful in passing the OQT. As a result, the appellant failed to certify as a baggage screening officer.

Following the appellant's Return-to-Duty test failures, she was assigned to work the exit lanes. Management made the decision to allow the appellant another opportunity to complete the Return-to-Duty program and on September 11, 2015, the appellant was given the option of being returned to duty as either a Single Function passenger screening officer or as a Dual Function officer in passenger screening and checked baggage, to include all appropriate equipment. The appellant elected to be returned to duty as a Dual Function officer, and signed a memorandum to that effect.

As a result, a Level II, PAX RTD (Passenger Return-to-Duty) interview was conducted by a Training Specialist based on the appellant's length of time away from screening functions and a completion date for return to duty was set for September 16, 2015. The appellant received the required training to certify as a passenger screening officer and was tested on the AIT/ATR JKT on October 2, 2015, and was unsuccessful in passing. The appellant received remediation and was retested on the AIT/ATR JKT on October 13, 2015, and was again unsuccessful in passing. As a result, the appellant failed to certify as a passenger screening officer.

Management alleged that the appellant failed to successfully complete mandatory Return to Duty training in accordance with TSA policy. The process to train the appellant exhausted a minimum of 200 man hours spent by training personnel from April 20, 2015 through June 10, 2015, and September 11, 2015 through October 15, 2015. As the appellant failed to certify either as a baggage screening officer, passenger screening officer, or Dual Function officer, it was determined that she could not be retained.

The appellant was issued a Notice of Proposed Removal on December 11, 2015, and a Notice of Removal on January 27, 2016.

TSA Management Directive (MD) 1100.90-1, *Transportation Security Officer (TSO) Training Requirements For Retention*, Section 5.A, Responsibilities, provides in pertinent part that Federal Security Directors (FSDs) are responsible for deciding whether to retain or terminate from employment TSO personnel who fail cross training or equipment certification. Additionally, Section 6.B provides that TSO personnel generally must successfully complete cross training or equipment certification, where applicable, to be retained as employees. Section 6.C. (2) provides that FSDs have the authority and discretion to consider for retention or to terminate TSO candidates or personnel who fail cross training or equipment certification. Section 7 provides that TSOs who fail to successfully complete return to duty training requirements are subject to the provisions set forth in this directive. Additionally, TSA MD 1900.8, *TSO Training and Initial Certification Programs*, provides that TSOs who have not performed screening functions for 15 or more consecutive days are required to complete the return to duty training requirements.

Management provided as evidence: Failure to Successfully Complete the ATR JKT Training Program paperwork, dated October 2, 2015 and October 13, 2015; Failure to Successfully Complete the EDS/OSARP Training Program paperwork, dated June 10, 2015; Time Detail report, dated from May 1, 2015 through October 14, 2015; Memorandum regarding Dual Function officer status, dated September 11, 2015; Statement from Assistant Training Instructor, dated June 2, 2015; training time line, dated from April 10, 2015 through October 15, 2015.

On appeal, the appellant argued that her failure to pass the AIT/ATR JKT is a conspiracy by certain management personnel and employees since 2014 to have her terminated. The appellant also contends that if she had not been wrongfully terminated in January 2015, she would not have had to complete Return-to-Duty training. The appellant argued that the only test she failed to pass for passenger certification was the AIT/ATR JKT. The appellant argued that she had been working with a trainer to pass all the exams and fell short on the AIT/ATR JKT by a mere (b)(3)-49 U.S.C. § 114(r). The appellant further argued that not everyone learns at the same pace nor does everyone have the ability to teach everyone. She argued that she had a good success rate under the instruction of the trainer. However, when she only had one more test to pass to complete all passenger exams, the trainer she had was “all of sudden” removed as her trainer/tester and replaced by another trainer who failed her. The appellant questioned why her first trainer was removed from the process when she had success under his tutelage. The appellant alleged that this was done on purpose to disturb her positive mindset, stress her, and to ensure that she failed. The appellant also argued that her score was never revealed to her, and that she was simply informed that she did not pass. The appellant argued that a conspiracy to ensure she failed is further illuminated by the fact that she was scheduled for a passenger training class on December 4, which would have helped her prepare for the AIT/ATR JKT, and on the day of the class she was told not to attend. She also argued that she was scheduled to attend an Explosive Detection System (EDS)/OSARP class from November 2 through November 6, and that she needed this class to pass her remaining test for baggage certification. The appellant stated that upon arriving for this class she was advised that she had been cancelled from the class. The appellant also argued that several staff members were upset when she was brought back to work in May 2015. She also argued that she had been placed on exit lane duty since her return last May, which did not support on the job training or time to read the Standard Operating Procedures (SOP). The appellant argued that she has a medical condition, which kept her out of work for a time. She contends that when she tried to resume FMLA with the Agency, management gave her the “run-around” and considered her Absent Without Leave (AWOL), so she did not receive pay for a month. The appellant also contends that the AWOLs reflected on the Time Detail report submitted by management as part of the evidence were reverted

to FMLA and contends that this was another attempt to assassinate her character. The appellant requested to be allowed to take the courses that were previously cancelled on her behalf in an effort to ensure she failed and requested her previous trainer.

Management responded and argued that the preponderance of the evidence establishes that the appellant did not successfully complete return to duty training. Management argued that on October 14, 2015², the appellant failed to pass the AIT/ATR JKT administered as part of her Return-to-Duty training. Management argued that the appellant was given an opportunity to successfully recertify through the Passenger Return-to-Duty Program in October; however, when she failed to recertify on the AIT it was determined that she could not be retained as a single-function passenger officer as she was not fully certified in that area.

Management argued that the Deciding Official noted that prior to the appellant's opportunity to successfully recertify through the Passenger Return-to-Duty Program; she failed the OSARP certification during her Return-to-Duty training as a single function baggage officer, which was her previous certification. Management argued that it was determined that the appellant could not be retained as a Single Function baggage officer or as a Dual Function officer because there was an operational need in the International Operation for all baggage and Dual Function officers to be certified on all equipment, including OSARP.

Management argued that the Deciding Official discussed the appellant's history dating back to May 2015, following the appellant's return after her previous OAB appeal. The Deciding Official discussed that in May 2015, the appellant was given a Return-to-Duty II Program for baggage, which included the New Hire Training Program Baggage Disk and a review with training. Management argued that during this period, the appellant failed the OSARP test and JKT; was remediated; and failed a second time. Additionally, the Deciding Official discussed that in June 2015, the full EDS/OSARP training was administered to the appellant, and on June 5 she failed the OQT. Management argued that the appellant was remediated a second time and following remediation, management elected to provide her a Level II Return-to-Duty Program for passenger screening. Management further argued that the appellant passed the Image Mastery Test and the Ticket Document Checker JKC and failed the initial AIT/ATR JKT; and that following remediation, the appellant was unsuccessful in passing her second attempt of the AIT/ATR JKT.

Additionally, management argued that the Deciding Official addressed all of the pertinent arguments the appellant made in her response to the Notice of Proposed Removal. Management argued that the Deciding Official considered the appellant's contention that there was a conspiracy to ensure she failed the training; however, noted that there was no evidence to support her claim. To the contrary, the Deciding Official noted that the appellant was provided with multiple opportunities to become fully certified. Management argued that the appellant's Time Detail report was included as evidence of when the appellant returned to duty pursuant to the previous OAB decision. With regard to the appellant's assertion that she was assigned to the exit lane, management argued that discretion was exercised to assign her to the exit lane because she was not fully certified. Additionally, management argued that the training department expended a substantial amount of time administering training and remediation in an attempt to certify the appellant.

² The Board notes the date of the second test failure was October 13, 2015.

The Board finds that the preponderance of the evidence establishes that in May 2015 the appellant was provided a Level II Return-to-Duty Training program to certify as a baggage officer. The Board finds that on May 22, 2015, and May 27, 2015, the appellant was unsuccessful in passing the Computer Tomography X-ray (CTX) 9000 Job Knowledge Test (JKT) after being provided with remediation after the first test failure. The record established that as a result, management made the decision to allow the appellant to participate in a Level III Return-to-Duty program for baggage screening certification. From June 2, 2015 through June 4, 2015, the appellant attended EDS/OSARP training. On June 5, 2015, the appellant was administered the Operator Qualification Test (OQT) required for OSARP certification and was unsuccessful in passing, received remediation, and retested on June 10, 2015, failing her second attempt. As a result, the appellant failed to certify as a baggage screening officer. The Board notes that all baggage and Dual Function officers must be certified in OSARP. The evidence in the record also shows that management made the decision to allow the appellant another opportunity to complete the Return-to-Duty program and on September 11, 2015, the appellant elected to be returned to duty as a Dual Function officer and signed a memorandum to that effect. The evidence in the record shows that the appellant was provided Level II, PAX RTD (Passenger Return-to-Duty) training, was tested on the AIT/ATR JKT on October 2 2015, and was unsuccessful in passing. The record shows that the appellant was remediated and retested on the AIT/ATR JKT on October 13, 2015, and was unsuccessful in passing on a second attempt. As a result, the appellant failed to certify as a passenger screening officer. The Board considered the appellant's claim that her failure to certify was due to a conspiracy by management to ensure that she failed. However, the Board finds no evidence in the record to support this claim. Adversely, the Board finds that although there was no requirement to do so, management allowed the appellant to attempt to certify as a passenger officer after she was unsuccessful in certifying as a baggage officer. The Board also considered the appellant's claim that she was scheduled for further classes in November and December of 2015, which would have assisted her in passing the tests and successfully certifying. However, the Board finds that the evidence shows that the appellant had already failed to certify as a passenger and baggage officer prior to these classes, and that the appellant had been scheduled in error.

The Board finds that the evidence in the record supports that the appellant was provided an opportunity to complete Return-to-Duty training and certify in both baggage and passenger screening and was unsuccessful in doing so. Therefore, the Charge, *Failure to Successfully Complete Return to Duty Training*, is SUSTAINED. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is a failure to certify and certification is a condition of continued employment as a TSO.

Pursuant to TSA Management Directive (MD) 1100.90-1, *Transportation Security Officer (TSO) Training Requirements for Retention*, Federal Security Directors (FSDs) have the authority and discretion to consider for retention or to terminate TSO candidates or personnel who fail cross training or equipment certifications. Additionally, the MD states that TSOs generally must successfully complete cross training or equipment certification, where applicable, to be retained as employees. Consequently, the Board finds that the appellant's non-disciplinary removal based on her failure to achieve certification as either a passenger or baggage officer was appropriate and consistent with TSA policy.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=087608
7875.TSA
Date: 2016.03.23 12:17:14 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-023

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 27, 2016

Issue: Failure to Cooperate in an Agency Investigation; Inattention to Duty; Unprofessional Conduct

OPINION AND DECISION

On December 15, 2015, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration based on three Charges: *Failure to Cooperate in an Agency Investigation, Inattention to Duty, and Unprofessional Conduct*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board GRANTS the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge(s), management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Failure to Cooperate in an Agency Investigation*, on one specification. The specification alleged that by Fact Finding Report dated September 8, 2015, Enclosure 17 – September 4, 2015, email: a Transportation Security Manager (TSM) reminded the appellant of his original request for the appellant to provide an email statement concerning the events of Saturday morning, August 29, 2015, during the time the appellant was assigned as the Lane 4 x-ray operator. The TSM had previously instructed the appellant on September 2nd to submit a

statement describing the events of August 29th. The appellant did not comply with the TSM's instructions to submit a statement as directed.

Management based Charge 2, *Inattention to Duty*, on two specifications. Specification 1 alleged that on August 22, 2015, at approximately 0605 hours, while assigned as the screening officer at the Advance Image Technology (AIT) on the passenger checkpoint, the appellant failed to maintain positive control of an alarmed passenger and failed to submit the passenger's accessible property for re-screening. Specification 2 alleged that on August 29, 2015, at approximately 0826 hours while assigned as an x-ray operator at the passenger checkpoint, the appellant failed to observe and/or stop the x-ray belt resulting in running a passenger's Continuous Positive Airway Pressure (CPAP) machine off the belt.

Management based Charge 3, *Unprofessional Conduct*, on two specifications. Specification 1 alleged that during the August 29, 2015, incident, the appellant failed to stop the belt resulting in bins piling up and damage to a passenger's personal property (CPAP) that fell onto the floor. In the passenger's statement, titled Poor Performance, the passenger wrote, "rather than see what was going on, the operator turns & laughs." Specification 2 alleged that immediately following the CPAP machine falling to the floor, the Supervisory Transportation Security Officer (STSO) reported he witnessed the passenger yelling in the appellant's direction saying "Hey, try having a little patience." The STSO provided in his witness statement that the appellant laughed and responded "yes sir boss" in a southern drawl.

Management found that the appellant's conduct violated the TSA Handbook to Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section F. (1), Providing Statements and/or Testimony, which states that employees must cooperate fully with all TSA and DHS investigations and inquiries, including but not limited to inquiries initiated by supervisors and management officials, OOI or DHS OIG. This includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so. Management also found that the appellant's conduct violated TSA MD 1100.73-5, Sections 5. A. (2), 5. A. (3), 5. A. (7), and 6. B. Section 5. A. (2) requires employees to respond promptly to and fully comply with directions and instructions received from their supervisor or other management officials. Section 5. A. (3) requires employees to exercise courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. Section 5. A. (7) states that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. B provides that employees must perform their duties in a professional and business-like manner throughout the workday. Management further alleged that the appellant's actions did not comply with TSA Screening Checkpoint Standard Operating Procedures, paragraphs 2.5C, 6.2B.2.a, and L3 Pro Vision AIT with Automatic Target Recognition Standard Operating Procedures, paragraphs 1.3.B.6 and 1.6D. Additionally, management alleged that the appellant's conduct also violated the Screening Checkpoint SOP, Chapter 13 and AT x-ray Alternate and Full Configuration SOP.

As background, management stated that on August 29, 2015, the appellant was operating the x-ray and continuously running the belt with no apparent awareness or concern for the volume of accessible property on the belt/roller system. As a result, a CPAP machine belonging to a

passenger fell off the conveyor belt as the bins were moved forward damaging the CPAP in the process. After the CPAP fell on the floor, the appellant turned and looked in the direction of the CPAP and then returned his attention to the x-ray monitor. The appellant did not notify anyone of the situation or attempt any physical action to rectify the situation. The STSO responded to the incident, recovered the CPAP from the floor, and engaged with the passenger who owned the CPAP. The STSO provided a statement, in which he stated that he observed the passenger yell in the appellant's direction saying "Hey, try having a little patience." The STSO stated that in response the appellant laughed and said "yes sir boss" in a southern drawl. The passenger filed a complaint against the appellant over this incident.

Additionally, management stated that the appellant was instructed to provide a written statement on September 2, 2015, and September 4, 2015, regarding the incident on August 29, 2015, and failed to do so.

Management also stated that on August 22, 2015, the appellant was in the position of AIT Search Officer (SO) when he was engaged in conversation with his full attention directed towards another TSO at the rear of lane 3. While the appellant's back was turned to a male passenger who had alarmed the AIT, the male passenger passed behind the appellant and proceeded to retrieve his personal accessible property from the rollers of lane 4. The appellant failed to maintain positive control of the male passenger who alarmed on the AIT and failed to conduct a (b)(3):49 U.S.C. § 114(r) to clear the alarm. Another Transportation Security Officer alerted the appellant to the situation and the appellant directed the male passenger to return for screening. The male passenger removed his personal backpack from his shoulder, and placed it back onto the x-ray roller complying with the appellant's direction. The appellant then conducted the SPD of the male passenger successfully clearing the alarm. The appellant then allowed the male passenger to retrieve his property again from the x-ray rollers and failed to submit the passenger's property for re-screening via x-ray or physical search.

TSA MD 1100.77-1, *OPR Appellate Board*, Section 6.E, Procedural Matters, requires the Board to conduct a complete review of all appealed actions properly before the Board. The Board is required to evaluate the evidence and review the procedural and substantive issues, as appropriate. In addition, the Board is tasked with examining each appealed action for due process issues and procedural compliance with TSA MD 1100.75-3. The Board panel is also tasked with reviewing and considering procedural errors when deliberating the appeal.

The Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix B, Delegation of Authority for TSOs, provides that FSDs have the authority to impose removals for any TSO in the FSD's chain of supervision. An FSD may delegate certain authority related to adverse actions, such as removal, to an AFSD or higher. An FSD may request to delegate this authority to the next lower level by submitting a request to the Assistant Administrator for TSA Human Capital. In the present case, the Deciding Official was a Special Assistant to the Federal Security Director. The Board determined that management made a critical error by failing to ensure that the Deciding Official was authorized to act as the Deciding Official and remove the appellant from his position of TSO. Additionally, the Board finds no evidence in the record to indicate that the FSD sought approval or requested to delegate his or her authority as the Deciding Official to the Special Assistant to the Federal Security Director.

Accordingly, the Board finds that management failed to follow agency policy.

Decision. The appeal is, therefore, GRANTED. The appellant is ordered reinstated to his position as a Transportation Security Officer. Further, the appellant will receive back pay from the date of his removal, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=087608
7875.TSA
Date: 2016.03.27 15:20:45 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-024

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 24, 2016

Issue: Inattention to Duty

OPINION AND DECISION

On January 22, 2016, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Inattention to Duty*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge(s), management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence in the record. Management based the Charge, *Inattention to Duty*, on one specification. The specification alleged that on September 16, 2015, while positioned at the exit lane position at the checkpoint, the appellant was observed by another TSO exhibiting signs that she was inattentive to the exit lane while working the exit lane position. This was indicated by the appellant's head slouched and bobbing, and failure to react to the TSO when she attempted to relieve her from her exit lane duty. The appellant's inattentiveness to her duties on exit lane was evident through review of Closed Circuit Television (CCTV) footage.

Management found that the appellant violated TSA Management Directive (MD) No. 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 6. B. states that employees' conduct at

work directly affects the proper and effective accomplishment of their official duties and responsibilities, and that employees must perform their duties in a professional and business-like manner throughout the workday. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred.

The appellant was assigned to monitor the exit lane on September 16, 2015. A TSO wrote in her statement, dated September 16, 2015, that "On Wednesday, September 16th, 2015 at about 4:30 a.m., as we were starting our rotation, I was walking out to exit to start my shift when I witnessed [the appellant] with her head down eyes closed sleeping. I stood for a few seconds, witnessed her head roll to the side and then turned walked back into the checkpoint and notified my supervisor [name of STSO]." The TSO indicated in her statement that after she notified her supervisor, she walked back out to the exit and that the appellant was then awake. A Transportation Security Manager (TSM) reviewed the CCTV footage and noted 8 occurrences of the appellant closing her eyes for extended periods of time and exhibiting sleeping behavior such as head nodding from 04:15 until the appellant was relieved at 04:28. On September 16, 2015, the TSM conducted a pre-decisional discussion with the appellant about the incident and provided the appellant with the opportunity to respond orally and/or in writing. The appellant submitted a written reply on September 16, 2015. The appellant stated that while she was assigned to watch the exit, her eyes were burning and she closed her eyes to try to make them feel better. The appellant also stated, "I was later told by management, footage was reviewed and I had fallen asleep on exit." The appellant was issued a Notice of Proposed Removal on December 21, 2015. The appellant provided a written response on January 13, 2016. In her written response, the appellant stated that she did not agree with the Charge of Inattention to Duty and the allegation of sleeping while performing security duties. The appellant argued that "a head moving or bobbling [sic] with eyes closed or open does not make a conclusion of sleeping." She argued that failure to react to someone approaching could happen to anyone and could happen for many reasons. She also argued that failure to react or to acknowledge someone approaching does not conclude that someone is sleeping. The appellant acknowledged that she was seen on the CCTV footage rubbing her eyes and stated that she closed her eyes to make them feel better.

Management provided as evidence: a summary of Pre-Decisional Discussion and notes, dated September 16, 2015; a statement from a TSO, dated September 16, 2015; a statement from the appellant, dated September 16, 2015; appellant's response to the Notice of Proposed Removal, dated January 13, 2016; CCTV footage from September 16, 2015; and still photos from the September 16, 2015, CCTV footage.

On appeal, the appellant stated that on September 16, 2015, when she was positioned at the exit lane, her eyes began to burn as a result of her seasonal allergies. She stated that in order to relieve the burning sensation consuming her eyes, she periodically closed them. The appellant stated that during one of the times she momentarily closed her eyes, a TSO approached the checkpoint area to relieve her from her work position. She argued that the TSO assumed that she was sleeping and went to the screening area to report to an STSO what she perceived as the appellant sleeping. The appellant argued that she made the TSM aware of her seasonal allergies

and the reason for closing her eyes during the pre-decisional meeting. The appellant also stated that she repeatedly denied sleeping. The appellant argued that management failed to prove that she violated the Code of Conduct by a preponderance of the evidence. She stated that the CCTV footage shows her sitting on a chair with her back towards the camera and that throughout the footage, she can be seen fidgeting in her seat, playing with her hair, tapping her foot, and adjusting her uniform. The appellant stated that in some angles, the CCTV footage does capture her rubbing and closing her eyes momentarily. She argued however, that she had repeatedly explained to the TSM that she suffers from seasonal allergies that cause her eyes to burn. The appellant reiterated that the burning sensation forced her to close her eyes on occasion in order to temporarily relieve the persistent discomfort. The appellant argued that when the TSO walked toward the checkpoint area, the TSO observed her with her eyes closed in one attempt to subdue the pain caused from her allergies. The appellant argued that without further investigation, the TSO reported to an STSO that the appellant was sleeping based on an encounter that lasted no longer than a few seconds; a time frame she argued was not long enough to temporarily relieve her eyes from burning. The appellant also argued that the fact that management states that she closed her eyes on eight separate occasions does not contradict her claims of seasonal allergy eye irritation, but that instead, it confirms it. The appellant stated that at one point in the CCTV footage, two passengers approached the checkpoint area to exit the vicinity and that she can be seen interacting with the two passengers as they walked down the hallway. She stated that when the two passengers neared the exit doors, one passenger looked back and exchanged a few words with her. The appellant argued that such an event would not have occurred had she been sleeping. The appellant noted that the TSM stated that her misconduct is “what some might characterize as sleeping” and argued that the TSM’s statement implies that the allegation upon which she was removed could be the result of an event other than sleeping, such as relieving her eyes from a burning sensation. The appellant argued that the TSM admitted in her statement that what the TSO claimed to have observed, and what the CCTV footage questionably depicts, is not more likely than not a fact. Therefore, management failed to prove misconduct by a preponderance of the evidence. The appellant also argued that the STSO never investigated the situation himself, and that Management relied on the TSO’s momentary observance of an uninvestigated interaction with the appellant in removing a loyal and dedicated officer. The appellant argued that she can be seen on the CCTV footage moving around and fidgeting which are mannerisms inconsistent with sleeping. She also argued that the TSM ignored her contentions that she was relieving her eyes from a burning sensation and asserted that the appellant fell asleep instead. The appellant argued that Management failed to prove by a preponderance of the evidence, other than its own bare assertions, that she was sleeping in deciding to remove her on the grounds of inattention to duty.

Management responded and argued that upon reviewing the CCTV from the day of the incident, as well as the witness testimonies, it is clear that the appellant was inattentive to duty while performing her duties as the exit monitor position. Management stated that the appellant was inattentive to duty, regardless of whether it was as a result of her trying to relive herself from seasonal allergy discomfort. Management argued that even if the appellant needed to close her eyes to relieve allergy symptoms; she admitted to being tired that day which only lends support to the video proof that she was exhibiting signs of sleeping at the exit lane. Management argued that if you close your eyes and are already tired, it stands to reason that you might very well fall asleep, as is demonstrated in this case. Management argued that even if she did not fall asleep, the evidence in the case proves that she was inattentive to her duties. Management further argued that if the appellant had been suffering from seasonal allergies and had concerns about

her ability to be fit, fully present, and aware for duty; she should have alerted her chain of command.

The appellant was not charge with *Sleeping on Duty*, but rather *Inattention to Duty*. The evidence shows the appellant to have her head tilted to the side and her eyes closed. The Board finds that the CCTV video, the still photos from the CCTV footage, and the witness statement are preponderant evidence to support the Charge. Therefore, the Charge, *Inattention to Duty*, is SUSTAINED.

Having sustained the Charge, the question is whether the Deciding Official has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly by the Deciding Official.

On appeal, the appellant argued that management failed to establish that removal is reasonable. She argued that management failed to demonstrate that the penalty of removal was determined after a careful consideration of the penalty determination factors. The appellant also argued that management failed to demonstrate that her removal was consistent with progressive discipline. The appellant stated that she has been a committed employee of TSA for approximately three years and that during that time she continually demonstrated her competency and fitness as an employee. She stated that an LTSO personally thanked her for her exemplary customer service performance and praised her professionalism. She also stated that management selected her to serve on the Standard Operating Procedures (SOP) Committee in which committee members discuss the implications of potential changes in procedures. The appellant argued that management trusted her judgment, and thus selected her to be a part of such a valuable group because they believe she is a model candidate for the Agency and personifies the ideals of TSA and its mission. The appellant argued that while she did receive disciplinary action in the past, she has continually demonstrated her potential for growth and rehabilitation within the Agency. She stated that on April 24, 2014, she was placed on a six week Performance Improvement Plan (PIP) and that the end of each week, management was supposed to meet with her to discuss her progress and determine the areas that may need improvement. The appellant stated that management failed to provide her with proper leadership, guidance, direction and feedback. She argued that despite management's lack of involvement in her PIP, she still actively sought to improve as an officer. She stated that she made her concerns known to management and then sought feedback from her fellow TSOs. The appellant stated that she worked diligently to improve her performance and did her best to achieve expectations, even though management failed to give her support. The appellant stated that according to her personal recollection of significant achievements, she has made great contributions to the Agency during her employment. She stated that she often served as a mentor to new and transfer employees, and provided them with her knowledge and experience with the SOP. She also stated that she was able to defuse stressful situations using critical thinking and communication skills. Additionally, the appellant stated that she prides herself on her excellent customer service skills as passengers often expressed their gratitude and appreciation for her professionalism while executing pat-down procedures.

The appellant acknowledged that she holds a position of authority, trust, and respect, and that she recognized that failing to monitor a security area where there are no backups or layers to prevent a single point of failure is a serious concern to management. She stated that as such, she would never commit an act that goes against the oath she vowed to uphold as an officer with TSA. She argued that management failed to consider that occasionally closing her eyes was the result of her seasonal allergies, and not sleeping while engaged in security duties. She argued that if management had taken all of the reasons she outlined into consideration, it is clear that removal is not an appropriate form of action. The appellant further argued that management's decision to remove her is inconsistent with progressive discipline. She argued that management failed to consider the mitigated penalty range in determining an appropriate penalty and in doing so imposed a disciplinary action that does not follow progressive discipline. She also argued that management failed to show that less severe disciplinary actions would not adequately address her alleged misconduct. Additionally, the appellant argued that her removal does not promote the efficiency of the service. She argued that the efficiency of the service is not promoted by removing talented employees like herself and that doing so results in years of wasted training resources and the loss of a dedicated employee.

Management responded and argued that prior to the incident on September 16, 2015; the appellant received a Letter of Reprimand for Failure to Follow SOP on April 2, 2014; a 5-day suspension for Failure to Follow SOP on August 31, 2014; and a 5-day suspension for Failure to Follow SOP on November 6, 2014. Management argued that prior disciplinary action is considered an aggravating factor when determining penalties and therefore, management used the appellant's previous disciplinary history as an aggravating factor consistent with progressive discipline.

The Deciding Official considered both aggravating and mitigating factors in determining an appropriate penalty. The Deciding Official considered that the appellant has been employed with TSA since May 6, 2013, and typically works well with others. The Deciding Official stated that TSA holds all employees to a high standard of conduct and found the appellant's behavior in this situation did not meet that standard. The Deciding Official stated that as a trained officer, the appellant knew that being inattentive at the exit could compromise the sterile area by allowing unauthorized individuals access. The Deciding Official stated that he must be able to rely on the appellant to perform her critical security duties in a manner that does not negatively impact the efficiency of the screening operation or diminish the confidence of management and the traveling public. The Deciding Official considered that the appellant was clearly on notice regarding the type of behavior she exhibited as evidenced by her extensive disciplinary history which includes a 10-day Suspension that was later mitigated to a 5-day Suspension on November 6, 2014¹, for Failure to Follow SOP; a 5-day Suspension for Failure to Follow SOP on August 27, 2014; and an LOR on April 4, 2014, for Failure to Follow SOP. The Deciding Official stated that the appellant's repetitive security-related misconduct led him to believe that she does not demonstrate the potential for rehabilitation and that anything less than removal would only provide her with another opportunity to put TSA and the airport mission at risk. The Deciding Official found that the appellant's past ascending discipline leading to her removal fits squarely into the Agency's commitment to progressive discipline. The Deciding Official considered that throughout the appellant's response to the Notice of Proposed Removal, she did not claim any

¹ The Deciding Official incorrectly cited that date of the 5-day Suspension as November 6, 2015. The correct date of the suspension was November 6, 2014.

personal responsibility for her conduct nor did she attempt to take any action to prevent her inattentiveness such as standing or walking around. The Deciding Official stated that he found no favorable justification for the appellant's misconduct and noted that the appellant did not offer one. The Deciding Official stated that he did not find the mitigating factors, such as the appellant's tenure and otherwise satisfactory performance, sufficient enough to outweigh the seriousness of her offense and the impact to the operations and mission of TSA and the airport.

The Deciding Official did not reference the Table in the Decision letter. However, the Proposing Official referenced H.5, pertaining to Inattention to duty where there is no potential danger to life or property or potential loss of revenue. Under Section H.5 of the Table, the recommended penalty range is an LOR to 10-day suspension and the aggravated penalty range is an 11-day suspension to removal. In Management's reply, the Federal Security Director cited Section M.5 as the applicable section of the Table. Under Section M.5, Inattention to Duty, the penalty under both the recommended and aggravated penalty range is Removal. The Guidelines for the Table also states the examples of aggravating factors include prior disciplinary record and prior warning/advisement not to commit misconduct. Management had grounds for removal under either of the Sections of the Table.

The Board finds that management's decision to remove the appellant, given her recent disciplinary history, was within the bounds of reasonableness.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08760
87875.TSA
Date: 2016.03.24 21:53:26 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-025

v.

March 24, 2016

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

Issue: Sleeping while Engaged in Security Duties

OPINION AND DECISION

On January 15, 2016, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Sleeping while Engaged in Security Duties*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charges, management then bears the burden of showing that the penalty imposed was reasonable.

Management based the Charge, *Sleeping while Engaged in Security Duties*, on one specification alleging that on or about October 14, 2015, while assigned to the Exit Lane Monitor position at the airport, the appellant was sleeping while engaged in security duties. Specifically, on that date, two Supervisory Transportation Security Officers (STSOs) observed the appellant sleeping at the exit lane. The appellant subsequently admitted that he was sleeping.

Management alleged that the appellant's misconduct violated Section 5. D. (1) of TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, which states that TSA employees must report to work on time and ready, willing and able to perform the duties of their position. This means reporting for duty free from any effects of alcohol and/or drugs that may impair job performance or conduct; physically and mentally capable of performing his or her job requirements and in appropriate clothing and/or outfitted with required tools or equipment. Management also alleged that the appellant's misconduct violated Section 5. D. (2) of TSA MD

1100.33-1, *TSO Fitness for Duty*, which states that Transportation Security Officers are responsible for informing his or her supervisor if he or she is impaired and therefore, unfit for duty. Under Section 4. C. of MD 1100.33-1, impairment is defined as including, but is not limited to, fatigue, drowsiness, lethargy, sluggishness, and other similar limitations due to sleep deprivation, alcohol, illegal drugs, or medication, including the failure to take prescription medicine as directed. Management also noted that the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A, Section (1) (f) states that sleeping on duty while assigned to a security activity is an offense for which removal is required.

Management included the following as evidence to support the Charge: an email Memorandum for Record of an STSO, dated October 15, 2015; a Memorandum for Record of an STSO, dated October 14, 2015; a Memorandum for Record of an LTSO, dated October 14, 2015; a Memorandum for Record of a TSO, dated October 14, 2015; an email Memorandum for Record of an STSO, dated October 14, 2015; a Memorandum for Record of an STSO, dated October 14, 2015; a Memorandum for Record of an LTSO, dated October 16, 2015; and Closed Circuit Television (CCTV) video footage.

On October 14, 2015, at approximately 0252 hours, an STSO observed the appellant sitting at the exit lane with his eyes closed and called out to him to get his attention. When the appellant did not respond, the STSO contacted another STSO. The second STSO walked over to the exit lane where the appellant was located and saw him sitting in a chair, leaning back with his legs stretched out, his head tilted to the right and his eyes shut. The second STSO called out the appellant's name and stated that the appellant's reaction appeared startled; his facial expression gave the impression that he had just woken up; his eyes were red; and he had to wipe his face with his hand. The STSO advised the appellant that he should not be sleeping and to stand up. The appellant apologized indicating that he was sorry he "fucked up" and that he did not feel tired. The appellant was relieved from the exit lane position. The appellant later went to the supervisor's podium and stated that he was sorry he "fucked up" and that he knew that he should not have been sleeping. On October 14, 2015, at approximately 0320 hours, the appellant admitted to an STSO that he was sleeping in the exit lane for about 10 minutes before he was woken up by another STSO. The next day, the appellant sent a text message to a Lead Transportation Security Officer (LTSO) stating, "I am done . . . I screwed myself over hard last night . . . I fell asleep at the exit." A review of the CCTV of the incident showed that the appellant was leaning back in the chair, in a slumped position, with his legs extended straight out across the exit lane and not moving for approximately 13 minutes from 0242 hours to 0255 hours, until an STSO woke him up. At approximately 0249 hours, a person exiting through the lane had to side step the appellant's legs as she went by and the appellant did not move. The appellant was issued a Notice of Proposed Removal on December 20, 2015, and provided a written response on January 7, 2016.

On appeal, the appellant stated that he felt that his actions were unbecoming and that he is truly sorry that the incident occurred. However, the appellant argued that he believes that the Transportation Security Manager (TSM) made the issue bigger than it really was so that she could justify her proposed disciplinary action instead of really investigating all of the facts in the matter. The appellant stated that he feels that he may have closed his eyes for a few minutes, but argued that he was not in a deep sleep and therefore, his removal from Federal service is not justified. The appellant argued that many of the exhibits are hearsay. He also argued that the incidents, in which he told others that he screwed up and used the word sleeping, were based on what he was told by an STSO. He stated that he admits to closing his eyes but argued that when he was approached by an STSO, he opened his eyes and acknowledged her as soon as she called his name. The appellant

stated that he believes he messed up and that he should have requested to be tapped out because his eyes were bothering him, but he figured that his rotation was almost over and that he could just finish it. The appellant stated that he acknowledged in his statement that he saw an LTSO and another female pass by him through the exit and argued that the CCTV footage would show that it transpired not long before the STSO arrived and called his name. He argued that it happened within a matter of minutes and therefore, he could not have been in a deep sleep. The appellant claimed that management never let him see any of the video footage so that he could confirm that it could not have been more than 3-5 minutes from when he saw the LTSO and the other female pass by him through the exit lane, and the time that the STSO approached him at the exit lane. Additionally, the appellant also stated that he had an eye infection that his medical doctor attributed to working the overnight shift. He stated that prior to the incident he asked management to change his shift to one that started at noon and finished at 8:30 p.m., but his request was denied. The appellant stated that he accepts the fact that some disciplinary action is justified, but argued that removal is over and beyond the normal action that should be taken. The appellant suggested that he should be given a Last Chance Agreement.

Management responded and argued that Under the Handbook to TSA MD 1100.75-3, Appendix A, sleeping on duty while assigned to a security activity is a mandatory removal offense and therefore, a Last Chance Agreement is not an option. Management argued that the Charge is supported by a preponderance of the evidence and referenced excerpts from statements from STSOs and LTSOs that were provided as evidence to support the Charge. With regard to the appellant's claim that he had an eye infection, management argued that in his October 14, 2015, statement, the appellant first asserted that he initially closed his eyes because he was distracted and thinking about a personal matter. Management stated that later he simply stated that his eyes were "bothering him" but that his rotation was almost over and that he decided he should just finish it. Management argued that the appellant's assertion that he had an eye infection was not brought up prior to his appeal. Management asserted that the appellant had a duty to inform his or her supervisor when he is unfit for duty and that he did not do so. Management noted that on the night of the offense, the appellant told his supervisors that he was not sleepy. Further, management stated that if the appellant had advised his supervisor that he was unfit or had submitted medical evidence indicating that he was not fit; it would have been appropriately addressed. Management argued that all of the evidence in the case simply indicates that the employee fell asleep. Management argued that the appellant was afforded all required due process rights to include the right to view all supporting documentation, as well as the CCTV footage of the incident.

The appellant responded to management's response and argued that the TSM coerced him when he wrote his original statement, and that she threatened that he would be charged with Lack of Candor if he did not write it the way that she wanted him to. He stated that the words were not his and that his definition of "dozed off" was not a form of him admitting to sleeping; instead it was more of his attention being drifted away. The appellant stated, "Bottom line I did not write that statement." The appellant also argued that the statement of one of the LTSOs was "clearly hearsay" and that the other LTSO and two of the STSOs based their statements on conversations that they had with him. The appellant argued that he was overzealous and that all of his emotions got the best of him. He stated that when he said he was sleeping, he was repeating what was told to him by an STSO. The appellant stated that he clearly heard one of the STSOs say "Hey Braddah," but argued that he did not respond to him because he does not know him and because he thought he was talking to someone else. The appellant stated again that he accepted the fact that some disciplinary action is justified because of his "inattention to duty," but argued that there was no potential danger to human life, property, or revenue, or any damage, injury, or loss. He stated that the airport is closed to the

public when the last flight leaves and that after that time the only persons that are allowed through the checkpoint are the airport employees.

The Board found the CCTV video evidence, witness statements, and the appellant's own admission to be preponderant evidence to support the Charge: *Sleeping while Engaged in Security Duties*. Therefore, the Charge is SUSTAINED.

Having sustained the Charge, the question is whether management has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly.

Under Section M.5 of the Table, the recommended penalty for Sleeping on Duty while engaged in security duties is Removal. Moreover, Appendix A.(1)(f) of the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, states that sleeping on duty is an offense for which Removal is required. The Board finds that the Deciding Official showed that he properly considered all the relevant penalty factors, as well as the Table, before making the decision to remove the appellant. Therefore, the Board finds that the penalty of Removal was within the bounds of reasonableness.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=087608
7875.TSA
Date: 2016.03.24 19:20:15 -04'00'



Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-026

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 25, 2016

Issue: *Failure to Follow Standard Operating Procedures (SOP)*

OPINION AND DECISION

On January 22, 2016, management demoted the appellant from her position of Supervisory Transportation Security Officer (STSO), SV-1802-G, to the position of Transportation Security Officer (TSO), SV-1802-E, with the Transportation Security Administration (TSA) based on one charge: *Failure to Follow Standard Operating Procedures (SOP)*. The appellant filed a timely appeal of her demotion to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charges, management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Failure to Follow Standard Operating Procedures (SOP)*, on one specification. The specification alleged that on October 11, 2015, while assigned to the checkpoint, the appellant was observed by a Transportation Security Manager (TSM) at approximately 0552 hours not using the required ultraviolet (UV) light or magnifying loupe while performing Travel Document Checker (TDC) functions.

Management alleged that the appellant's conduct violated Sections 3.2.1(D.1), *Verifying Identification*, of the Travel Document Check Standard Operating Procedures (SOP).

Additionally, management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5.D. (7), which provides that employees are responsible for observing and abiding by all laws, rules, regulations, and other authoritative policies and guidance.

The Deputy Assistant Federal Security Director (DAFSD) provided a written statement dated October 13, 2015. In her statement, the DAFSD said that on October 1, 2015, between 0602-0615 hours, she conducted a Practical Skills Observation (PSO) on the appellant while the appellant was performing TDC duties. The DAFSD stated that she observed that the appellant did not use the UV lights as required by the SOP to verify the IDs provided to her by 2 female passengers. The DAFSD stated that directly after her observation she advised the appellant that she had failed the PSO because she failed to use the UV light, as required by the SOP. The DAFSD stated that the appellant told her that she uses the overhead lights because she can sometimes see the "stuff on the identifications." The DAFSD further stated that she advised the appellant that the method she used was unacceptable and against the SOP, and that she was only to use the methods approved by the SOP. The DAFSD stated that the appellant said "okay." Additionally, the DAFSD stated that on October 11, 2015, at approximately 0831 hours, she was advised by a TSM that he had observed the appellant conducting TDC duties by using the overhead lights again, and that the appellant had not followed her direction to follow the SOP. The DAFSD stated that the appellant gave the TSM the same excuse she had given her and added that she needed batteries for the lights. The DAFSD stated that the appellant did not advise her that she needed batteries for the lights. The DAFSD further stated that she called the Federal Security Director, advised him of the situation with the appellant, and relayed that she had lost all confidence and trust that the appellant could perform as an STSO or comply with the SOP, and felt the appellant was a security risk to screening operations. The DAFSD recommended that the appellant be relieved of duty as an STSO, and that she be placed in a non-security function such as administrative duties until further notice, to which the FSD concurred.

A TSM provided a written statement dated October 11, 2015, in which he stated that on October 11, 2015, at approximately 0445 hours, he observed the appellant performing TDC duties without using a light to identify security markings. The TSM stated that he informed the appellant that she could not perform this function without using a UV light. The TSM stated that the appellant started moving the passenger's identification (ID) around attempting to display the holograms using the ceiling light, and that he informed her that the ceiling light was not a black light or UV light as required by the SOP. The appellant then advised the TSM that they did not have any batteries for the lights. The TSM stated that he advised the appellant that she could not use short cuts or fail to follow the SOP because she did not have batteries. The TSM stated that he also impressed upon the appellant that she was setting a bad example and showing her employees that it was ok to break the rules. The TSM further stated that he told the appellant to stop. He then called to get batteries for the lights and an STSO brought 4 batteries from another location for their use. The TSM stated that later that day when he mentioned this incident to another TSM, the TSM told him that the appellant was the same STSO that the DAFSD had observed not using the light while performing TDC duties earlier that week. The TSM stated that he and the other TSM met with the appellant and asked her why she was still not using the UV lights after the DAFSD had instructed her to do so. The appellant replied that she did not recall that conversation, only that the DAFSD had asked her what she doing at the TDC. The TSM stated that he advised the appellant that another TSM had also informed her that same day, to which the appellant replied that she did not remember that conversation either. The TSM

stated that the DAFSD was informed of this incident and the decision was made to remove the appellant from screening duties.

Another TSM provided a written statement dated October 18, 2015. He stated that on October 1, 2015, the DAFSD approached him and advised him that during a PSO of the appellant, she had witnessed the appellant not utilizing the UV light when screening passenger IDs. The DAFSD also told the TSM that she observed the appellant multiple times clearing passengers by holding the ID up to the fluorescent light and clearing the ID in a manner that does not comply with the SOP. The TSM stated that the DAFSD advised him that the appellant had failed a PSO in TDC functions due to the observations, and that the DAFSD spoke with the appellant regarding her failure. When questioned about the UV light, the appellant stated that she normally holds the ID up to the light and can see the security features on the ID in that manner. The TSM stated that the DAFSD offered correction to the appellant and told her that she must utilize proper procedures. The TSM stated that the DAFSD instructed him to speak to the appellant also regarding the failure and to impress upon the appellant the requirements when performing TDC duties. The TSM further stated that he spoke with the appellant and recapped what was conveyed to him by the DAFSD concerning her failure. The TSM stated that the appellant acknowledged the conversation with the DAFSD and that he instructed the appellant to ensure she uses the UV light moving forward when performing TDC duties. The TSM also advised the appellant that her actions constituted a PSO failure.

Another TSM provided a written statement dated October 12, 2015, and said that on October 11, 2015, at approximately 0500 hours, she was informed by another TSM that the appellant was not using a light at the TDC position. The TSM stated that she advised the other TSM that the appellant was the same STSO that the DAFSD had stated had failed her PSO at the TDC position for not using the UV light. The TSM further stated that she and the other TSM met with the appellant and asked her why she was still not using the lights after the DAFSD instructed her to do so. The TSM stated that the appellant said she did not recall that conversation with the DAFSD, and that the DAFSD only inquired about what she was doing at the TDC in reference to a passenger going into security. The TSM stated that the appellant told them that maybe she spoke with a TSM about the incident; however, the DAFSD never spoke to her about not using the lights at the TDC position.

The appellant provided a written statement dated October 11, 2015, and stated that on October 11, 2015, she was at the TDC assisting without a light and was notified by a TSM to stop. The appellant stated that she explained to the TSM that she did not have any batteries and was trying to help fill in the queuing area. The appellant further explained to the TSM that they were behind because an airline was using paper boarding passes. The appellant stated that she explained that she could see the holograms on the IDs. She also stated that she remembered talking with the DAFSD at the TDC; however, could not remember what the conversation was about or when it took place. She also stated that she could not remember if a TSM spoke to her about the TDC. The appellant apologized and stated that she has a lot to deal with at the checkpoint, and that she has been dealing with the lack of supplies, calling around for supplies, and equipment not working. On October 15, 2015, the appellant provided another statement and said that on Monday October 12, 2015, she and a TSM discussed that she did not remember word for word what the DAFSD said or the date of that discussion. The appellant also stated that she never denied speaking with the DAFSD; only that she could not remember everything that was said. She also stated that on the same morning she remembered that she had enough

batteries for possibly 2 lights, but not enough for all the lights as she had 3 empty lights. She stated that she also remembered explaining to a TSM that she was able to see the hologram on the ID from the ceiling lighting and that she was trying to fill up the queue. The appellant stated that she has a lot on her plate and is a responsible person. She apologized again for any embarrassment she has caused the Agency. On October 15, 2015, the appellant provided an additional statement and added that she and the TSMs discussed that she may have processed at least 5 other passengers at the TDC, and that prior to her encounter with the DAFSD she had not done this.

On December 17, 2015, the appellant was issued a Notice of Proposed Removal. On January 4, 2016, the Assistant Federal Security Director (AFSD) met with the appellant and her representative to receive the appellant's oral reply to the Notice of Proposed Removal. The AFSD provided a written account of this meeting via an email dated January 7, 2016. During this meeting, the appellant's representative argued that the appellant had experienced traumatic events during Hurricane Katrina, which still affect her demeanor. He argued that the appellant owned up to her mistakes and did not honestly remember or recall certain things as she was under stress. The representative argued that the airline representative and the TSM were both pressuring the appellant and she was overwhelmed. He argued that the appellant did what she could do to improvise and asked for leniency in the decision process. The appellant argued that she has been able to balance her experiences with her work and was the only STSO for a while with no issues or complaints. She also argued that she does not push back as it is not her style and did not argue with the DAFSD or the TSM. The appellant argued that when she was challenged by the DAFSD she tried to explain that she could still see the security features of the ID with the overhead fluorescent light. She also expressed that she had previously submitted an order for supplies, which had not been filled. The appellant argued that her checkpoint was the first to open and that they went through the batteries much faster than other locations.

On December 21, 2015, the appellant provided a written reply to the Notice of Proposed Removal. In her written reply, the appellant argued that she acknowledged her error and according to a TSM apologized for her misconduct. She argued that she was confronted about specific instructions, which she did not remember, and stated that this was supported by the video because there was an enormous crowd and the line was over a mile long. The appellant argued that the TSM only frustrated the matter further by constantly, aggressively screaming in her ear "Need to get the crowd down!" The appellant argued that it was the TSMs first day in this area and he was overwhelmed as well with the long line. The appellant argued that as an alternative, she remembered her previous training on the Custom and Border Patrol (CBP) Fraudulent Identification/Passport Booklets/Passport Cards. The appellant argued that per the CBP training and Management SOP, she may rely upon enriched training in performing her duty unless otherwise authorized by the FSD due to exigent circumstances. The appellant concluded that to move the crowd faster she could use other measures to validate traveler's credentials. The appellant also argued that she was assigned to perform her duty without the proper batteries for the scanner and UV light, and that on 2 previous occasions she had ordered the required batteries but did not receive them and improvised. The appellant argued that she has apologized and is willing to write a formal letter of apology and abide by the decision.

The Deciding Official issued a decision on January 22, 2016, and demoted the appellant from the position of Supervisory Transportation Security Officer to the position of Transportation Security Officer.

Management provided the following evidence to support the Charge: a copy of Summary of Pre-Decision Discussion with Employee, dated October 11, 2015; the appellant's statements, dated October 11, 2015, and October 15, 2015; a Lead Transportation Security Officer's (LTSO) email, dated October 10, 2015; a TSM's statement dated October 11, 2015; a TSM's statement, dated October 12, 2015; a TSM's statement, dated October 18, 2015; the DAFSD's statement, dated October 13, 2015; a TSM's email, dated December 7, 2015; TDC OLC Learning History for the appellant, dated May 17, 2012 through June 12, 2015; and OLC Learning History for the appellant.

On appeal, the appellant argued that she has over 13 years of experience of performing TDC duties and was aiding in the operations using the tools provided to her. The appellant argued that on October 2, 2015, and October 10, 2015, an LTSO sent an email request to logistics for adequate supplies for the TDC scanner. The appellant further argued that the area she worked in was the first to open and that there was not any other area to request supplies from for at least 60-90 minutes due to the next checkpoint opening at 0400 hours and/or 0430 hours. Additionally, the appellant provided another statement from a TSO who wrote that he did not have a light or loupe on another occasion at the TDC and was later issued a Letter of Reprimand (LOR) for his actions. The appellant also argued that the TSO stated that the checkpoint does not have sufficient lights, loupes, or batteries for lights.

Management argued that the appellant does not dispute the misconduct as charged but argued that the involuntary demotion is too harsh. Management stated that on October 1, 2015, the DAFSD observed the appellant not using the required UV lights to verify the IDs provided by 2 passengers and advised the appellant that she must use the UV lights in accordance with the SOP when verifying IDs. Management also pointed out that the DAFSD also advised the appellant that use of the overhead ceiling lights to verify holograms on the IDs was unacceptable. Management argued that on October 11, 2015, a TSM observed the appellant once again not using the UV lights while performing TDC duties. The appellant told the TSM that she was attempting to assist in reducing the passenger lines, that she did not have batteries for the lights, and that she could see the security features on the passenger's IDs with the ceiling lights. Management also argued that they were troubled by the appellant's unconvincing excuses for not following the SOP, including not having batteries for the required TDC tools and having to open the first checkpoint. Management argued that as an STSO, the appellant is responsible for verifying and completing the Checkpoint Daily Shift Summary before opening the checkpoint. The Shift Summary is in essence a checklist to confirm the checkpoint has all the tools and equipment needed for the operation. Management contends that a review of the checkpoint summary on October 11, 2015, revealed that the appellant had documented that all TDC lights and magnifying loupes were available and ready for use that day.

In response to management's reply, the appellant argued that she included the statement of the TSO who received an LOR to substantiate her claim that the checkpoint consistently lacked sufficient tools, such as batteries and lights/loups, to effectively support the mission. The appellant also argued that management used the example of another TSO who did not have a UV light and walked back and forth utilizing the light mounted on another podium to verify IDs. The appellant argued that this also bolsters her claim of a lack of sufficient supplies even after multiple requests were made via email. Additionally, the appellant argued that her checkpoint

was the first one opened in the airport with no other checkpoints opening for a minimum of 90-120 minutes later.

The Board considered the appellant's argument that she could see the holograms on the IDs with the overhead light and finds no merit to this argument, as it is a clear violation of the SOP. Additionally, the Board considered the appellant's argument that there were insufficient supplies on the checkpoint to operate the UV lights. The Board finds that as the STSO in charge of the checkpoint, the appellant had the responsibility to ensure proper equipment functionality and an appropriate level of supplies to operate the equipment. The Board acknowledges that requests for supplies were made. However, it is reasonable to conclude that if the supplies were not received that the appellant, as the STSO in charge, would have made proper notification to management rather than violate the SOP. The Board finds that the evidence in the record, coupled with the appellant's admission, is preponderant evidence to support that the appellant verified passenger IDs without the use of proper equipment and thus failed to follow SOP. Therefore, the Charge, *Failure to Follow Standard Operating Procedures (SOP)* is SUSTAINED.

Having sustained the Charge, the remaining question is whether the appellant's demotion is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly by the Deciding Official.

On appeal, the appellant argued that demoting her from STSO to TSO after 13 years of tenure and 3 years as a supervisor, whose 2 most recent evaluations have been Exceeded Expectations and Achieved Expectations, is too harsh. The appellant argued that the specification created a nexus between the events of October 11, 2015, and a conversation with the DAFSD on October 1, 2015, that served as a corrective action. The appellant argued that these two events appeared similar in form; however, were actually different in function. The appellant argued that on October 1, 2015, she was not performing TDC duties when she was observed by the DAFSD, rather she was simply verifying as an STSO that the airline had corrected the boarding passes of 2 passengers. Therefore, her actions were not in direct insubordination to her supervisor or did they pose a risk to the traveling public. The appellant argued that prior to the Letter of Reprimand she received in September 2015; she had not received any formal discipline in any capacity (TSO, LTSO, and STSO) during her previous 12 years of Federal service. Additionally, the appellant argued in response to management's concern that she could not perform as an STSO or LTSO due to the perception of being overwhelmed; that since the proposal notice 17 administrative assistant vacancies have opened for the express purpose of aiding STSOs and TSMs in various administrative tasks. The appellant argued that these administrative positions were created after several supervisor meetings with upper management. She indicated that due to the large amount of administrative responsibilities, in addition to the daily operational responsibilities, the assistance on a daily basis would be needed to ensure timely submission of all paperwork.

Management responded and argued that the Proposing Official deemed the offense a willful and deliberate violation of the SOP; therefore, the aggravated penalty range was applied. Management argued that the Demotion is reasonable, appropriate, and consistent with Agency policy. Management argued that the appellant attempted to distinguish the SOP failure on

October 1, 2015, for which she received a verbal counseling, from the SOP failure on October 11, 2015. Management also argued that the appellant tried to minimize the importance of the Letter of Reprimand issued to her in September 2015, for failing to follow instructions. Management argued that the appellant's overall length of service was considered as a significant mitigating factor as evidenced by the decision not to remove her from Federal service. Management further argued that instead, the decision was made to demote her taking into consideration her past performance and the belief that she remains capable of executing the security mission under more direct supervision with fewer responsibilities. Management stressed their belief that the appellant's continued employment in a supervisory capacity is detrimental to the operation. Management argued that the appellant was promoted to the STSO position on December 2, 2012, and that while the appellant points to her performance ratings for 2014 and 2015 as mitigating factors, management views her performance and conduct while serving in this position differently. Management argued that in the 3 years the appellant has been an STSO her performance ratings went from Exceeding Expectations in 2014 to just Achieving Expectations in 2015. Management further argued that in the appellant's verbal and written replies to the proposed removal she and her representative repeatedly advised management that she felt overwhelmed by the checkpoint operations. Management suggested that various personal challenges and her experience during Hurricane Katrina have affected her decision-making abilities. Thus, management accepted the appellant's word and concluded that she may not be well suited to handle the pressure and responsibility that comes with being a supervisor at a large, busy airport. Management argued that the appellant's argument regarding the incident on October 1, 2015, is flawed in that the boarding passes presented to her by the 2 passengers were new boarding passes. Therefore, the passengers were subject to full TDC verification when they returned. By the appellant taking upon herself to perform the verification and then failing to use the required tools; the appellant violated the SOP. She was informed of this PSO failure on October 1, 2015, and reminded to follow the provisions of the SOP which required the use of UV/black lights. She was specifically instructed not to use the overhead lights when examining passenger identification. Management argued that this speaks to the seriousness of the offense in that it was deliberate in nature and to the clarity with which the appellant had been placed on notice. With respect to the LOR the appellant received on September 26, 2015, for failure to follow instructions, management contends that the appellant's arguments that the LOR should carry little weight since the introduction of administrative assistance is irrelevant, and that the LOR was correctly cited as prior discipline. Further, management contends that the appellant was not involved in the execution of any administrative tasks at the time she violated the SOP. Management also contends that during the pre-decision meeting, the appellant argued that she had too many responsibilities to handle and lacked sufficient resources. Management argued that this particular incident further demonstrated her difficulty in functioning in a supervisory capacity. Management also argued that the other TSO who received an LOR for failure to use the UV light while performing TDC duties had no prior offenses. Furthermore, management argued that the appellant, as an STSO, is held to a higher standard and had already received a prior warning for her failure to follow the SOP.

In the appellant's response to management's response, the appellant argued that management's interpretation of the events of October 1, 2015, is incorrect. The appellant contends that she was performing in the role of an STSO at the time of the PSO. She argued the passengers were entering via the exit entryway, which indicated that the passengers had already processed through the queue initially. The appellant stated that there was a reason that the DAFSD only witnessed her interacting with 2 passengers in that she was only there to ensure the boarding

passes for these 2 passengers were in compliance after being reissued. She argued that after checking compliance, she returned to the back of the checkpoint. The appellant argued that she was not performing TDC functions, so it was inaccurate to state that she failed a PSO when she was not performing TDC duties at the time. The appellant stated that she provided an email so that she could show that she was given formal disciplinary action for something that was not under her control. The appellant argued that she was the only STSO to receive discipline for submitting the reports after the deadline. She argued that the other STSOs who were not there to perform the PSOs on their teams were not issued discipline. The appellant argued that this is an example of the inconsistency in applying formal disciplinary actions. The appellant questioned management's statement that she would not thrive in her role of STSO since the role now has changed with the addition of the administrative assistants. She argued that senior management clearly recognized that it was not possible for an STSO to effectively balance the deluge of daily paperwork and maintain a strong leadership presence on the floor. The appellant argued that with these welcomed changes that have been initiated in direct response to the increase passenger loads, new training, and new implementation of Real-Time Threat Assessment; she is confident that she would continue to excel in the capacity of an STSO. The appellant also argued that the recommended penalty for failing to follow the SOP is an LOR. Lastly, the appellant noted an error with respect to management's response wherein management requested the Board to uphold the decision to "remove" the appellant. The appellant argued that it is disheartening to believe that the decision to demote an officer with over 13 years of experience with the Agency was not important enough to not copy and paste from a previously archived response. The appellant requested that the demotion be reversed and that a suspension take the place of the demotion, so that she may continue to serve the Agency in the role of an STSO.

The Deciding Official considered both mitigating and aggravating factors. He considered the nature and seriousness of the misconduct and its relationship to the appellant's duties as an STSO. As such, the Deciding Official considered that the appellant is relied upon to provide positive leadership to her team, ensure adherence to policy, and effectuate appropriate corrective measures to ensure sustained threat detection and resolution. Additionally, the Deciding Official considered that the appellant is expected to meet high standards of performance, conduct, and judgment to include carrying out her responsibilities in accordance with the SOP. The Deciding Official also considered that TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, specifies that employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, negatively impact the Agency's ability to discharge its mission, or cause the Agency to question their reliability, judgment, or trustworthiness. The Deciding Official concluded that the appellant's violation of policy is serious, and directly related to her responsibilities as an STSO. The Deciding Official also considered the appellant's past disciplinary history and noted that on September 26, 2015, the appellant received an LOR for failure to follow instructions. The Deciding Official considered the clarity with which the appellant was placed on notice of the rules violated and noted that she had been verbally counseled by the DAFSD on October 1, 2015, for the same misconduct that she repeated on October 11, 2015. The Deciding Official contends that this was particularly aggravating as the same misconduct occurred in both instances in full view of the appellant's subordinate officers and created security vulnerabilities in the transportation system. The Deciding Official also contends that the PSO checklist, which the appellant has completed a total of 18 times as of October 30, 2015, identifies using magnifying loupes or UV lights to check for security features as one of the pass/fail measures. The Deciding Official also considered that as an Agency employee, the appellant has been advised of the Agency's policies and is tested on these policies

on a yearly basis. Further, the Deciding Official noted that on May 17, 2013, the appellant took several TDC courses via the OLC covering an overview of the TDC and procedures. The Deciding Official also noted that the appellant took a job knowledge test on TDC on May 17, 2013, and that she has read TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, on March 16, 2015, via the OLC. Additionally, the Deciding Official considered that the appellant received an LOC on August 7, 2014, for inattention to duties, which coupled with the LOR, cautioned the appellant that future misconduct could lead to additional and more severe action, up to and including removal from the Agency. The Deciding Official concluded that the appellant knew or should have known that her conduct was in violation of TSA policies and could lead to more severe disciplinary action, up to and including removal. The Deciding Official considered mitigating factors such as the appellant's over 13 years of service; mostly delivering satisfactory and sometimes above satisfactory performance. However, the Deciding Official concluded that the serious nature of the appellant's misconduct and its effect on her subordinates, as well as the mission, cannot be overshadowed by these mitigating factors. The Deciding Official also considered the appellant's potential for rehabilitation and concluded that he has diminished confidence in the appellant's ability to successfully execute the requirements of the STSO position based on her own claims of being overwhelmed by routine operational activity, and persistent attempts to justify improper procedures as "improvising." However, the Deciding Official concluded that the appellant could be successful in a more structured position where she is subject to supervision. The Deciding Official considered that since an LTSO position routinely requires performance as an Acting STSO, this is not a viable option in this case and demotion to the TSO position is the appropriate action.

Under Section M.1 of the Table, the recommended penalty for *Failure to Follow Standard Operating Procedures (SOP)* is a five (5)-day suspension to removal and the aggravated penalty is removal. The References/Explanatory Notes section of M.1 states that deliberate violations warrant the aggravated penalty range. The guidelines also provide that a demotion may always be considered as an option when the applicable penalty range includes removal. The Deciding Official concluded that while the circumstances of the appellant's violation indicate that she was aware of violating the SOP by not using the required tools while performing the TDC duties, a demotion to the position of a non-supervisory TSO is the appropriate penalty to address the appellant's misconduct and to promote the efficiency of the service.

The Board agrees with the Deciding Official's conclusions and finds no merit to the appellant's claim that management incorrectly considered the LOR or that the recommended penalty is an LOR. The Board also agrees with management's conclusion that the appellant was not engaged in administrative duties at the time of the SOP violation; thus rendering the appellant's assertion that the creation of administrative assistant positions would enable her to perform the duties of an STSO. The Board considered the appellant's argument that she was performing in the role of an STSO during the PSO on October 1, 2015, and finds no merit to this argument. The appellant was not charged with misconduct on October 1, 2015, and her role on that date does not change the fact that she was clearly advised by the DAFSD that using the overhead lights to verify ID is unacceptable and in violation of the SOP. The Board also finds it reasonable to believe that given the appellant's training and certification as an STSO, coupled with evidence in the record that the appellant was aware of proper procedures pertaining to TDC duties; that she chose not to exercise them on October 11, 2015. The Board finds that the appellant's misconduct was egregious and presented an unacceptable risk to persons and property, which had the potential to result in grave danger.

The Board finds that management's decision to demote the appellant from her position as an STSO to the position of a TSO was within the bounds of reasonableness.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S
ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08
76087875.TSA
Date: 2016.03.25 15:59:11
-04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-028

V.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 25, 2016

Issue: Failure to Maintain Certification

OPINION AND DECISION

On January 21, 2016, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on the non-disciplinary charge: *Failure to Maintain Certification*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. In this matter, management bears the burden of establishing that it followed proper TSA protocol by providing proper testing, remediation and retesting, if applicable, for the appellant, with a fair opportunity to demonstrate proficiency.

Management supported the Charge with one specification. The specification alleged that on September 21, 2015, the appellant failed his first attempt to meet the standard for technical proficiency on the On-Screen Alarm Resolution Protocol (OSARP) Annual Assessment (OAA). The appellant was given the opportunity to improve his performance and provided with remediation. On September 25, 2015, the appellant failed to meet the standard for technical proficiency on the OAA for a second time. Again, the appellant was given the opportunity to improve his performance and provided with remediation. On October 2, 2015, the appellant failed to meet the standard for technical proficiency on the OAA for the third time. Consequently, the appellant has not met the requirements for technical proficiency as a Supervisory Transportation Security Officer.

On September 21, 2015, the appellant was tested on the OSARP/OAA in accordance with the TSA Annual Proficiency Review (APR) program. The appellant failed to successfully complete the OSARP/OAA. In accordance with the APR, the appellant was remediated for three (3) hours on September 25, 2015. The appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgment – OAA indicating that he participated in self-study and was ready to reassess. The appellant was reassessed on September 25, 2015, and again failed to successfully complete the OSARP/OAA. Following a second remediation of one (1) hour on October 1, 2015, and remediation of three (3) hours on October 2, 2015, a third and final OSARP/OAA was administered on October 2, 2015. The appellant was unsuccessful in passing his third and final OSARP/OAA. Based on the third failure, in accordance with the APR Guidance, the appellant was issued a Notice of Proposed Removal from Federal service on November 6, 2015.

The OSARP/OAA is part of a larger annual proficiency review that TSA administers to all employees who occupy TSO positions. TSA administers the annual proficiency review pursuant to the legal requirements imposed on it by the Aviation and Transportation Security Act (ATSA). ATSA specifically requires that every TSO undergo an annual proficiency review, and that any individual employed as a TSO “may not continue to be employed in that capacity unless the evaluations establish that the individual...demonstrates the current knowledge and skills necessary to . . . effectively perform screening functions.” 49 U.S.C. § 44935(f)(5).

The TSA FY15 Annual Proficiency Review User’s Guidance sets forth the requirements TSOs must meet to remain certified for employment as a TSO. Section 1.2. of the Guidance provides: To maintain the standards of the annual proficiency review (screening certification) and employment with TSA, employees in the following positions must successfully complete annual recertification requirements on all applicable assessments . . . Transportation Security Officer (TSO); Lead TSO (LTSO); Supervisory TSO (STSO); Master TSO (MTSO) and Expert TSO (ETSO) – Security Training Instructors (STI); and Master TSO (MSTO) and Expert TSO (ETSO) – Behavior Detection Officers (BDO), Lead BDO (LBDO) and Supervisory BDO (SBDO). Section 4.1.B. provides that employees must successfully complete the required APR assessments related to their official position of record and job function once annually as a condition of employment with TSA. Appendix A, Section (1) (a) of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal of a TSO who fails to maintain certification requirements.

Management provided as evidence: Online Learning Center (OLC) Learning History reports, dated September 21, 2015, September 25, 2015, and October 2, 2015; APR Technical Proficiency Assessment Remediation Acknowledgment – OAA, dated September 25, 2015; and APR Technical Assessment Remediation Acknowledgment – OAA, dated October 1, 2015, and October 2, 2015.

The appellant provided a written reply to the Notice of Proposed Removal on December 10, 2015, and an oral reply on December 15, 2015. In his replies, the appellant argued that he noticed sometime around January 2014, that he was having issues with his vision. The appellant argued that he strongly believes that he did not meet the standard for technical proficiency for the OSARP/OAA due to a medical condition, which will require him to have surgery to alleviate the issue. The appellant argued that once he has the surgery, he will be able to meet the standard and be able to perform the necessary job functions. The appellant acknowledged that on September 21, 2015, he failed his first attempt on the OSARP/OAA and was given a few days to improve his performance. He also acknowledged that he reassessed on September 25, 2015, and once again was

unsuccessful in passing. The appellant acknowledged that he was given another opportunity to take the OSARP/OAA on October 2, 2015, and was unsuccessful in passing. The appellant argued that it was at this point that he decided to make an appointment to see an eye doctor because he was having difficulty seeing properly and believed that this was why he did not pass the OSARP/OAA. The appellant also argued that during the past 6-8 months he noticed that he was having some issues with his eyes; however, this was heightened during the testing period for the OSARP/OAA as he noticed the strain on his eyes. The appellant argued that on November 6, 2015, he was issued the Notice of Proposed Removal and on November 11, 2015, he had a scheduled appointment. The appellant argued that his doctor believed he had cataracts and referred him to an eye surgery center and on November 19, 2015, he went to the eye surgery center where it was confirmed that he had decreased vision of 20/60 in both eyes, which was causing an interruption of daily and work activities. The appellant further argued that it was recommended that he have cataract surgery. The appellant argued that he had a pre-planned trip for November 22 through December 8 and that upon his return he scheduled his surgery for January 5, 2016, which was the earliest available date. Additionally, the appellant argued that he has taken the OSARP/OAA several times during his career and has never had any issues until 2015 when his eyesight began to deteriorate. The appellant does not dispute that he failed to maintain his certification; however, contends that the Agency should provide him a reasonable accommodation and allow him to receive the requisite surgery and then reassess for the OSARP/OAA.

The appellant also provided medical documentation to support his medical condition and need for cataract surgery.

On appeal, the appellant argued that he has a highly successful record of employment and that while he concedes that he failed to maintain his certification, the failure was solely the result of his diagnosis of cataracts. The appellant argued that he was not initially aware until after he failed to certify on three occasions that his eyesight was the significant factor for his failing to pass the OSARP/OAA. The appellant further argued that his eyesight diminished slowly over a period of time. The appellant argued that the Deciding Official based his determination on the fact that he did not mention his eye condition prior to testing three times. However, the appellant contends that the Deciding Official neglected to consider that it was not until he failed the certification three times did it occur to him that it might be his eyesight. The appellant also argued that this was a certification that he had successfully passed numerous times throughout his 13 year career, and that it was the failure to certify that caused the appellant to seek answers and obtain the diagnosis that he had decreased vision of 20/60 in both eyes, which was disrupting his daily and work activities. The appellant argued that it is nonsensical for the Deciding Official to base his decision on the fact that there is no clear evidence that the medical condition is the absolute cause of the failure or that surgery will guarantee that the appellant would then pass the recertification even if a fourth assessment could be allowed. Additionally, the appellant argued that this reasoning is flawed because it is undisputed that because of the cataracts his vision was decreased to 20/60 and would only significantly improve with surgery. The appellant also argued that his due process rights were violated with the Deciding Official's final analysis challenging his integrity and decision making abilities as a TSA Officer, which the appellant contends attacked his character. The appellant contends that there is no charge in the proposal relating to his integrity and as such, the Deciding Official should not have considered his integrity in deciding to remove him. The appellant argued that this was a due process error because it did not place him on notice that the Deciding Official was making a negative determination with respect to his character. The appellant contends that if he had been notified of that fact he would have addressed it and responded accordingly. The

appellant argued that he underwent the surgery on his right eye on February 19, 2016, and already has reported marked improvement in his vision. He further argued that he is scheduled for surgery on his left eye on March 1, 2016, and that after his surgery he will provide the medical records. Lastly, the appellant requests one more opportunity to take the OSARP/OAA since having surgery to correct his eyesight condition.

Management responded and argued that the facts surrounding the appellant's case are clear and straightforward; speak for themselves; and clearly support his removal. Management argued that there is no clear evidence that the medical condition is the absolute cause of the appellant's OSARP/OAA failure, or that surgery will guarantee that he passes the recertification even if a fourth assessment could be allowed. In response to the appellant's argument that he was not initially aware that his eyesight was a significant factor until failing to certify on three occasions, management argued that during the appellant's oral reply, the appellant admitted that he was having problems with his vision as far back as January 2014 and sought out a medical provider. Management also argued that the appellant stated he was still encountering problems with his vision, which he felt may have led to him missing a Quad-S (Selectee marking) on a boarding pass at the end of July 2015. Additionally, management argued that after each assessment failure the appellant could have raised the issue, especially knowing his history with his vision; however, chose not to. Management argued that the appellant is asking to be allowed to take the assessment one more time, which would be determinative as to whether his eyesight was the causal factor. Management contends that current Agency policy is such that a fourth attempt to test is not allowable unless there has been a valid testing error, which is not the case in this instance. In conclusion, management argued that the appellant failed to meet the standard for technical proficiency on the OSARP/OAA after three (3) attempts. Therefore, the appellant has not met the requirements of technical proficiency as an STSO and his removal was justified and appropriate within current Agency policy.

The Board found that the preponderance of the evidence establishes that the appellant took and failed the OSARP/OAA on September 21, 2015, September 25, 2015, and October 2, 2015. The Board also found that on September 25, 2015, and October 2, 2015, prior to his second and third OSARP/OAA reassessments, the appellant signed the APR Technical Proficiency Assessment Remediation Acknowledgement-OAA form acknowledging that he chose to participate in self-study; that he received remediation in accordance with APR program and policy requirements; and that he was ready to take his OSARP/OAA reassessments. The Board found that the appellant was properly assessed in accordance with the 2015 Annual Proficiency Review User's Guidance. Additionally, the Board found that the evidence establishes that the appellant participated in proper and sufficient remediation after his first and second reassessment failures and that he was reassessed within the timeframe defined in the guidelines. The Board considered the appellant's argument that his eye condition contributed to his unsuccessful attempts to pass the OSARP/OAA assessments. However, the Board found that the appellant was aware that he was having problems with his vision months prior to taking his OSARP/OAA assessments. Given this, it is reasonable to conclude that the appellant had an opportunity to address his eye condition with management prior to or during the assessment/reassessment period, and failed to do so. The Board finds that the efficiency of the agency is promoted when, as here, the basis for removal is failure to maintain required certification and certification is a condition of continued employment as an STSO.

Pursuant to the 2015 Annual Proficiency Review User's Guidance, each employee who conducts screening functions must complete and pass all recertification requirements on all applicable APR

assessments in order to meet the basic conditions of employment with TSA. Consequently, the Board finds that the appellant's non-disciplinary removal based on his failure to maintain his certification was appropriate and consistent with TSA policy.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=0876087
875.TSA
Date: 2016.03.25 20:51:11 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

**DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD**

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-030

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 31, 2016

Issue: Intentionally Bypassing Required Screening; Lack of Candor

OPINION AND DECISION

On January 26, 2016, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on 2 Charges: (1) *Intentionally Bypassing Required Screening and Lack of Candor*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is a preponderance of the evidence. A preponderance of the evidence simply means that a fact is more likely to be true than untrue. If the evidence establishes the charge(s), management then bears the burden of showing that the penalty imposed was reasonable.

Management based Charge 1, *Intentionally Bypassing Required Screening*, on one specification. The specification alleged that on November 25, 2015, the appellant was assigned to TSO duties. The appellant entered the Employee Access Portal (EAP) door. The EAP leads from the public area to the sterile area. Behind the turnstile, the TSA Playbook Team was conducting additional screening of all airport employees entering the EAP. Once the appellant viewed the team through the turnstile, the appellant left the EAP area and proceeded to the Americans with Disabilities Act (ADA) gate entrance. The appellant did not undergo the additional screening at the EAP turnstile.

Management based Charge 2, *Lack of Candor*, on one specification. The specification alleged that on November 25, 2015, the appellant was assigned to TSO duties. At approximately 3:34

p.m., a Supervisory Transportation Security Officer (STSO) asked the appellant what happened at the turnstile and the appellant stated that she had attempted to access the EAP turnstile, but that her fingerprints had been declined. Closed Circuit Television (CCTV) demonstrates that the appellant did not place her finger on the biometric scanner or attempt to badge into the EAP turnstile.

Management alleged that the appellant's conduct was in violation of TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5.D., which states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Management also alleged that the appellant's conduct was in violation of Section 6.A., which provides that TSA employees must comply with all standards, responsibilities, and code of conduct established by this directive and shall report any violations of this directive to appropriate management officials. NOTE: Failure to comply with this directive and/or failure to report violations of this directive may result in appropriate corrective, disciplinary, or adverse action, up to and including removal. Additionally, Section 6.D. provides that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Lastly, Section 6.E. provides that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness.

Management provided as evidence: the appellant's statements, dated November 25, 2015, and December 30, 2015, STSO statements, dated November 25, 2015; a Behavior Detection Officer's (BDO) statement, dated November 25, 2015; a Transportation Security Manager's (TSM) statement, dated November 25, 2015, TSO statements, dated November 25, 2015; CCTV depicting the appellant entering the EAP and ADA gate, dated November 25, 2015; and three EAP signage photos.

The CCTV evidence shows the appellant entering the EAP portal, looking toward the turnstile and immediately exiting the portal through the same door she entered. The CCTV also shows that the appellant did not place her finger on the biometric scanner, attempt to swipe her badge to gain entrance, or enter the turnstile.

The appellant provided three written statements dated November 25, 2015. In one statement, she stated that on November 25, 2015, at approximately 3:25 p.m. she entered the EAP room intending to come through the turnstile when she realized she had to use the restroom. The appellant stated she left the EAP room to use the restroom. In another statement, she stated that she walked into the turnstile intending on coming through when she realized she had to use the restroom. The appellant stated she left the turnstile to use the restroom. In another statement, the appellant stated that on November 25, 2015, at 3:33 p.m., she was in the office looking for the sign in sheet, which an STSO was signing. The appellant stated another STSO asked her "What happened?" The appellant stated that she was confused about what the STSO was talking about and asked her what she was referring to. The appellant stated that the STSO asked why she walked away from screening at the turnstile, to which the appellant replied, "Because my finger wouldn't work." The appellant stated that the STSO asked her "Are you sure it was

because your finger wasn't working?" The appellant stated that she replied "Yes." The appellant provided another written statement dated December 30, 2015, and stated that she was running late, her finger had not been working lately, and she was going through the checkpoint more frequently. The appellant stated that her instinct was not to go through, but because of where she parked the EAP was closer. The appellant also stated that she does not know the rules of the EAP and questioned when screening starts at the EAP. The appellant stated that she had no intention of avoiding screening and that she left the EAP and decided to go through the Pre-Check lane and not use the restroom because it was close to her clock in time. The appellant stated that a Playbook Officer told her that she should not have left the EAP and that she could get into trouble. The appellant also stated that she has not received training regarding the EAP or Playbook. She also stated that she was approached by an STSO who was unprofessional and she felt like she was being attacked. The appellant stated that the STSO asked her if she had used her finger, to which she replied "Yes." The appellant stated that the STSO was treating her like a child, and that following this she and her possessions were screened on the checkpoint in front of her peers. The appellant admitted that she wrote in her statement that she swiped but that it was not true. The appellant stated that she was informed that she was being charged with Lack of Candor because "she lied about the whole thing." The appellant stated that she knew what she had done was wrong but felt removal was not right and extreme. She stated that she does not feel that being screened is a big deal and they are just doing their job. The appellant stated that she does not know if briefings were ever given on the EAP protocol and she has questions about the protocol. The appellant also argued that she is a good employee and made a dumb comment because of how she was being treated.

An STSO provided a written statement and said that on November 25, 2015, she was advised by a TSO that was screening employees at the EAP that the appellant had intentionally avoided screening. The STSO stated that the TSO said as soon as the appellant saw the screening taking place in the turnstile area she turned around and left the EAP. The TSO informed the STSO that he noticed the appellant enter through the front checkpoint accessing an ADA gate. The STSO stated that she asked another STSO to come into an office where a third STSO was present. She stated that when she entered the office, the appellant flicked her shoulder boards and said "this goes against everything I believe in being in the office with supervisors." The STSO stated that she asked the appellant if she had avoided screening at the EAP and the appellant told all three STSOs present that she had attempted to access the turnstile and her fingerprints had been declined. The STSO stated that she confirmed with the appellant that she attempted to use her fingerprints, and that the appellant stated again that she had. The STSO stated that they then decided to view the CCTV due to the conflicting stories between the appellant and another TSO's statement, and that a TSM was immediately notified.

Another STSO provided a written statement and said that on November 25, 2015, at approximately 3:28 p.m., that another STSO was notified that the appellant presented herself and her accessible property at the north screening employee access. The STSO stated that the appellant entered and saw that Playbook was running a play at the time in the access point. The STSO stated that the appellant did not attempt to badge in, turned, and walked out. The STSO stated that another STSO asked him to be part of an Interest Based Conversation (IBC) with the appellant, and that when the appellant was asked about the situation, the appellant told the other STSO that the finger reader did not work and she walked out.

Another STSO provided a written statement and said that on November 25, 2015, at approximately 3:34 p.m., he was at the computer working when the appellant came in to use the sign in sheet. The STSO stated that at that time another STSO asked the appellant "What just happened at the turnstile?" The STSO stated that the appellant replied, "I tried to swipe my finger and it didn't work so I went around." The STSO stated that the other STSO asked him to verify what happened on the CCTV. He stated that the appellant is clearly seen walking into the EAP then looking toward the Playbook Officers on the inside, turning around, and leaving the EAP. The STSO stated that the appellant did not attempt to swipe her finger as she stated and did not use her badge on the inside badge reader.

Another STSO provided a written statement and said that on November 25, 2015, he was notified by a TSO that the appellant had attempted to circumvent screening at the EAP portal and that he notified a TSM. The STSO stated that after conferring with the TSM, he ran the appellant's accessible property through the x-ray and performed (b)(3):49 U.S.C. § 114(r) ETD search. The STSO stated that based on BDO observations (b)(3):49 U.S.C. § 114(r) physical search of the property was also conducted and the appellant's jacket was screened. He stated that no prohibited items were found.

A BDO provided a written statement dated November 25, 2015, and stated that he witnessed a conversation that lasted approximately 5 minutes between what appeared to be a BDO and the appellant at Pre-Check. The BDO stated that the CCTV showed the appellant walking through the ADA gate with no anomaly behaviors apparent after having her badge checked. The BDO stated that another view showed the appellant entering the employee turnstile looking over her shoulder to see that there was an officer clearing badges and bags. The BDO stated that as soon as she saw this inspection taking place she turned and walked out avoiding the security check.

A TSO provided a written statement and said that On November 25, 2015, he and another officer were working at the turnstile at the employee entrance when they observed the appellant stop, look at them screening, turn around, and exit.

Another BDO provided a written statement and said that she was asked by a TSM to view a video of the appellant attempting to enter the EAP portal. She stated that during the video she witnessed the appellant enter the EAP, look at the individuals conducting screening and proceed to exit the EAP door. The BDO further stated that the appellant was exhibiting (b)(3):49 U.S.C. § 114(r) when submitting to the screening process. The BDO also stated that she was asked to witness the appellant undergo the screening of person and property. She stated that she observed the appellant (b)(3):49 U.S.C. § 114(r) both signs of stress due to the screening process. Additionally, the BDO stated that the appellant said that she was uncomfortable being screened on the same checkpoint with her coworkers, which explained her behavior. The BDO stated that during the conversations the appellant had with the STSO, that she did not present any additional behaviors or signs of deception.

Another TSO provided a written statement and said that he ran into the appellant on the Pre-Check lane and that their conversation consisted of some pleasantries and then she had to leave to use the restroom. He stated that he was in the middle of his break and not paying much attention. Lastly, he stated that he believed the appellant was entering the checkpoint and he did not see her use the restroom.

On appeal, the appellant stated that on November 25, 2015, at 3:25 p.m., she arrived at the EAP turnstile and entered through the EAP; however, argued that she never went in the line to be screened. She argued that she needed to use the restroom and quickly left the entrance of the EAP and turned away. The appellant stated that to avoid being late for work she immediately decided to be screened at the Pre-Check lane at the ADA gate. The appellant also stated that while walking to the Pre-Check lane she ran into a BDO and had a short verbal exchange. She contends that at that moment she realized that she would not have time to use the restroom and proceeded toward the ADA gate. She then stated that after entering through the ADA gate, she dropped off her belongings in her locker. The appellant stated that at that moment, a TSO approached her and said, "Just for the future, you're not supposed to leave like that. You could get into a lot of trouble, and people like managers would have to be called in." The appellant stated that she told the TSO that she had been unaware of this policy. She stated that a short time later both she and her property were screened on the checkpoint in front of her coworkers. The appellant argued that she stated to the STSO that she felt embarrassed being screened in front of her coworkers, to which the STSO replied, "I don't care, we have the passengers there with us when we put stuff through the x-ray, and I have put your stuff in the x-ray." The appellant contends that she was very confused, as she knows of no Agency policy requiring that TSOs be screened prior to their shift. The appellant argued that management speculated that she intentionally bypassed screening and that when the Notice of Proposed Removal was issued on December 21, 2015, the only evidence management had to support this was that she momentarily walked in and out of the EAP door and had a brief exchange with a BDO on her way to the ADA gate. The appellant argued that the CCTV footage shows her leaving the EAP area and proceeding through the ADA gate, which is an alternative entrance. The appellant further argued that there is no policy requiring that a TSO enter work through any specific gate. She argued that TSOs are free to enter work from any approved entrance including but not limited to the EAP and ADA gate. The appellant also argued that management cited TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, which discusses how TSOs are supposed to screen members of the public. The appellant argued that this does not address how, when, or if TSOs must be screened before they begin their workday. The appellant contends that management's attempt to support the Charge by citing an irrelevant MD firmly establishes that management did not prove the Charge by a preponderance of the evidence. The appellant argued that she was neither a TSO conducting screening nor intentionally allowing a person or property to bypass screening, and that she had not even clocked in for work yet. Additionally, the appellant argued that management never cited any management directive which requires TSOs to enter through the EAP entrance or a management directive that requires TSOs to be screened. Therefore, management failed to prove by a preponderance of the evidence that the appellant intentionally bypassed screening. The appellant also argued that management questioned her need to use the restroom and did not find her assertion credible. She argued that management assumed that because she happened to walk by and speak to the BDO she never had to use the restroom. The appellant contends that while walking to the checkpoint she briefly stopped to speak with a coworker for approximately 1 minute, and after looking at the time realized she could not use the restroom because she would be late.

As to Charge 2, the appellant argued that an STSO confronted her and said, "What happened at the turnstile; why did you leave?" The appellant argued that she replied that her fingerprints had been rejected; however, the CCTV footage showed that she had walked into the EAP room and had not swiped her finger. The appellant acknowledged that she holds a position of authority, trust, and respect and admitted to telling the STSO that her fingerprints had been rejected. The

appellant argued that at that moment, at least two STSOs had confronted her in front of other employees in the break room, and that she had never heard of any policy requiring that a TSO go through the EAP entrance and was confused as to why she had been reprimanded. Nonetheless, the appellant argued that she would never intentionally do anything to go against the oath she vowed to uphold with the Agency.

As to Charge 1, management responded and stated that the EAP entrance is a bypass portal through which authorized employees who are issued Security Identification Display Area (SIDA) badges may enter the sterile area without processing through the screening checkpoint. Management stated that employees enter the EAP through an outer door and walk into a small room containing a turnstile. After entering into the small room, employees must swipe their badges and place their fingers on a biometric reader then pass through the turnstile into the sterile area. Management argued that signage posted at the EAP entryway reads in part "Attention. By Order of the Department of Homeland Security Transportation Security Administration, Employees entering the sterile area are subject to inspection." Management stated that on November 25, 2015, the Playbook Team was conducting additional screening of employees entering the EAP, which is a tactic the Agency employs randomly and without warning to combat the insider threat. Management explained that this screening is not conducted every day because doing so would be predictable. Management argued that once badged employees enter the EAP; they must submit to screening if the Playbook Team is present, per the airport's posted signs. Management argued that instead of proceeding through the turnstile and submitting to screening once the appellant entered the EAP room, she viewed the Playbook Team through the turnstile and then quickly turned around and left the EAP area. Management further argued that the appellant proceeded to the ADA gate for entry into the sterile area where she showed her badge to another employee, however, did not undergo screening of her person or property. Management stated that the appellant engaged in a conversation with a BDO, which lasted a couple of minutes then clocked in and went to the break room. Management also stated that while in the break room a TSO, who had been part of the Playbook Team, told the appellant that she was not supposed to leave the EAP and could get into a lot of trouble for doing so. Management argued that because the appellant had avoided screening at the EAP, she was screened at the checkpoint and made the comment that she was uncomfortable undergoing screening in front of her peers. Management also argued that despite her familiarity with the EAP checkpoint the appellant decided to leave the EAP room once she saw the team conducting screening, and that there was no doubt that she would have continued to enter the sterile area through the turnstile had there not been the presence of her TSA colleagues conducting screening. Management argued that the appellant's alleged motivation for leaving the checkpoint is not credible and is not supported by the facts. Management contends that had the appellant's assertion of needing to use the restroom been truthful, one would have expected her to actually use the restroom at some point after leaving the EAP; however, she did not. Management argued that after the appellant left the EAP, she did not immediately use the restroom; instead, she had a conversation with a BDO and exchanged pleasantries for at least 2 minutes. Management further argued that after the conversation the appellant entered the checkpoint, clocked in, went to the break room, and spoke with a TSO. Then the appellant walked into the supervisor's office, flicked her supervisor's shoulder boards, and provided less than candid information to her supervisor when asked. Management argued that there is no evidence that the appellant ever used the restroom contemporaneous to her avoiding screening at the EAP. Further, management contends that even if she did use the restroom, it certainly was not urgent enough to constitute her sole reason for leaving the EAP since she did not, in fact, go

to the restroom. Management argued that it is more likely that the appellant left to avoid undergoing screening by her peers, and that when she was ultimately screened at the checkpoint; she complained that she felt uncomfortable being screened by her coworkers. Further, management argued that her statement is further evidence that she intentionally bypassed screening at the EAP because she also would have felt uncomfortable undergoing screening by her peers there. Management argued that in order to believe the appellant's assertion, one would have to ignore the actual undisputed facts and take her word for it since her assertion is not corroborated by any evidence.

As to Charge 2, management argued that upon learning that the appellant had apparently bypassed screening, an STSO went to investigate. Once the STSO entered the office, the appellant flicked her shoulder boards and said something to the effect of "this goes against everything she believed in...being in the office with supervisor." Management argued that the STSO asked the appellant whether she had avoided screening at the EAP, to which the appellant replied that she had attempted to enter through the EAP; however, her fingerprints had been rejected. Management argued that the appellant's lack of candor in providing inaccurate information instead of a candid response to her supervisor was an attempt to avoid responsibility for her actions. Additionally, management argued that the appellant does not dispute the Charge, which is supported by preponderant evidence. Lastly, management argued that the CCTV confirms that the appellant did not attempt to swipe her finger at the biometric reader.

The appellant responded to management's response. As to Charge 1, the appellant argued that she never entered the sterile area; therefore, was not subject to inspection. She argued that management cannot prove by a preponderance of the evidence that she intentionally bypassed security when she chose to exit the EAP entrance and instead enter through the Pre-Check lane at the ADA entrance. The appellant pointed out that management argued that employees may enter the EAP through an outer door and walk into a small room containing a turnstile, and after swiping their badges and placing their fingers on a biometric reader, employees then pass through the turnstile into the sterile area. The appellant argued that she only entered through the EAP entrance and never swiped her badge, placed her fingers on the biometric reader, or even entered through the turnstile. She argued that in order to be subject to inspection she would have had to perform three different steps to reach the "sterile area" as the signage indicated. Instead, the appellant argued, she momentarily walked through the entrance and upon her realizing the time decided to enter through the ADA gate instead. The appellant argued that management asserts she should have been screened but failed to prove why she should be penalized for choosing to go through the ADA gate at her discretion. She argued that on the same day other employees entered through the ADA gate and were not penalized, and that TSA policy requires neither that a TSA employee enter work through a specific entrance each day or that TSA employees must be searched before beginning their duties. She further argued that she values the screening process and realized that these are imperative to the TSA mission; however, she was not required to enter through the EAP. The appellant also argued that if she had been required to enter through the EAP security would have refused her entrance at the ADA gate. The appellant argued in response to management's claim that she would have entered the sterile area through the turnstile had screening not been taking place; that management has no evidence to prove her motives or intentions. Management relied on CCTV footage showing her going from one place to another and pointed to no other evidence to show that she had a reason to avoid being screened. The appellant pointed out that management found no security threats on her person or property after conducting intensive screening showing that she had no ulterior motives to avoid

being screened by her peers. She argued that under these circumstances a reasonable person would conclude that she simply did not have time to go to the restroom and wanted to report to work on time. Additionally, the appellant argued that management's claim that her appeal demonstrates her "disdain for TSA's procedures" is unfounded. The appellant argued that the screening management conducted on her was unwarranted, intensive, and invasive. The screening was unwarranted because employees are not required to undergo any screening when reporting to work. She also argued that the screening was intensive and invasive because not only was her personal property screened through the x-ray, but she was also screened through the Advanced Image Technology (AIT) and her items underwent Explosive Trace Detection (ETD) screening. The appellant argued that she has always adhered to screening procedures.

With respect to Charge 1, the Board notes that management stated that after entering the EAP, employees swipe their badge and place their finger on a biometric reader, then pass through the turnstile into the sterile area, and that employees entering the sterile area are subject to inspection. The Board finds that the pictures of the signage in the EAP room indicate that employees entering the Sterile Area are subject to inspection and that these signs were located in the EAP room prior to the turnstile; thus indicating that the sterile area is entered after going through the turnstile. The Board notes that the CCTV evidence in the record shows the appellant entering the EAP room; however, she does not swipe her badge or place her finger on the biometric reader, nor does she go through the turnstile to enter the sterile area. Therefore, it is reasonable to believe that the appellant was within her rights to elect not to enter the Sterile Area through the EAP, regardless of her reason for not entering. In addition, it is management's burden to prove that the appellant intentionally bypassed required screening. Not only did management fail to prove that there was a policy in place that required all TSA employees to only enter the sterile area through the EAP but they also failed to prove intent. The Board finds that the evidence in the record fails to prove by preponderant evidence that the appellant was required to enter the Sterile Area through the EAP or that she intentionally bypassed required screening. Therefore, Charge 1, *Intentionally Bypassing Required Screening*, is NOT SUSTAINED.

With respect to Charge 2, the Board finds that the evidence in the record, to include the CCTV footage and the appellant's own admission that she was untruthful, is preponderant evidence to support that the appellant was less than candid when she told an STSO that she left the EAP area because her fingerprints had been declined. Therefore, Charge 2, *Lack of Candor*, is SUSTAINED.

Having sustained one of the two Charges, the question becomes whether management has shown that the penalty of removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been properly considered by the Deciding Official.

In her appeal, the appellant argued that she has been employed with the Agency since June 3, 2013, with no prior discipline, and has exceeded her supervisor's expectations. The appellant argued that she has received high scores in critical thinking, integrity, honesty, and public trust. Additionally, the appellant argued that she has served with new security measures that occur during Pre-Check, MI1 and MI2, and adapted quickly to these new responsibilities with limited

guidance. The appellant also argued that management selected her to be an “officer in charge” two times, which is a duty commonly given to those in supervisory roles. The appellant argued that this treatment changed when management alleged that she bypassed security screening on November 25, 2015. The appellant argued that she has supervised new hires, made decisions for entire checkpoints during special events, implemented a nursing mother’s room, and became a Women’s Coordinator. As such, she proposed a Women’s Empowerment Project to address women’s domestic violence issues, encouraged women to learn self-defense, and motivated women to thrive in the workplace. Additionally, the appellant argued that she has also proposed having community service activities where TSOs could donate food and toys to food banks and children’s hospitals. The appellant argued that the penalty of removal does not follow progressive discipline. The appellant argued that management’s conclusion that the aggravated range of the Table is appropriate because she fails to take responsibility for her conduct and continues to “offer additional excuses” is not correct. The appellant argued that management acknowledged that she admitted to not placing her finger on the biometric scanner in her written reply. Further, the appellant argued that since she did not intentionally bypass screening, and given that there is no policy that requires a TSA employee to enter a specific checkpoint, management’s penalty is inconsistent with progressive discipline. The appellant argued that management did not use the least severe form of discipline to correct the problem. The appellant argued that management also did not properly weigh the mitigating factors in its decision to remove her. The appellant argued that she has been a committed employee of the Agency for two and a half years, continually demonstrating her competency, fitness, and ability to take initiative. The appellant further argued that she has passed all of her annual assessments and has made important decisions while leading checkpoints. The appellant argued that she has demonstrated exemplary work performance in guiding and assisting new hires and communicating with passengers at checkpoints and personifies the ideals of the Agency and its mission. In response to management’s contention that her offense was serious enough to warrant removal, the appellant argued that if management was concerned with security it should not have waited until one month later to remove her. Further, if management truly believed that she intentionally bypassed screening then she should have not been permitted to screen passengers and property for an additional month. Lastly, the appellant argued that she is an excellent employee and tens of thousands of taxpayer dollars and Agency resources have been used to train her, and that it would be a shame to let a successful employee be removed without giving her meaningful opportunity to advance. The appellant argued that she deserves an opportunity to continue her career with TSA based on her longevity of service, knowledge of policy and procedures, diligent performance history, and dedication to empowering women in the workplace, and that for these reasons her removal does not promote the efficiency of the service.

Management argued that the appellant’s actions were so severe that management believed her presence in the workplace would pose a threat to the efficiency and effectiveness of the Agency. Therefore, on November 28, 2015, the appellant was removed from the workplace and placed on administrative leave. Management argued that the Agency did not trust the appellant and she was not allowed back to conduct security responsibilities on behalf of TSA. Management argued that either Charge on its own is so severe that they justify removal. Management argued that the appellant acted in a way that brings discredit to herself and to the Agency and has undermined management’s confidence in her reliability, judgment, and trustworthiness. Management contends that the appellant’s behavior was unacceptable and intolerable, and her removal was reasonable and clearly in the efficiency of the service. Management argued that the appellant does not appear to understand the severity of the Lack of Candor Charge and how negatively this

reflects on TSA's mission and her ability to successfully perform her duties. Management argued that the Table recommends removal for Lack of Candor, and that based on the discussion of the penalty factors in the decision letter, this case clearly does not fit into the mitigated range. Management further argued that the appellant's lack of candor in this instance involved whether or not she complied with screening measures that were implemented to address the insider threat. Management contends that her lack of candor does not involve a "white lie" regarding some tangential or irrelevant matter. Further, management argued that her lack of candor about whether or not she submitted to screening is something vitally important to TSA and the Proposing and Deciding Officials made it clear that they have lost trust in the appellant's reliability, judgment, and trustworthiness. Management contends that if the appellant could not be candid regarding her compliance with the requirements of TSA's core mission; the Agency cannot ever trust her to be candid in any other aspect of her job. Management argued that the mitigating factors raised by the appellant in her statements and appeal were considered; however, it was the determination of the Proposing and Deciding Officials that the seriousness of her misconduct far outweighed the mitigating factors. Additionally, management argued that the appellant's file contains a verbal warning stemming from a passenger compliant for rude behavior on March 21, 2015, and a verbal counseling on June 7, 2015, for failing to properly log out a Travel Document Checker stamp. Management argued that this served as evidence that the appellant had received notice that rudeness or sloppiness would not be tolerated. Management argued that it is important to note that the incident that occurred on November 25, 2015, was not performance related, but rather a reflection of the appellant's poor judgment and misconduct. Management argued that the appellant's assertion that she was permitted to screen passengers and property for an additional month after the incident is untrue as she was placed on administrative leave on November 28, 2015, because of lost confidence and trust. Management also contends that the appellant's statement that her screening on November 25, 2015, was "unwarranted, intensive, and invasive" is demonstrative of her attitude that caused the misconduct in the underlying case. Management argued that she showed disdain for Agency procedures when she bypassed screening on November 25, 2015, was disrespectful when she flicked her STSO's shoulder boards, and was less than candid about her actions. Management argued that it is this attitude that reaffirms management's position that the appellant does not understand the seriousness of her misconduct and could not be rehabilitated to be part of the TSA team, which conducts screening to ensure prohibited items are not introduced onto aircraft.

The Deciding Official stated that she considered a number of factors to include the nature and seriousness of the appellant's misconduct in relation to her job duties. The Deciding Official considered that the appellant is responsible for behaving in a way that does not bring discredit upon the Federal Government or the Agency and concluded that the appellant's actions bring into question her reliability, judgment, and trustworthiness. The Deciding Official also considered that the appellant is to be forthright, especially when faced with a difficult situation, and that she admitted that she did not tell her STSO what had really happened at the turnstile, which caused management to lose confidence in her judgment. The Deciding Official considered that on a daily basis the appellant is faced with difficult and stressful encounters. The Deciding Official concluded that if the appellant cannot be strong enough to be candid with her STSOs or managers; there is no faith that the appellant will not be deceptive with the traveling public. The Deciding Official also considered that rather than taking responsibility for her conduct, the appellant continued to offer additional excuses, which appear to be an attempt to deflect blame for her actions. The Deciding Official considered that although the appellant has not received prior discipline she has been placed on notice of the importance of adhering to TSA

policy and using good judgment on prior occasions. The Deciding Official considered that the appellant received a verbal counseling regarding a passenger compliant on March 21, 2015, for her rude behavior and a verbal counseling on June 7, 2015, for failing to properly log out her Travel Document Checker (TDC) stamp. The Deciding Official considered that if the appellant does not perform her duties with integrity and good judgment there is the potential for very serious consequences for both TSA employees and the traveling public.

Under Section E.2 of the Table, pertaining to Lack of Candor, the recommended penalty is removal. The Deciding Official concluded that there are some offenses, which are so egregious and undermine the security process as to warrant removal for the first offense. TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section 6.G. (3) states, "Nothing in this section or in the accompanying Handbook prevents management from removing an employee after the first offense when the misconduct is so serious as to warrant removal." The Deciding Official concluded that the appellant's behavior as described in the Charge is the exact type of misconduct that is intended to be addressed through removal from the Federal service.

The Board finds that the appellant's removal is in accordance with TSA policy and within the bounds of reasonableness and therefore SUSTAINS the penalty decision.

Decision. Based on the above, the appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08760
87875.TSA
Date: 2016.03.31 21:43:20 -04'00'



Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-031

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 31, 2016

Issue: Positive Alcohol Test

OPINION AND DECISION

On January 28, 2016, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Positive Alcohol Test*. The appellant filed a timely appeal with TSA's Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is substantial evidence. Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. It is a lower standard than preponderance of the evidence. If the evidence establishes the charge, management then bears the burden of showing that the penalty imposed was reasonable.

The issue before the Board is whether the appellant was properly removed from his TSO position for testing positive for alcohol. Management's charge specified that on January 27, 2016, the appellant was administered a random alcohol test pursuant to the TSA Drug and Alcohol Free Workplace Program. At approximately 12:03 p.m.,¹ the appellant was administered a Breathalyzer

¹ The Board notes that the evidence shows the time of the first Breathalyzer test was actually 12:04:23.

test with a reading of .063. At approximately 12:06 p.m.,² the appellant was administered a second Breathalyzer test with the reading of .056. Both readings were above the .02 threshold established to be considered fit for duty as a TSO.

The Board considered all of the evidence and arguments submitted by the appellant and management. The record shows that on January 27, 2016, the appellant was on duty when he was selected for random drug and alcohol screening and administered a Breathalyzer test. At approximately 12:04 p.m., the appellant was given the first of two Breathalyzer tests. The result of the first test was a positive influence with a reading of 0.063. A second test was administered at approximately 12:22 p.m. as confirmation, and the result was a positive influence with a reading of 0.056.

Pursuant to Department of Transportation (DOT) Order 3910.1C and TSA Management Directive (MD) 1100.33-1, *TSA Daily Fitness for Duty*, a threshold of 0.020 or higher establishes sufficient cause to render the appellant not fit for duty. TSA MD 1100.33-1, *TSA Daily Fitness for Duty*, also states, "Impairment due to the presence of alcohol occurs when a TSO has a blood alcohol concentration level of 0.020 or higher." Additionally, management cited the Aviation and Transportation Security Act, Public Law 107-71, which requires screeners to have the ability to demonstrate daily fitness for duty without any impairment due to alcohol. Management also cited TSA MD 1100.33-1, *TSA Daily Fitness for Duty*; Section 6.A., which states TSOs must be able to demonstrate fitness for duty daily without any impairment. Section 6.C. states that employees occupying Testing Designated Positions, which includes TSOs, are prohibited from consuming or being under the influence of alcohol while on duty or consuming alcohol for a minimum of eight (8) hours preceding performance of security-related functions. Additionally, management cited the Handbook to TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section O.2.(e), which prohibits employees occupying a Testing Designated Position (TDP) from consuming or being under the influence of alcohol while on duty, or consuming alcohol for a minimum of eight (8) hours preceding performance of security-related functions.

A pre-decisional meeting was held with the appellant on January 28, 2016. During that meeting, the appellant stated that he thought the results of the test were wrong. The appellant stated that he was drinking whiskey, KD, Kentucky Deluxe, but was not drinking any more than usual and his last drink was about 11:30 p.m. the previous evening.

The appellant provided a written statement dated January 28, 2016, and said that he did consume some alcohol on the night of January 26, 2016. The appellant stated that he did not drink to excess and did not have any alcohol after 11:30 p.m., and that his girlfriend was present and could verify this statement. The appellant stated that he went to bed and reported to work at 11:30 a.m. on January 27, 2016, and was not suffering any effects from the alcohol consumed 12 hours prior. The appellant stated that he took the Breathalyzer at 12:00 p.m.³ and was informed that he had failed. He stated that he retested at 12:22 and failed again. The appellant argued that the Breathalyzer test results were due to an interaction between his blood pressure medications and the alcohol, and that it is well documented that these medications will interact with alcohol. Additionally, the appellant pointed out that he was administered the drug test by TSA recently and had nothing to drink the night prior and passed. The appellant argued that he had no idea that the medications he takes and

² The Board notes that the evidence shows the time of the second Breathalyzer test was actually 12:22:33.

³ The Board notes that the appellant stated "12 am."

alcohol could have this effect. He further argued that he has been with the Agency for 14 years and has never had any issues of this nature before. The appellant requested that the Federal Security Director seek an exception to the mandatory removal based on the possible faulty readings due to the interaction of his prescription drugs and alcohol consumed on the night prior to the test.

On appeal, the appellant argued that he suffers from high blood pressure and takes medication. The appellant argued that on the night prior to his removal he consumed a few alcoholic drinks at his home and stopped drinking at approximately 11:30 p.m. He argued that he prepared for work the next morning, which included gargling mouthwash and arrived at work at 11:30 a.m.; 12 hours after he had his last alcoholic drink. The appellant further argued that prior to entering the workplace that morning he also used chewing tobacco, which he routinely consumes. The appellant argued that when he arrived at work a Supervisory Transportation Security Officer (STSO) informed him that random Breathalyzer tests were being conducted. The appellant also argued that the STSO provided a statement, in which he stated that he did not notice anything unusual about the appellant's behavior, and that he did not smell any alcohol on the appellant. Additionally, the STSO stated that the appellant did not react or get nervous when he was informed of the tests being conducted. The appellant argued that shortly thereafter, he immediately and readily complied with two Breathalyzer tests, one at 12:03 p.m. resulting in a Breath Alcohol (BAC) level of 0.063, and one at 12:06 p.m. resulting in a lower BAC level of 0.056. The appellant stated that he was shocked and unsure how the test could have yielded a positive result. He also argued that during the post-test review, management did not inquire whether any of a number of factors could be present that would have potentially triggered a false positive result, and that he was terminated in a one-step removal. Additionally, the appellant argued that management's contention that he was intoxicated is unsupported by the facts as a whole and is incorrect for three reasons. First, prior to any drug or alcohol test being conducted, management did not suspect that he was intoxicated. The appellant argued that just prior to speaking with the STSO the appellant had spoken to coworkers and had been performing his duties at the checkpoint. The appellant argued that at no time did he appear to be intoxicated or under the influence of alcohol. The appellant contends that his appearance was polished, his stature was firm, his speech was unimpeded, and his behavior was professional. The appellant further contends that after the removal management failed to produce any evidence to indicate a suspicion of intoxication prior to the Breathalyzer test or that he had consumed alcohol during the prohibited window. The appellant argued that he was forthcoming regarding his most recent drinking activity, and that the activity took place well beyond the time limitations set forth in the management directives. Second, the appellant argued that his positive Breathalyzer test results are explained by a valid medical reason; his high blood pressure medication. The appellant contends that his prescription medication information indicates that it may interact with other medicines and substances. Third, the appellant argued that the administration of his Breathalyzer test did not conform to standard and accepted practices for administration of such tests; therefore, cannot be used as a basis for validating the first test or imposing discipline. The appellant argued that according to TSA policy, the confirmation test results are the basis for disciplinary actions, not the result of the screen test. The appellant argued that the failure to properly administer the confirmation test was an egregious procedural error that rendered the test results unreliable and cannot be used against him. The appellant argued that the Agency is required to observe a full 15 minutes waiting period before administering a confirmation test, and that this is a safeguard built in to guard against a false positive due to the presence of mouth alcohol. The appellant argued that he was at particularly high risk for a false reading as he had a least three potential sources of mouth alcohol that morning to include mouthwash and chewing tobacco used prior to work and his acid reflux disease. The appellant contends that despite the 15 minute required waiting period; the

Agency maintains in its Charge against him that his Breathalyzer tests were administered at approximately 12:03 p.m. and approximately 12:06 p.m. Additionally, the appellant argued that the time is corroborated by the test results, which show at the top under the category of "Test Time" that the tests were administered at "12:03:30" and "12:06:41." Thus, the appellant argued that the record indicates that he was not provided the full 15 minutes between tests as required by policy. The appellant argued that he has maintained from the beginning that the test results were wrong and did not properly reflect his BAC. He further argued that he pointed to his medication as a possible factor in addition to mouthwash, chewing tobacco, and acid reflux. The appellant argued that management never inquired if any of these issues may have triggered a false positive test result, and that the rapid decline in blood alcohol level in such a short period between tests from 0.063 to 0.056 suggests that one or more of those factors may have caused the false test results. The appellant argued that the Agency has not proven the Charge by substantial evidence and that given his long, outstanding career as a TSO it would be a harsh result and grave injustice to remove him over a single incident if there is any question whatsoever as to whether the tests were correctly administered or the results accurate.

Management replied and argued that on January 27, 2016, after being notified that he had been randomly selected for testing, the appellant submitted to two tests. Management argued that the first Breathalyzer test was conducted at approximately 12:04 p.m., resulting in a reading of 0.063 and the second test, the confirmation Breathalyzer test, was conducted at 12:22 p.m., resulting in a reading of 0.056. Management noted that the first test was administered 39 minutes after the appellant was notified of being randomly selected for testing. Management also argued that there was an 18-minute wait between the first Breathalyzer test and the confirmation test resulting in a waiting period of at least 15 minutes between the screening test and the confirmation test. Additionally, management argued that the tests were administered in accordance with DOT Order 3910.1D, Chapter VIII 10.b and 11.c. Management also argued that both test results were above the 0.020 threshold established to be considered fit for duty as a TSO according to DOT Order 3910.1D. Management argued that the appellant was provided evidence of the test results, time, and accuracy check results on January 27, 2016, and at the pre-decision discussion on January 28, 2016. Management contends that any inadvertent listing of the test times other than the actual test times was a harmless error, as the actual documented times met the testing requirements of DOT Order 3910.1D, and the results were provided to the appellant prior to a final decision being issued. Management further argued that the appellant does not provide any medical or scientific evidence to support his assertion that his prescription medication affected his Breathalyzer tests, and that the drug information sheets provided only indicate that patients should limit alcoholic beverages. Additionally, management argued that with respect to the appellant's claim that using mouthwash, chewing tobacco, and acid reflux may have affected his Breathalyzer tests; management conferred with the Medical Review Officer (MRO) and found that these factors did not impact the outcome of the appellant's validated test results. Lastly, management argued that once it was determined that the appellant's BAC was three times the limit permitted for an on-duty TSO, management removed him in accordance with TSA policy, which requires removal.

The evidence in the record proves that the appellant tested positive for alcohol on January 27, 2016. The evidence also shows that on January 27, 2016, the appellant was administered a Breathalyzer screening test at 12:04:23, which resulted in a reading of 0.063. Additionally, the Board finds that the evidence in the record shows that the appellant was administered the confirmation Breathalyzer test at 12:22:33, which resulted in a reading of 0.056. Therefore, there is no merit to appellant's argument that policy was not followed as there was over a 15 minute waiting period between the

two tests. The appellant admits that he was drinking the night prior to the Breathalyzer test. Additionally, the Board finds no merit to the appellant's claim that the test results were a result of his medication, mouthwash, chewing tobacco, or acid reflux. The Board finds that the evidence supports that the breath alcohol test was conducted in accordance with policy and that the evidence supports the Charge. Therefore, the Board SUSTAINS the charge of *Positive Alcohol Test*.

The Aviation and Transportation Security Act, Public Law 107-71, requires screeners to have the ability to demonstrate a daily fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication or alcohol. TSA has defined "Fit for Duty" in its Management Directive (MD) No. 1100.33-1, *TSO Daily Fitness for Duty*, as "A statutory requirement that mandates that a TSO cannot be impaired while on duty due to illegal drugs, sleep deprivation, medication, or alcohol." The MD further states that, "Employees occupying Testing Designated Positions, which includes TSOs, are prohibited from consuming or being under the influence of alcohol while on duty or consuming alcohol for a minimum of eight (8) hours preceding performance of security-related functions." Appendix A.1(c) of the TSA Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal for certain TSO offenses, including a validated failure of alcohol test (on duty).

The Board has sustained the Charge, *Positive Alcohol Test*, and removal for the sustained Charge is required.

Decision. The appeal is, therefore, DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA S
ENGEL**

Debra S. Engel
Chair
OPR Appellate Board

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=087608
7875.TSA
Date: 2016.03.31 22:38:12 -04'00'



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—16-032

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

March 27, 2016

Issue: Arrest on Attempted Murder Charges; Arrest on a Felony Assault Charge

OPINION AND DECISION

On January 27, 2016, management removed the appellant from her position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two (2) charges: *Arrest on Attempted Murder Charges and Arrest on a Felony Assault Charge*. The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is substantial evidence. Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. It is a lower standard than preponderance of the evidence. If the evidence establishes the charge, management then bears the burden of showing that the penalty imposed was reasonable.

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Arrest on Attempted Murder Charges*, on two (2) specifications. Specification 1 alleged that on or about January 22, 2016, the appellant was arrested for Attempted 1st Degree Murder. This incident was documented by local law enforcement and the appellant was charged with the felony of Attempted 1st Degree Murder, among other charges. Specification 2 alleged that on January 22, 2016, the appellant was arrested for Attempted 2nd Degree Murder. This incident was documented by local law enforcement, and the appellant was charged with the felony of Attempted 2nd Degree Murder, among other charges.

Management based Charge 2, *Arrest on a Felony Assault Charge*, on one (1) specification. The specification alleged that on January 22, 2016, the appellant was arrested for Assault – First Degree. This incident was documented by local law enforcement, and the appellant was charged with Assault – First Degree, among other charges.

Management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 6.E, which provides that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the Agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness.

A police report dated January 22, 2016, indicated that officers responded to a call from a female who stated that she had been assaulted and believed that her arm was broken. The first arriving units located the victim near the entrance to an apartment complex, specifically at the gatehouse. The victim was a juvenile and was bleeding profusely, so a medic was called. The medic arrived and discovered that the victim had sustained several stab wounds to her upper back, arms, head, and neck area. The victim also indicated that she had been "stomped" and that her head hurt badly resulting in her being transported to the hospital. It was later determined that the victim sustained approximately seven stab wounds and a skull fracture, which led to her being admitted to the hospital for monitoring. The victim was interviewed and stated that she and another female drove to an apartment complex. She stated that while driving through an apartment complex that the vehicle she was in was struck by a blue SUV. The victim stated that she believed they were intentionally struck by the other vehicle and that the vehicle was going to ram them again. The victim stated that she exited the vehicle while it was moving and landed on the roadway. Believing the other vehicle was going to strike her, she fled to the sidewalk. The victim stated that two suspects, a female driver and a male passenger, exited the vehicle and that the female suspect began to attack her. She also stated that as they were locked up fighting the male suspect began stabbing her in the back. The victim stated that she continued to fight the female until she started to black out and fell on the ground. She stated that the female and male suspects began kicking and stomping her on the head as she lay on the ground, and that she believed she was going to die from her injuries. The victim stated that her purse and phone fell to the ground and that they were retrieved by the suspects before they left.

The report stated that the officers then spoke to the driver of the vehicle in which the victim had been a passenger. They observed damage to the vehicle's driver side. The driver stated that earlier in the day on January 21, 2015, her ex-boyfriend had shown up at her home with the appellant who was his new girlfriend. She stated that he became angry when she did not give him some clothing that he was trying to recover from her house. She also stated that he entered a dark colored sedan that was being driven by the appellant and they left the location. The driver stated that she picked up the victim and they drove to her ex-boyfriend's apartment to drop off his clothing and that when they arrived: they were side swiped by the appellant who was driving a dark colored SUV. The driver stated that she believed that the appellant was going to strike her again, so she maneuvered her vehicle out of its path and fled the area. The driver also stated that after being side swiped and before fleeing the area, the victim jumped out of her moving vehicle, and that she believed that the victim was struck by the SUV. The driver also stated that upon returning, she saw the police vehicles and fled the area. The driver told the officers where the appellant lived.

The report stated that another person, who was in the vehicle with the victim at the time of the incident, stated that she knew the appellant was the female driving the other vehicle. She also stated that she observed the other vehicle strike them.

The report stated that the officers then responded to the appellant's residence and noted that parked in front of the residence was a black Toyota, which was confirmed to be registered to the appellant. Also noted by the officers was a blue Chevy Traverse registered to someone with the appellant's name. The officers noted that on the front driver's side bumper there was damage consistent with swiping or striking another vehicle. A photograph of the appellant was shown to the driver of the vehicle that was struck and she immediately identified the appellant as the driver of the blue SUV that struck her vehicle. The officers then responded to the appellant's residence where they found the appellant and the male suspect and placed both under arrest. The officers obtained a search warrant, searched the residence, and discovered a black folding knife with a silver skull design under the living room sofa. The knife appeared to have a substance with the appearance of blood along the edge and inside of the blade's fuller. The officers also observed a substance with the appearance of blood on the vehicle's driver door both inside and outside and that same substance on the vehicles steering wheel, driver's seat, and exterior passenger door handle.

On January 27, 2016, the Assistant Federal Security Director (AFSD) held a pre-decisional meeting with the appellant at the County Detention Center to discuss the appellant's arrest on the felony charges and give her an opportunity to respond orally. The appellant declined to give an oral response.

Management provided the following evidence to support the Charge: District Court Charge Summary and Statement of Probable Cause, dated January 22, 2016; and Summary of Pre-Decisional Meeting, dated January 27, 2016.

On appeal, the appellant argued that she was still being held and dealing with the current situation, and that she was awaiting a final outcome. The appellant gave no other response or additional information.

Management responded and argued that that appellant was arrested on January 22, 2016, and charged with attempted first degree murder, attempted second degree murder, first degree assault, three counts of second degree assault, theft of less than \$1,000 in value, reckless endangerment, having a concealed dangerous weapon, and malicious destruction of property greater than \$1,000 in value. This resulted from her alleged involvement in an incident in which a minor female was beaten, stabbed, and repeatedly kicked in the head after she exited a vehicle that the appellant struck with her car.

With respect to Charge 1, the Board finds that the evidence in the record, to include the police report, is substantial evidence to support that the appellant was arrested on January 22, 2016, for Attempted First Degree Murder and Attempted Second Degree Murder. Therefore, both specifications are SUSTAINED as is the Charge, *Arrest on Attempted Murder Charges*.

With respect to Charge 2, the Board finds that the evidence in the record, to include the police report, is substantial evidence to support that the appellant was arrested on January 22, 2016, and

charged with a felony assault. Therefore, the Charge, *Arrest on a Felony Assault Charge*, is SUSTAINED.

Having sustained the Charges, the remaining question is whether the appellant's removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considers whether the penalty factors listed in the TSA Handbook to Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly by the Deciding Official.

Management argued that the appellant's removal is supported by the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section D (1) (b) (iv) (g), which permits a one-step removal for any arrest listed in Appendix A, Section (2) (g). Appendix A, Section (2) (g), provides that TSOs may be removed upon the first offense of an arrest for the following offenses: (xiv) Assault with intent to murder; and (xxvi) Felony involving Aggravated assault. Management argued that the action in this case followed TSA policy and was correct under the circumstances, and that the employee has alleged no facts on appeal to suggest otherwise.

The Deciding Official considered both mitigating and aggravating factors. He considered as mitigating factors that the appellant has been employed with the Agency since July 17, 2011, and had a satisfactory performance record. However, the Deciding Official concluded that these mitigating factors do not outweigh the seriousness of the appellant's arrest. The Deciding Official considered that the Agency depends upon the public's confidence in its abilities to accomplish its transportation security mission and concluded that the appellant's arrest undermines the efficiency of the security operations and the trust and confidence of the traveling public in the integrity of the Agency. The Deciding Official contends that as a result of the appellant's arrest, all confidence in her ability to work effectively as a TSO has been lost.

Under Section G.24 of the Table, the recommended penalty range for criminal misconduct is a thirty-one (31) day suspension to removal and the aggravated penalty is removal. The Deciding Official stated that the Table provides for removal on the first incident when misconduct is egregious enough and progressive discipline may be inappropriate. The Deciding Official also considered that the nature of the Agency's mission requires that employees, particularly TSOs, not be perceived as being a danger to the public. He concluded that the appellant's arrest for these charges has the potential to cause irreparable harm to the Agency's reputation in the eyes of the public and believes that removal is the penalty necessary to promote the efficiency of the Federal service.

The Board agrees with the Deciding Official's conclusions and finds that the appellant's arrest for these egregious charges has the potential to cause harm to the Agency and diminish the trust of those the Agency is entrusted to protect.

The Board finds that management's decision to remove the appellant from her position as a TSO was within the bounds of reasonableness.

Decision. The appeal is DENIED. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

**DEBRA
S ENGEL**

Digitally signed by DEBRA S
ENGEL
DN: c=US, o=U.S. Government,
ou=Department of Homeland
Security, ou=TSA, ou=People,
cn=DEBRA S ENGEL,
0.9.2342.19200300.100.1.1=08
76087875.TSA
Date: 2016.03.27 19:23:13
-04'00'

Debra S. Engel
Chair
OPR Appellate Board



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598