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

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-111

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

December 8, 2017

***Issue**: Lack of Candor; Inappropriate Conduct*

DECISION ON RECONSIDERATION

On November 7, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On November 17, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On November 27, 2017, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-128

December 5, 2017

Issue: *Unacceptable Performance*

OPINION AND DECISION

On September 18, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration based on the Charge: *Unacceptable Performance.* 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 substantial evidence, which 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.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unacceptable Performance*, on one specification. The specification alleged that the appellant failed to improve her unacceptable performance to an acceptable level as specified in a Performance Improvement Plan (PIP) dated February 20, 2017, with respect to Performance Goal 1 of her Employee Performance Plan (EPP). Upon completion of the PIP, the appellant's performance with respect to Goal 1 remained at an unacceptable level.

As background, the appellant signed her EPP for fiscal year 2017 on October 2, 2016. On December 31, 2016, the appellant was notified that she would be placed on a Threat Detection

Training Plan (TDTP) due to her unacceptable performance related to Performance Goal 1 of her EPP. On February 21, 2017, the appellant was placed on a PIP for 60 days following her failure to reach an acceptable level of performance with regard to Goal 1 during the TDTP. On April 4, 2017, the appellant was temporarily placed on non-screening duty. The appellant was returned to screening duties on June 23, 2017 and completed her PIP on July 10, 2017. The appellant was issued a Notice of Proposed Removal (NOPR) on August 19, 2017.

On appeal, the appellant stated that on April 18, 2017, management issued her a NOPR for allegedly failing her PIP – even though she did not complete the entirety of the PIP and that the NOPR was rescinded on June 16, 2017. The appellant argued that the question is whether the PIP issued to her was properly implemented and or/administered during the entire course of the PIP. She stated that between April 7, 2017 and June 16, 2017, there was an approximate lapse of 70 days where she could not and did not perform screening functions on her own or with a shadow watching and assisting her. The appellant argued that after management made a decision to extend her PIP, without a rescission and reissuance of the PIP or a newly-issued PIP, that she argued would have been proper, she was forced to continue where she left off on her PIP from April 2017. The appellant stated that after management determined that she was unsuccessful in her intermittent PIP, despite what she claimed was actual significant improvement, management decided to propose removal again on July 28, 2017. She argued that although she received a NOPR, management allowed her to screen passengers without a shadow. The appellant stated that on August 19, 2017, management rescinded the July 28, 2017, NOPR, and issued a new NOPR due to additional matters that occurred as a result of management allowing her to screen despite its assertion that she failed her PIP. The appellant argued that management should take full responsibility for its poor decision-making.

The appellant stated that management provided her EPP, which rated her at a Level 1 in the specified Charge of the proposal and argued that the discussion took place after she was placed on a PIP, not prior which she alleged is a violation of the TSA Collective Bargaining Agreement (CBA), Article 1: Section G. 3 which states, "Additional progress reviews may be appropriate whenever ratings officials notice a significant change in performance. The most obvious situation is when the rating official notices a downturn in performance when performance is at or below the Achieved Expectations level." She argued that this did not occur and it placed her at a disadvantage regarding her alleged downturn in performance. The appellant argued that the TDTP program is not governed by the CBA.

The appellant stated that she was on a PIP scheduled to last 60 days, noting that it states, "the opportunity period begins today [February 21, 2017] and will continue for 60 days." She argued that the language in the PIP is very distinct in that there is no room for additional days to be added or a stipulation that it will include an extension of time. She argued that the PIP should have ended on April 22, 2017, but management prematurely removed her from the PIP to its own error. She argued that the PIP did not grant management additional time to regroup after its mistake and therefore the PIP should have continued as noted within the language of the PIP. The appellant stated that instead, she was awaiting a decision between April 5, 2017 and June 22, 2017. She argued that management never issued her a letter suspending the PIP until further notice at any time before April 22, 2017, and that during the time she was awaiting a decision on the proposed removal, she was removed from screening functions prior to actually failing the PIP

which is contrary to management's decision to allow her to resume full screening functions while allegedly failing a PIP and pending removal.

Management responded and argued that the decision to stop her PIP before the end of the normal 60-day period was not arbitrary but made because the appellant failed (b)(3) 49 U S C § 114(r) (b)(3) 49 U S C § 114(r) to pull threat bags. Management argued that they considered the appellant to be a security vulnerability and proposed her for removal. Management explained that in response to the removal, the appellant argued that she was not given 60 days to improve her performance and management accepted this argument and returned her to duty. The appellant was then placed back on the PIP for approximately 2 weeks after she completed return-to-duty training. Management acknowledged that there may be a legitimate question as to whether she should have been allowed to continue performing screening functions but that the appellant is accountable for the quality of her performance and it was not unreasonable to consider the appellant's performance failures subsequent to the PIP. Management argued that since January 1, 2017, they have provided the appellant with 30 days of threat detection training, followed by 60 days of training under the PIP, as well as return-to-duty training. Management asserted that it was reasonable to use the appellant's performance after these training efforts had been completed as the basis to determine whether she had reached the "achieved expectations" level under Goal 1 of her EPP.

The Board determined that the appellant was put on notice of her unacceptable performance through the use of the TDTP. The evidence in the record shows that the PIP issued to the appellant, dated February 21, 2017, states that "the opportunity period begins today and will continue for 60 days." The PIP was set for a specific period of time and management did not formally extend it. The PIP also stated "I will meet with you weekly to discuss your performance. For these meetings you will need to bring information as to your progress, any challenges that you have faced and what actions you have taken and your plans to integrate these principles in your daily routine." There is no evidence in the record to show that management met with the appellant weekly as specified and required per the PIP; the evidence in the record shows that management met with the appellant on March 7, March 21, July 3, and July 11, 2017. The Board determined that management did not comply with the weekly meeting requirement. The Board also found that management never formally closed out the appellant's PIP; there is no Performance Improvement Plan (PIP) Close-Out/Unsuccessful Performance letter in the record. The only document in the record dated near what management alleged was the end of the 60-day PIP period is a Memo to File, entitled Final PIP Review, dated July 11, 2017, written by a Transportation Security Manager to a Lead Transportation Security Manager which summarizes the appellant's performance over the course of the PIP but there is no document officially notifying the appellant that at the conclusion of the 60-day period she failed the PIP and that her rating for Goal 1 remained at a level 1.

Further, the Board agrees that the appellant should not have been returned to perform screening functions if her performance remained unacceptable at the end of the 60-day PIP period as alleged. The two incidents in August 2017 occurred after management erroneously returned her to screening duties.

Management failed to properly administer the PIP. A PIP is designed to assist employees with achieving expectations; the Board determined that the process used by management did not afford the appellant the opportunity to do so. Management failed to follow to follow the proper timeline established by the PIP; management failed to meet with the appellant weekly during the duration of the PIP; management failed to properly close out the PIP; and management failed to remove the appellant from all security related duties when they determined that she failed to bring her performance to "Achieved Expectations" for Performance Goal 1. Management failed to prove the Charge by substantial evidence. Therefore, the Charge, *Unacceptable Performance*, is NOT SUSTAINED.

Decision. The appeal is, therefore, GRANTED. The appellant is ordered reinstated to her position as a Transportation Security Officer. Further, the appellant will receive back pay from the date of her 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

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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)

Master Transportation Security Officer- Behavior Detection Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-131

December 5, 2017

Issue: *Indefinite Suspension*

OPINION AND DECISION

On June 9, 2017, management indefinitely suspended the appellant from his position as a Master Transportation Security Officer- Behavior Detection with the Transportation Security Administration (TSA) based on one charge. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the appeal is GRANTED.

ANALYSIS AND FINDINGS

Section I of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, provides that an indefinite suspension is appropriate "when evidence (i.e., more than a mere suspicion or allegation) exists to demonstrate misconduct." There are several conditions under which an indefinite suspension may be imposed. The condition relevant to the Indefinite Suspension, dated June 9, 2017, is set forth in Section I. (1) (d):

> (a) An employee's security clearance has been suspended, denied, or revoked, and a security clearance is a condition of employment or is otherwise required for the employee's position.

The issue before the Board is whether the appellant's continuance on an indefinite suspension after October 1, 2017, was appropriate under TSA policy. The Board considered the evidence and arguments presented by both parties.

The Handbook to Management Directive 1100.77-1, *OPR Appellate Board*, Section C. (2) states that the basis for continuing an indefinite suspension may be appealed to the Board at any time during the action.

The appellant's indefinite suspension was upheld by the Board on September 8, 2017. The appellant appealed the basis for continuing his indefinite suspension. On October 1, 2017, the appellant was reassigned to the position of Lead Transportation Security Officer. The appellant's new position does not require a security clearance. Management acknowledged that there was a change of title and description of duties for the appellant and that a secret clearance is no longer needed for the position. Management removed the appellant from the indefinite suspension effective November 17, 2017.

The Board determined that as of October 1, 2017, the appellant no longer needed a security clearance. Therefore, management's decision to continue the appellant on indefinite suspension after October 1, 2017, was not consistent with TSA policy.

Accordingly, the appeal is GRANTED, and the appellant shall receive back pay from October 1, 2017, to November 17, 2017.

FOR THE BOARD:

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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,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-133

December 6, 2017

Issue: Failure to Follow Standard Operating Procedures (SOP)

OPINION AND DECISION

On October 6, 2017, management removed the appellant from his position as a Transportation Security (TSO) with the Transportation Security Administration based on the Charge, *Failure to Follow Screening Standard Operating Procedures (SOP).* 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, 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 alleging that on May 6, 2017, while performing his duties as a Baggage Officer in Baggage 2, Terminal 1, the appellant retrieved a brown box from the Checked Baggage Resolution Area (CBRA) belt at Baggage 2 and transported it near his Passive Threat Resolution Interface (PTRI) table to resolve the threat items. The images contained two threat items. The appellant failed to properly search one threat item and chose not to search the second threat item. As a result of the appellant's decision, the brown box was improperly screened and allowed to continue to the airline.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D.[1] (7) which states that TSA employees are required to observe and abide by all laws, rules, regulations and other authoritative policies and guidance. Management also alleged that the appellant's conduct violated the Screening Standard Operating Procedures, Section Chapter 5. G. and Chapter 5, Section 4. A.1., 3. a. 1) – 2).

On May 6, 2017, the appellant was assigned to the baggage area. Management alleged that the appellant failed to properly screen a brown box.

In the Decision letter, the Deciding Official stated, "While I was not able to view the video of [the appellant] screening the box in question myself, I did take into consideration [the appellant's] account of what [he] saw and I spoke with [a Transportation Security Manager] and again reviewed the statement by [a Supervisory Transportation Security Officer] and a TSO." It is clear that the Deciding Official considered the CCTV video in making his determination because he spoke to the Proposing Official, the Transportation Security Manager (TSM), about it. The content of the Deciding Official's conversation with the TSM is not known to the Board or the appellant as there is no evidence of it in the record. The Board determined that the fact that the Deciding Official did not have and rely upon the same evidence that was relied upon by the Proposing Official is a harmful error. Therefore, the Charge, *Failure to Follow Standard Operating Procedures*, is NOT SUSTAINED.

Decision. Accordingly, the appeal is GRANTED. The appellant is ordered reinstated to his position as a Transportation Security Officer, and returned to duty subject to meeting TSA employment standards. Further, the appellant will receive back pay from the effective 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

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

[1] Management cited "Section 5. A. (7) in the Notice of Proposed Removal which is the incorrect section of MD 1100.73-5. The verbiage referenced is from Section 5. D. (7) of the MD.

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-134

December 1, 2017

Issue: *Unacceptable Performance*

OPINION AND DECISION

On October 6, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Unacceptable Performance.* The appellant filed a timely appeal of his removal to 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 substantial evidence, which 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.

Management based the Charge, *Unacceptable Performance,* on one specification alleging that the appellant failed to improve his unacceptable performance to an acceptable performance level in Goal #1 'Risk Based Security' as specified in his Performance Improvement Plan (PIP). The appellant's performance during the PIP between June 22, 2017 to August 22, 2017, remained at an unacceptable level.

The record shows that the appellant signed his Transportation Officer Performance System (TOPS) Performance Plan for FY 17 on October 9, 2016. During his mid-year review on April 28, 2017, the appellant was advised that his performance was at an Unacceptable level for Performance Goal 1-Risk Based Security. The appellant was placed on a sixty (60) day PIP beginning on June 22, 2017, and ending on August 22, 2017. The appellant missed 21 work days during the PIP for unscheduled absences. On August 25, 2017, management offered to extend the PIP but the appellant declined. On August 25, 2017, the appellant was removed from all security related duties due to his inability to bring his performance up to the "Achieved Expectations" level in Performance Goal 1.

On appeal, the appellant argued that the penalty was too harsh because he was monitored by the two strictest mentors; that the PIP was a non-opportunity to succeed; and that the Deciding Official admitted that his mistakes were small and medium. The appellant also argued that management failed to consider his 11 years of seniority as a mitigating factor.

Management argued that the appellant was afforded 60 calendar days for his PIP working one-on-one with an on-the-job training (OJT) mentor and afforded an opportunity to extend, which he declined. Management argued that this one-on-one mentoring was an investment in him with the goal to improve his screening performance and rating on TOPS. In its reply, management argued that the appellant noted that the two TSOs assigned as his mentors are the strictest because they are well versed in and followed the Standard Operating Procedures (SOP). Management argued that the mentors provided the appellant with coaching on his application of the screening procedures throughout the workday and provided written feedback to his TOPS STSO outlining both positive performance and areas that required improvement. In the appellant's response to the Notice of Proposed Removal (NOPR), management indicated that the appellant stated that his mentors were policy oriented towards following the SOP, whereas he was a purpose orientated person and knows what needs to be done, but does not always follow the policy.

The Board finds that management reasonably determined that the appellant's performance was "Unacceptable" and gave him ample opportunity to improve. The Board also finds that the well-documented record supported management's finding that, notwithstanding its significant efforts to assist him, the appellant failed to perform at an acceptable level. The appellant had nine (9) documented deficiencies for Performance Goal 1 during the PIP. Therefore, the Board finds that management reasonably concluded that the appellant's performance was unacceptable.

The Board finds that management's decision to remove the appellant from the TSO position is supported by substantial evidence. Thus, the Board sustains management's decision to remove the appellant based on his *Unacceptable Performance.*

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. Accordingly, there is no further right to appeal.

FOR THE BOARD:

Transportation
Security
Administration

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Withheld pursuant to exemption

Non Responsive Record

of the Freedom of Information and Privacy Act

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—17-135

December 18, 2017

Issue: *Lack of Candor; Inappropriate Conduct*

OPINION AND DECISION

On September 6, 2017, management removed the appellant from her position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on two Charges: *Lack of Candor* and *Inappropriate Conduct*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is GRANTED, in part, and the appellant's removal is mitigated to a seven (7) day suspension.

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, *Lack of Candor*, on one specification alleging that on June 22, 2017, during questioning by a Transportation Security Manager (TSM), the appellant was asked if she "spoke to [a Transportation Security Officer (TSO)] about one of the on-the-job training (OJT) mentees being a transgender." The appellant answered the TSM by saying "no." Contrary to the appellant's response, the TSO reported that: "yesterday at about 1:30 p.m. [the appellant] asked me if I knew [newly hired TSO] was a transgender. I said that I had no idea. She told me she found out when [the appellant] was helping with [sic] uniform issue. That when looking at [the newly hired TSO's] records that he was a female. [The appellant] thought that I knew what the

situation was. I had no idea. If [the appellant] has said nothing. [sic] I would never have known." The appellant's response to the TSM was not truthful and less than candid.

Management based Charge 2, *Inappropriate Conduct*, on five specifications. The Notice of Proposed Removal (NOPR) contained seven specifications. The Deciding Official did not uphold specifications 2 and 3 from the Notice of Proposed Removal.

Specification 1 alleged that on June 7, 2017, while assigned to non-screening functions in the logistics department, the appellant engaged in an inappropriate conversation with an OJT coach regarding the sexual orientation of a recent new hire. Specifically, the appellant revealed sensitive personally identifiable information (SPII).

Specification 4 alleged that on April 4, 2017, a TSO reported to two Transportation Security Inspectors (TSIs), as part of an informal administrative inquiry, that the appellant stated "any idiot would know . . ." within the context of knowing what to do in the event of an evacuation. The TSO also reported that the appellant would describe international passengers as "smelly passengers" or they "smell" bad. The TSO wrote that the appellant referred to her at times as a "moron."

Specification 5 alleged that on May 4, 2017, two TSIs interviewed the appellant as part of an informal administrative inquiry. When asked whether the appellant referred to any officers in a derogatory manner, the appellant stated, "Never to anyone's face. Probably they're being a moron" if she was talking to someone. The appellant admitted that she would say something like that to a lead or other supervisor about either a passenger or an officer. Further, in a supplemental written statement dated May 2, 2017, the appellant expanded on the question of whether she referred to people in a derogatory manner. In her statement, the appellant wrote, "I said I could see myself talking to other leadership and saying things like – 'There must be something in the water today because people are acting like morons.'"

Specification 6 alleged that during an informal inquiry, a TSO provided a written statement, dated February 14, 2017, detailing inappropriate comments the appellant made to the traveling public. The TSO described a situation when the appellant became frustrated and impatient with passengers at checkpoint 7. The TSO reported that the appellant yelled at the passengers to "hurry up we don't have all day." The appellant allegedly told passengers, "Wow look these two are in a real hurry let's go, let's go!" When the passengers walked by, they said "you don't need to be rude," the appellant responded, "And you don't need to be slow." The TSO mentioned that when the appellant addressed employees at the checkpoint saying, "We don't have all day, let's go," a passenger allegedly asked the TSO who was working at the x-ray position, "Does she always yell at you like this?" When the TSO said yes, the appellant does, the passenger "shook her head and said I apologize you have to deal with that."

Specification 7 alleged that on May 11, 2017, a Lead Transportation Security Officer (LTSO) provided a written statement as part of an informal administrative inquiry, detailing inappropriate statements the appellant made to him. Specifically, the LTSO described a time in which he asked the appellant a question and she responded to him by saying, "look at the fucking paperwork." The LTSO further alleged that the appellant would encourage him to try and get female passengers' phone numbers since he was single.

Management found the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. B. (4) states that managers and supervisors are responsible for providing positive leadership and serving as a role model for subordinates by complying with all employee responsibilities, and demonstrating a commitment and sense of responsibility to their job and high ethical standards. Section 5. B. (5) states that managers and supervisors are responsible for treating fellow TSA employees with dignity, respect, and in a fair and equitable manner. Section 5. D.[1] (3) states that TSA employees are responsible for exercising 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 6. D. states that employees in direct contract 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. 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.

Management also found the appellant's conduct violated the Handbook to TSA MD 1100.73-5. Section F. (1) 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, unless a Garrity warning is issued to the affected employee . . . 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. Section I states that employees are accountable for the statements they make and the views they express. For example, defamatory, irresponsible, false or disparaging statements about employees may disrupt the orderly conduct of official business or adversely affect the efficiency of TSA.

On March 29, 2017, two TSIs were tasked by the Federal Security Director (FSD) to conduct an informal administrative inquiry regarding allegations of misconduct by the appellant. The TSIs interviewed 38 employees as part of the inquiry and on May 18, 2017, provided the FSD with a Report of Informal Administrative Inquiry Regarding Allegations of Misconduct by [the appellant]. During the inquiry, several employees made allegations claiming the appellant acted inappropriately toward subordinates and passengers.

On June 7, 2017, the appellant spoke to a TSO regarding the gender of the new hire TSO he was working with as an OJT mentor. In a statement dated June 8, 2017, the OJT mentor stated, "Yesterday at about 1:30 p.m. [the appellant] asked me if I knew if [new hire TSO] was a Transgender. I said that I had no idea. She told me she found out when she [the appellant] was helping with [sic] uniform issue. That when looking at [the new hire TSO's] records that he was a female. [The appellant] thought I knew what the situation was. I had no idea. If [the appellant] had said nothing. [sic] I would have never known." In the appellant's statement dated June 8, 2017, she stated, ". . . I asked him if they were doing male or female pat downs. [The OJT mentor] seemed to be annoyed or not too sure what his body language was saying but he replied something like male pat downs and that [the new hire TSO] was a male. He said just like our SOP states that we screen people as they present themselves. I said that I literally didn't know what gender this Officer was trying to present. I felt like [the OJT mentor] was confused

[1] Management referred to Section 5. A. (3) however, the verbiage cited is from Section 5. D. (3) of the MD.

or something by my response. I quickly told him a little about the uniform fitting day . . . I explained that I wanted to talk to [the new hire TSO] and check in with him but the last thing I wanted was to be offensive. I didn't want to embarrass myself like I did in the past. [The OJT mentor] said that prior to getting this OJT Officer he had a meeting about this and that [the new hire TSO] would be taking some time off soon for medical purposes or something along those lines. I told him that I didn't really care about that but I just didn't want to offend him. [The OJT mentor] seemed to understand that I was not trying to be inappropriate by asking and that my main point was not to offend anyone." The appellant stated, "If [the OJT mentor] felt I was being inappropriate, he completely overshared information that I never asked about, cared about, or even thought about. [The OJT mentor] was the one that stated something inappropriate." She also stated, ". . . I didn't know that this Officer was transitioning their gender. I literally didn't know the appropriate gender because of the mix up at BLN. I didn't know this Officer was transitioning until I read it on this sheet that was handed to me by [an STSO] and put two and two together that that is what [the OJT mentor] was eluding to when he said something about [the new hire TSO] taking some time off for medical purposes." The appellant submitted a second statement on June 22, 2017, in which she stated that she was called to the Senior Manager's Office to talk to a Senior Transportation Security Manager (STSM) regarding her conversation with the OJT mentor. She stated, "I was asked about when did I first learn that this Officer was transgender. I learned this by reading the paper [an STSM] handed me. [The STSM] approached me and said that [the Assistant Federal Security Director] wanted me to answer some more questions . . . On the paper was a statement and then some questions. The statement said something along the lines of 'it was reported that you were having a conversation with another Officer regarding a new hire that is transitioning their gender.' I was not aware previous to reading that statement . . .."

The appellant was issued a Notice of Proposed Removal (NOPR) on September 6, 2017, and placed on administrative leave. The appellant met with the Deciding Official on September 15, 2017, and gave an oral reply.

Management provided as evidence: Informal Administrative Inquiry appointment letter, dated March 29, 2017; Informal Administrative Inquiry – [appellant] Report of Investigation, dated May 18, 2017; Memorandum of Record from a TSM, dated June 22, 2017; and statement of a TSO, dated June 8, 2017.

On appeal, the appellant argued that she did not know that the new hire had transitioned genders and that when she spoke to the OJT mentor, her intention was to address the discrepancy in the paperwork regarding the new hire's gender. The appellant stated that it was not until she received a request, the next day, for a statement from senior management, in which she was questioned why she thought it was appropriate to tell the OJT mentor that the new hire was transgender, that she found out that the new hire was transgender. She argued that it was an assumption on the part of senior management, in their request for a statement, that she had prior knowledge of the new hire's gender identity.

The appellant also argued that when the OJT mentor was interviewed by the Supervisory Transportation Security Manager (STSM), the OJT mentor left doubt in his response when he replied, "Yes, I believe so" when asked if she used the word "transgender." The appellant also argued that the OJT mentor's statement had additional inaccuracies including, stating that the information she gave him was from paperwork she had access to in logistics. She stated that the

only paperwork in logistics was the uniform order sheet which reported the new hire as male, not transgender.

The appellant argued that the DFSD inferred that she knew the new hire was transgender based on clothing records and her role in the logistics department. She argued that the only paperwork in logistics was the uniform order sheet which reported the new hire as male, not transgender. The appellant noted that the NOPR stated that the reason for the Lack of Candor charge was because she replied "no" when asked if she informed the OJT mentor that the new hire was transgender. The appellant stated that was the truth; she argued that she did not have a discussion about the new hire being transgender. She stated she did not know at the time. The appellant argued that she was not being evasive or trying to misrepresent the facts. She stated that the facts are that she was asked if she had talked to the OJT mentor about his new hire being transgender and she replied "no." The appellant argued that had she been asked if she talked to the OJT mentor about the paperwork discrepancy regarding the gender of the new hire he was coaching, then she would have said "yes." The appellant also argued that management provided no support to show that the OJT mentor was more credible than her.

With regard to Charge 2, specification 1, the appellant argued that the specification alleged that she disclosed a person's sexual identity in relation to the gender to which they are attracted to; the fact of being heterosexual, homosexual or bisexual. She argued that those words were never referenced and that she believes the Proposing Official intended to reference gender identity. She reiterated that she did not find out about the new hire being transgender until management gave her a piece of paper with a statement saying the new hire was transitioning genders. The appellant argued that she did not disclose SPII to the OJT mentor; she argued that the SPII was disclosed by management.

The appellant argued that specifications 4-7 were not specific and that more of the specifications came up during an informal inquiry that started after two other investigations had already been completed. She argued that the informal inquiry did not specify a timeframe or specific event to investigate noting that specifications 4-7 do not reference a date the incidents occurred; instead they reference a date the officers provided a statement or were interviewed as part of an informal inquiry. She also noted that specification 6 was based off of a statement written and given to management on February 14, 2017, and that management chose not to address it despite the fact that she was given a pre-decisional meeting on February 26, 2017.

The appellant further disputed the timeliness of the specifications. She stated that the FSD assigned two TSIs to conduct the administrative inquiry and gave them a letter with instructions on March 29, 2017, at which time she was removed from her assigned screening checkpoint and moved to a non-screening, non-supervisory role. The appellant further noted that the instructions on the letter stated that the TSIs had 30 days to deliver the results and argued that the results were not delivered until May 18, 2017 which is beyond the 30-day period. The appellant stated that to her knowledge, no further extensions were granted. The appellant stated that on September 7, 2017, she was presented with a NOPR, nearly four months after the completion of the informal inquiry.

Management responded and argued that the appellant's argument with respect to Charge 1 is disingenuous and "attempts to deflect from her behavior." Management noted that the appellant stated that she had been assigned to non-screening, non-supervisory duties and argued that her

statement that she went to the checkpoint to clear up a discrepancy is dubious given the work she was assigned to do. Management stated, "it is arguable that she had any reason to be at the checkpoint on the day in question." Management argued that there is preponderant evidence that she went to the checkpoint on the day in question and approached the OJT mentor. Management noted that the OJT mentor wrote in his statement that the appellant approached him that day to ask if he knew the employee was a transgender and that the appellant responded to management that she did not discuss the employee's gender status. Management argued that the appellant's reply during the discipline process and on appeal demonstrates, "through her words, that she was aware the employee looked like a male, yet she was told the employee was a female" and that she consistently acknowledged that she went to the checkpoint to clarify the matter. Management argued that it is completely acceptable for the proposing and deciding officials to find the statement of the OJT mentor to have more credibility than the appellant's statements given the totality of the circumstances. Management argued that there is preponderant evidence that the appellant was less than forthcoming about her discussion with the OJT mentor.

With regard to the second charge, management argued that there is preponderant evidence that the appellant engaged in the misconduct. Management acknowledged that specification 1 should have read "gender orientation" rather than "sexual orientation" but argued that given the context of the discussion, the appellant understood the misconduct was with the revelation of the employee's transgender status and that disclosure of either gender or sexual orientation without a need to know is disclosure of SPII. Management argued that although the appellant states that specifications 4 through 7 are "anything but specific," she offered nothing to dispute the specifications, but rather tried to explain in great detail how her actions or comments were taken out of context or misconstrued.

With respect to Charge 1, the specification is based on the fact that the appellant answered "no" when asked if she talked to the OJT mentor about the new hire TSO being transgender. The appellant admits speaking to the OJT mentor; she admitted that she told the OJT mentor that the new hire TSO was female, but there is not preponderant evidence that she told the OJT mentor that the new hire TSO was transgender or specifically used the word transgender. The Board found that management failed to prove by preponderant evidence that the appellant intended to deceive when she answered "no" to the question regarding the use of the word transgender. It is clear that there was a discussion regarding the TSO's gender and the appellant does not dispute this. She only disputed that she used the term transgender. Therefore, Charge 1 is NOT SUSTAINED.

With respect to Charge 2, specification 1, the appellant admitted that she had a conversation with the OJT mentor regarding the new hire TSO. The appellant was assigned to non-screening, non-supervisory duties at the time the conversation occurred and she did not have a need to be involved in any discussions concerning the OJT mentee. If the appellant had concerns about proper screening protocol given the circumstances, she should have taken them to management instead of discussing it with the OJT mentor who is a subordinate. Her conversation with the OJT mentor regarding the new hire TSO was inappropriate and there is preponderant evidence to support the specification. Specification 1 is SUSTAINED.

With respect to specifications 4 and 5, although there were no specific dates referenced, the appellant did admit during the investigation to using the type of language described in the

specifications. The language she used is inappropriate, especially for an STSO. Therefore, specifications 4 and 5 are SUSTAINED.

With regard to specification 6, the appellant did not admit to the behavior described and there were no dates associated with the claim, nor a passenger complaint to support that the alleged misconduct occurred. Management did not prove the specification by preponderant evidence. Therefore, specification 6 is NOT SUSTAINED.

With regard to specification 7, there was no context or specific dates associated with the allegations made by the TSO and the appellant denied the allegations. While the appellant has admitted, in general, to at times using profanity, there is no specific evidence to support that she used it in the situation described or that the appellant told the TSO to get the phone numbers of passengers. The Board determined that there is no preponderant evidence to support the allegations in the specification. Therefore, specification 7 is NOT SUSTAINED.

Having sustained specifications 1, 4 and 5 of the charge, Charge 2, *Inappropriate Conduct*, is SUSTAINED.

Having sustained only Charge 2, the remaining question is whether removal is consistent with the TSA Table of Offenses and Penalties (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considered whether the penalty factors listed in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly by the Deciding Official.

On appeal, the appellant argued that the penalty is too harsh. She noted that the Notice of Decision states the recommended penalty for *Inappropriate Conduct* is a 5-day suspension to removal and that the Deciding Official relied on both charges to serve as aggravating factors. The appellant argued that a mitigated penalty was not considered even though she is a 15-year employee and a supervisor and has no previous disciplinary history. The appellant stated that she has taken ownership for some of the inappropriate conduct and agreed to work with a mentor and that even in the pre-decisional meetings she agreed to participate in a mentorship but that management lacked follow-through.

Management replied and argued that they acknowledged the appellant's length of service since August 2002 but that no matter how many years of service an employee had, the fact cannot overcome the seriousness of a lack of candor and repeated inappropriate conduct breaches made by her. The Board notes that management's reply and the decision by the Deciding Official gave great weight to the Charge, *Lack of Candor*. The discussions centered primarily on the appellant's Lack of Candor, which was not sustained by the Board.

The appellant replied stating that she disagreed with management's reply. The appellant reiterated and elaborated on the arguments she made in her appeal. She argued that it appeared the decision to remove her weighed heavily on the first charge, *Lack of Candor*.

The Deciding Official considered the nature of the offense and its relationship to the appellant's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, was committed maliciously or for gain, or was frequently repeated. The Deciding Official considered that it was not within the appellant's duties to approach the OJT mentor and

discuss the new hire TSO's gender; noting that the appellant learned of a possible discrepancy on May 1, 2017, but did not interact with the OJT mentor until June 7, 2017. The Deciding Official also stated that he considered that the appellant stated that she answered the question about transgender correctly but "if" it was phrased differently she would have answered "yes" to the question which he inferred to mean that the appellant was less than candid or complete in her response. The Deciding Official considered that the appellant frequently repeated the use of offensive and degrading language when addressing employees and passengers, thus creating an atmosphere at the screening checkpoint where the majority of the staff found it difficult to work with her. The Deciding Official stated that he found it to be an aggravating factor that the administrative inquiry was full of examples of the appellant's use of profanity and degrading comments about passengers.

The Deciding Official considered the appellant's job level and type of employment and found that as a supervisor the appellant is held to a higher standard and that it is her responsibility to treat employees and the public with dignity and respect. He considered that the checkpoint where she was assigned is where international passengers entering the United States formulate their opinions of the United States and the Federal Government based on their contact with her. The Deciding Official considered that as an STSO, the appellant is to contribute to a positive team environment by recognizing and building on the strengths and talents of the workforce. He considered that the appellant is expected to behave in an honest, fair and ethical manner, where she shows consistency in words and actions, and models high standards of ethics. The Deciding Official considered that STSOs have a tremendous impact on the organization and noted the examples presented in the administrative inquiry and how it stated the appellant described international passengers. He stated that is troubling and causes concern regarding the appellant's ability to lead others and represent TSA.

As mitigating factors, the Deciding Official considered that the appellant has no previous discipline. He also considered her length of service, job performance, ability to get along with fellow workers and dependability, noting that she has over 15 years of service with TSA and received a rating of Achieved Excellence on her 2016 performance appraisal. The Deciding Official considered that the appellant always welcomed coaching on how to communicate and that she apologized for offending anyone or hurting anyone's feelings. The Deciding Official also considered the steps the appellant took to improve herself by talking to a therapist. He found however that the mitigating factors do not outweigh the seriousness of the appellant's misconduct.

The Deciding Official considered the effect of the offense upon the appellant's ability to perform at a satisfactory level and its effect upon management's confidence in the appellant's ability to perform her assigned duties. The Deciding Official considered that the appellant violated one of TSA's core values – integrity, when she was not entirely truthful about her conversation with the new hire TSO's OJT mentor and informed the Deciding Official during her oral response that if the question was presented differently then she would have answered "yes" to the question. The Deciding Official considered that the appellant's response demonstrated that she "deliberately omitted key facts to mislead [him]." The Deciding Official stated that he is convinced, based on the appellant's oral and written replies, that the appellant would again misrepresent or omit key facts in future circumstances. He stated that he has no confidence the appellant would be successful if retained in another positon and found it to be an aggravating factor.

The Deciding Official considered the recommended penalties of the Table and stated that given the appellant's lack of candor and combined with the unprofessional conduct offenses, he determined that the appropriate penalty falls within the aggravated range.

He considered the notoriety of the offense or its impact upon the reputation of the agency noting that TSA strives to create a model workplace for employees through engagement, pride and teamwork while ensuring the integrity of TSA security systems and methods. He considered that when the appellant referred to international passengers as "smelly" or raised her voice to hurry them out of the checkpoint, it damages the reputation of TSA at the airport and nationally. The Deciding Official considered that employees must answer inquiries honestly and completely and that if they do not and the behavior is tolerated, the Agency's reputation cannot recover. The Deciding Official found that to be an aggravating factor.

The Deciding Official also considered the clarity with which the appellant was on notice of the policies and procedures in question, noting that she most recently acknowledged that she read and understood MD 1100.73-5 on March 16, 2017. He considered that a Letter of Counseling (LOC) the appellant received on January 6, 2014, for making unprofessional and inappropriate comments and an (LOC) on September 29, 2015, for failing to provide positive leadership during a training class put her on notice about inappropriate conduct.

The Deciding Official considered the appellant's potential for rehabilitation and focused on the appellant's September 15, 2017, conversation with him in which he alleged that she lacked candor. The Deciding Official stated, "If your oral and written replies took responsibility for your conduct and you were *completely* honest with your role in revealing a transgender employee's gender status, I would have considered rehabilitation." Additionally, the Deciding Official considered the adequacy and effectiveness of alternative actions and focused on the alleged lack of candor. The Deciding Official stated, "When you again insisted you did not commit lack of candor, I could no longer consider any option other than removal."

Under Section B.1 of the Table, for *Inappropriate Conduct*, the recommended penalty range is a 5-day to 14-day suspension. The aggravated penalty range is a 15-day suspension to removal.

After considering all the facts and weighing the relevant penalty factors, the Board finds that removal is not within the bounds of reasonableness for the three sustained specifications of the one charge that was upheld. The Board agrees that the appellant's misconduct is inappropriate, especially given her position as a supervisor; however, TSA policy promotes the use of progressive discipline as a means of motivating an employee to correct misconduct. The appellant has no prior discipline. The Board also noted that the appellant has been with the agency since 2002, received an Achieved Excellence rating on her last performance evaluation, and that there is no evidence that any of the misconduct detailed in the specifications upheld occurred in front of the public. Additionally, it is clear the Deciding Officially relied heavily on the Lack of Candor charge - which was not sustained - when weighing the penalty factors and determining that an aggravated penalty was appropriate. The Board finds that a 7-day suspension, a penalty in the recommended range, is sufficient to put the appellant on notice of her inappropriate conduct.

Decision. Accordingly, the appeal is GRANTED, in part, and the appellant's removal is mitigated to a seven (7) day suspension. The appellant will be reinstated as an STSO and will receive back pay from the date of her 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

Digitally signed by DEBRA S ENGEL
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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,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-136

December 14, 2017

Issue: *Inappropriate Conduct*

OPINION AND DECISION

On October 10, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Inappropriate Conduct*. The appellant filed a timely appeal of his 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 the Charge, *Inappropriate Conduct*, on one specification. The specification alleged that on August 20, 2017, at approximately 2312 hours, the appellant was on duty at the Advanced Imaging Technology (AIT) as the male screening operator (SO). The appellant screened a male passenger through the AIT. When the passenger exited the AIT, the appellant physically moved the passenger to face him by grabbing his shoulder and kicked the passenger three (3) times in order to widen his stance.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. holds all employees responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic-on-the-job rules. Section 5. D. 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. D. 7) states that employees are responsible for observing and abiding by all laws, rules, regulations, and other authoritative policies and guidance, written and unwritten. Section 6. states that employees must comply with all standards, responsibilities, and code of conduct established by the directive and shall report any violation(s) of the directive to appropriate management officials. Section 6. B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. 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, judgement or trustworthiness.

Management also alleged that the appellant violated Section L of the Handbook to MD 1100.73-5, which states that violent threatening, intimidating, or confrontational behavior is unacceptable and will not be tolerated. Threatening behavior may include harassment, intimidation, or any oral and/or written remarks or gestures that communicate a direct or indirect threat of physical harm, or which otherwise frighten or cause an individual concern for his or her personal safety.

On May 9, 2017, the appellant was assigned to the AIT when a male passenger exited the AIT. Closed Circuit Television (CCTV) footage shows the appellant physically positioning the passenger and then kicking the passenger's feet in order to get the passenger to widen his stance. The passenger approached a Supervisory Transportation Security Officer (STO) and inquired as to where he could file a complaint. The passenger explained to the STSO that the appellant had kicked him. The passenger stated that the appellant was giving him advisements to widen his stance for a pat down and that the appellant could not understand his English and kicked his legs to widen his stance.

The appellant provided a statement and stated that the male passenger had several anomalies and that he politely asked the passenger to please stand in front of him facing him and that the passenger appeared to ignore his request and kept looking around apparently not aware of what was requested. He again asked the passenger to stand in front of him facing him with a wider stance and the passenger ignored his request appearing to be completely unware of the particular screening area he had entered and the procedure required. The appellant said that he again informed the passenger that there were anomalies but the passenger again ignored his request and seemed not to understand. The passenger stated that he was from a foreign county and did not understand what was being said or done. The appellant stated that in an effort to assist the passenger with screening procedures, he placed his foot next to the passenger's foot to indicate placement of feet and accidentally tapped his ankle with the placement of his foot.

The appellant was issued a Notice of Proposed Removal (NOPR) on September 12, 2017. The NOPR advised the appellant of his right to reply orally and/or in writing within seven days of receipt of the NOPR. The appellant met with the Deciding Official on September 29, 2017, and gave an oral reply. The appellant provided a written response to the NOPR on September 27, 2017.

Management included as evidence: a pre-decisional discussion, dated August 24, 2017; a memorandum from the STSO, dated August 24, 2017; a response to the pre-decisional discussion, dated August 25, 2017; a memorandum detailing the passenger's complaint, dated August 2017; and a statement from the appellant, dated August 20, 2017.

On appeal, the appellant argued that the Decision should be overturned because management failed to show by a preponderance of the evidence that his conduct rose to the level of *Inappropriate Conduct*. The appellant acknowledged that touching the passenger was not the correct way to show the passenger how to stand; has apologized and explained that he did not intend to harm or mistreat the passenger in any way. The appellant argued that the touching of a passenger while clearing him of anomalies detected by the AIT machine does not justify a charge of *Inappropriate Conduct*. The appellant argued that management failed to identify a specific policy that he violated while clearing the passenger. The appellant argued that he cannot be disciplined for violating a policy or rule unless the rule exits and the employee has actual or constructive notice of that policy or rule. The appellant argued that none of the policies cited address the non-violent touching of a passenger.

The appellant also argued that management incorrectly contends that he violated Section L of the Handbook since he did not frighten, intimidate, threaten or intend to harm the effected passenger in any way. The appellant argued that management has significantly overstated his physical contact with the passenger and that the CCTV footage shows that that the touching was not harmful or threatening.

Management responded and argued that the CCTV footage and the statement of the STSO show that he engaged in highly inappropriate conduct in grabbing the passenger by the shoulders and then kicking the passenger in order to widen his stance. Management argued that the appellant's actions were highly disruptive and disgraceful and have damaged the image of TSA. Furthermore, they argued that his actions were humiliating and abusive.

The appellant responded and argued that the tapping of the inner legs was accidental and was not intended to strike the passenger but rather to demonstrate the need for the passenger to widen his stance. The appellant argued that variations in description and word choice are not relevant to management's charge or the Board's review.

The Online Learning Center shows that the appellant acknowledged reading MD 1100.73-5 on December 23, 2016. The sections of the MD cited by management clearly placed the appellant on notice of his inappropriate behavior. The appellant failed to exercise courtesy and tact with the traveling public and failed to perform his duties in a professional and business like-manner. His behavior adversely reflected on TSA, caused embarrassment to the agency and caused the public and/or TSA to question his reliability, judgment and trustworthiness. The Board gave no merit to the appellant's argument that he had no notice of the rule or policy that he violated.

As to the argument concerning Section L of the Handbook. The Board agrees with the appellant that this policy is not applicable to the conduct at question. However, citing the policy is not a harmful error.

The CCTV footage clearly shows the appellant physically moving a passenger to face him and kicking the passenger three times in order to widen his stance. The CCTV footage did not show that he accidentally tapped the passenger's ankle. It is immaterial that the passenger did not file a written complaint. He complained to the STSO about the appellant's behavior. Therefore, the Charge, *Inappropriate Conduct*, is SUSTAINED.

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

On appeal, the appellant argued that removal is not a reasonable penalty for any misconduct proven. The appellant argued that management failed to give sufficient weight to significant mitigating factors and thus, the penalty should be mitigated to a lesser disciplinary action. The appellant argued that management gave undue weight to the nature and seriousness of the offense since his actions were explanatory and not threatening, harassing, or violent. He also alleged that management failed to consider his work history and performance in that they incorrectly stated that he had worked for TSA for about three years when in truth he had been employed by TSA for a total of thirteen years. The appellant also argued that management's decision to remove was inconsistent with penalties assessed in other similar cases. Both cases cited resulted in suspensions and not removals. The appellant argued that he has been allowed to screen passengers up until the date of his removal which contradicts management's assertion that his continued service would create an opportunity for misconduct. He argued that he has a strong potential for rehabilitation because he has accepted responsibility and admitted that he could have better handled the situation. Additionally, the appellant argued that management failed to properly consider that the passenger was from a foreign country and could not communicate well in English. Finally, the appellant argued that management failed to utilize progressive discipline and recognize that a lesser penalty would have adequately corrected any misconduct. The appellant stated that the only discipline cited by management is a 5-day suspension for inappropriate comments made at a training session. The appellant gave an explanation as to the basis for his comment which resulted in the 5-day suspension.

Management replied and argued that penalty factors were taken into consideration. Management acknowledged that the appellant has a longer work history than described in the decision and that his Entry on Duty date is October 27, 2002. Management argued that whether three (3) or thirteen (13) years, the Deciding Official did consider the appellant's length of service as mitigating. Management argued that the Deciding Official properly found that the seriousness of his misconduct, in conjunction with his prior disciplinary and work history, was incompatible with continued employment. Management argued that the Table indicates that in cases where the misconduct is egregious enough or is accompanied by sufficiently aggravating circumstances, progressive discipline may be inappropriate and removal or other severe action

would be warranted on the first offense. Both the Deciding and Proposing Officials determined that the appellant's actions were egregious and that he lacked any rehabilitation potential.

The appellant replied and argued that management failed to address the comparator cases and that another TSO touched passengers in a manner objectively more egregious than the action at issue here and yet, retained their job. The appellant argued that his descriptions of the incident are not inconsistent and that the tapping of the inner legs was accidental and that CCTV footage shows the light contact made when he attempted to reposition the passenger's feet. Finally, he argued that management's stance concerning his length of service is baffling since it negates the entire purpose of mitigating factors.

The Deciding Official considered the aggravating and mitigating factors as outlined by the Proposing Official. He noted that the appellant is in a position of trust and held to a high standard of conduct, integrity, and professionalism. The Deciding Official considered that TSA must actively work to keep the public's confidence and trust and that dealing with the traveling public, in the face of provocation is required. The Deciding Official determined that the appellant failed to uphold the standards and his lack of professionalism and highly inappropriate conduct raises serious questions about the appellant's judgment and willingness to abide by rules and regulations. The Deciding Official stated that the appellant's actions have irreparably undermined his confidence in the appellant to perform his duties in a safe and professional manner.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA for three years and had satisfactory job performance, but that these factors did not outweigh the seriousness of the offense.

As an aggravating factor, the Deciding Official noted that the appellant did have prior disciplinary action. On April 19, 2017, the appellant was issued a five (5) day suspension for inappropriate comments. Management also considered the appellant's corrective actions: a Letter of Counseling (LOC) on August 21, 2017, for failure to follow directions; an LOC on August 20, 2016, for failure to follow standard operating procedures; a Letter of Reprimand (LOR) on August 9, 2015 for failure to follow proper leave procedures and absence without authorized leave (AWOL); and an LOC on May 27, 2015, for chewing gum at the screening checkpoint. Management also considered over 30 interest based conversations beginning in October 2014 and ending July 2017. Many of the interest based conversations were issued for unprofessional conduct and failure to follow procedures.

Under Section B. 6, pertaining to Inappropriate Conduct, the recommended penalty range is a 5-day suspension to removal and the aggravated penalty range is removal.

The Board found management did consider the appellant's service with TSA as mitigating. Although management indicated three years; the appellant did not continually serve TSA for thirteen years. The appellant's thirteen years of Federal service does not in this case warrant a lesser penalty. The appellant's actions were egregious and management appropriately weighed the relevant mitigating and aggravating factors. Although TSA policy favors progressive discipline, where appropriate, if the misconduct is egregious enough or is accompanied by significantly aggravating circumstances, progressive discipline may not be appropriate and removal may be warranted on the first time. The appellant had a previous 5-day suspension

issued in 2017, and had numerous corrective actions, many of which involved unprofessional conduct. The egregious nature of the appellant's actions clearly allowed management to seek removal. In addition, the cases cited by the appellant are not on point. The appellant in the case provided was issued an LOR for numerous actions one of which was inappropriate comments. The appellant in the case cited did not have a previous suspension for inappropriate comments nor did he have numerous corrective actions and numerous interest based conversations for unprofessional conduct. The Board also viewed the actions of the case cited to be different than the scenario presented in this case. The Board also reviewed OAB 11-166 and also found the fact pattern in this case distinguishable from the case at hand. Therefore, the Board gave no merit to the appellant's argument that his penalty is inconsistent with the penalties assessed in other, similar cases.

TSA employees, while on or off-duty, 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. TSA employees are also expected 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. The appellant was aware of those requirements and clearly failed to abide by them. The appellant, in his position as a TSO, has direct contact with the traveling public and is expected to perform his duties in a professional and business-like manner throughout the workday and in this instance, the appellant failed to do so. Contrary to the appellant's assertions, the CCTV footage did not show that the contact made with the appellant was "accidental," nor does it show that he simply "tapped" the inside of the passenger's legs. There is no merit to the appellant's argument regarding a communication barrier. The appellant could have at any time demonstrated what was required. Additionally, the passenger was able to clearly make a complaint to management in English that the appellant kicked him. Although the appellant was allowed to continue screening passengers after the August 20, 2017, incident, the Board agrees that his continued service would create an opportunity for future misconduct.

Removal is within the aggravated penalty range and recommended range for the Charge. The Board finds that management's decision to remove the appellant from his 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=0876087875.TSA
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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)

Supervisory Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-137

December 12, 2017

Issue: *Inappropriate Comments*

OPINION AND DECISION

On September 27, 2017, management demoted the appellant from his position of Supervisory Transportation Security Officer (STSO), SV-1802-G, to the position of Lead Transportation Security Officer (LTSO), SV-1802-F, with the Transportation Security Administration (TSA) based on the charge*: Inappropriate Comments.* The appellant filed a timely appeal of his 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, *Inappropriate Comments* on three specifications. Specification 1 alleged that during January 2017, the appellant asked a Transportation Security Officer (TSO), "Why do you have to be a tremendous cunt?" The appellant further admitted that he has called the TSO a "cunt" on multiple occasions.

Specification 2 alleged that in late January 2017, the appellant called the TSO "a pregnant cow." The appellant further admitted that on possibly more than one occasion between November 2016 and January 2017, he called her "a Pregnant Cow."

Specification 3 alleged that during late January or February, the appellant told the TSO that she "could stand to lose a few ounces." The appellant further admitted that, "I have made the statement of losing a few ounces to [the TSO] on multiple occasions."

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5.C. (4), which states that supervisors are tasked with "providing positive leadership and serving as a role model for subordinates by complying with all employee responsibilities, and demonstrating a commitment and sense of responsibility to their job and high ethical standards. Section 5.C. (5) states that managers and supervisors are responsible for treating fellow TSA employees with dignity, respect, and in a fair and equitable manner.

The appellant made inappropriate comments to a female TSO on multiple occasions. In the appellant's statement, he admitted to saying the comments to the TSO and admitted to using the language cited on more than one occasion.

Management provided the following evidence to support the Charge: administrative inquiry, dated March 2, 2017, statement of the female TSO, dated February 12, 2017; interview of the female TSO, dated February 24, 2017; statement of a TSO, dated February 12, 2017; interview of the TSO, dated February 24, 2017; statement of the Transportation Security Manager (TSM), dated March 1, 2017; emails from the TSM, dated February 6, 2017 and May 5, 2017; interview of the TSM, dated March 2, 2017; statement of an STSO, dated February 14, 2017; interview of the STSO, dated February 27, 2017; statement of the appellant, dated February 19, 2017; and interview of the appellant, dated February 27, 2017.

On appeal, the appellant did not dispute the charge. The appellant only disputed the penalty determination.

The Board found that the appellant's statement admitting to the charge and the supporting documentation are preponderant evident to prove the Charge and all specifications. Therefore, the Charge, *Inappropriate Comments*, 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 the Proposing and Deciding Officials both interjected an inappropriate level of personal opinions into their decision. He also argued that another STSO made similar comments and received a lesser penalty. The appellant argued that contrary to the claims made, he is in fact remorseful. In addition, the appellant argued that he was told verbally by his manager that by taking a transfer, the demotion would be off the table as a penalty and acted based on that information. The appellant complained that he was interviewed by TSA Internal Affairs over the matter and not made privy to the outcome of that investigation. The appellant submitted numerous letters of support and the email between he and the TSM regarding the transfer.

Management responded and argued that a demotion may always be considered as an option when the applicable penalty range includes removal and that the aggravated range did include removal. Management also stated that under the Table for second and/or successive offenses the penalty should generally fall within the aggravated range. Management argued that the applicable penalty factors were considered by the Deciding Official. In addition, management stated that the other STSO's involvement was reviewed and addressed. As to the appellant's claim that he was told by management that if he transferred demotion would be taken off the table as a penalty, management argued that two supporting documents indicate that the TSM did not make such a statement.

The Deciding Official considered both mitigating and aggravating factors. The Deciding Official considered that as an STSO, the appellant occupied a prominent position of trust and was held to a higher standard of conduct. The Deciding Official considered that as an STSO, he was responsible for leading the workforce by example. The Deciding Official considered that the appellant's conduct was not inadvertent and it was frequently repeated. He also considered that the behavior was disrespectful, offensive and inappropriate and disregarded the agency's model workplace principles. The Deciding Official considered as aggravating that the appellant received a Letter of Counseling on February 24, 2016, for failure to follow instructions and was verbally counseled by a TSM on January 18, 2016, for inappropriately joking around with his employees. In addition, the Deciding Official indicated that he lost confidence in his ability to perform as an STSO.

As mitigating factors, the Deciding Official noted the appellant has been with TSA since January 15, 2012, received an Achieved Excellence on his last performance review, and had no prior discipline. However, he did not believe that these mitigating factors outweighed the seriousness of the offense.

Under Section B.5 of the Table, the recommended penalty range for use of abusive, offensive disrespectful, inflammatory or similarly inappropriate language is a Letter of Reprimand (LOR) to a 5-day suspension. The aggravated penalty range is a 6-day suspension to removal. Under the Table, management may consider a demotion as an option when the applicable penalty range includes removal. The Deciding Official also found that a lesser alternative penalty would not be appropriate.

The Board agrees with the Deciding Official's conclusions and finds that the Deciding Official correctly analyzed the penalty factors in making the determination to demote. In addition, the Deciding Official followed the guidance provided in the Table. The Table provides that a demotion may always be considered as an option when the applicable penalty range includes removal. Demotion may also be considered in appropriate circumstances when the applicable penalty range does not include removal. The appellant's actions are not reflective of an STSO and were egregious in nature. In addition, the Board found no merit to the appellant's argument that he was told that demotion was off the table if he transferred. It is clear that there was a discussion regarding the demotion but there is no evidence that the appellant was told that he would not be demoted.

The Board finds that management's decision to demote the appellant from his position as an STSO to the position of an LTSO 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

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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)

Supervisory Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-138

December 20, 2017

Issue: Absent Without Leave (AWOL)

OPINION AND DECISION

On October 19, 2017, management reduced the appellant in pay band and pay rate from her position as a Supervisory Transportation Security Officer (STSO), SV-1802-G, to a Transportation Security Officer (SV-1802-E), with the Transportation Security Administration (TSA) based on the Charge: *Absent Without Leave (AWOL).* 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 the Charge, *Absent Without Leave (AWOL)*, on two specifications. Specification 1 alleged that the appellant failed to report to duty from August 2 to August 5, 2017. The appellant did not have adequate annual leave balances to support the absences; she did not support the absences with administratively acceptable medical documentation, and the absences were not authorized. Consequently, the appellant was coded 30 hours of AWOL.

Specification 2 alleged that the appellant failed to report for duty on August 19, 2017. The appellant did not have authorized leave and did not support the absence with administratively acceptable medical documentation. Consequently, the appellant was coded 9 hours of AWOL.

Management alleged that the appellant's misconduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5, which states that TSA employees are responsible for (1) reporting to work on time and ready, willing and able to perform the duties of their position, (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; and (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Management also alleged that the appellant's misconduct violated the Handbook to MD 1100.73-5, Section BB (1) which states in part that employees are expected to schedule and use earned leave in accordance with established procedures. Whenever possible, employees must obtain prior approval for all absences including leave without pay (LWOP) . . . Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA.

The appellant did not report to work on August 2 – 5, and August 19, 2017 and was charged AWOL for her absences. In a statement from a Transportation Security Manager (TSM), dated September 1, 2017, the TSM stated that the appellant approached her with a request to take leave on August 19, 2017. The TSM stated that after she reviewed that appellant's leave balances she informed her that she did not have a sufficient leave balance. The TSM stated that she also told the appellant that due to her low leave balance, she could not take her upcoming leave scheduled through a leave bid for July 30 through August 5, 2017. The TSM stated that on August 1, 2017, she noticed that the appellant was not at work so she sent a text to the appellant but did not get a response. The TSM stated that another STSO told her that the appellant was scheduled to be on leave. The TSM stated that she met with the appellant when the appellant returned to work to get an explanation as to why she took her leave bid knowing she did not have sufficient leave accrued to cover her time off. She stated that the appellant told her she thought she had accrued enough hours and that she wanted to use her sick leave for her annual leave bid. The TSM stated that she told the appellant that she did not have the leave balance to cover her absence, that she could not use sick leave to cover her annual leave bid, and that the leave request form she submitted was denied and her absence would be coded as AWOL.

The appellant submitted a statement, dated August 17, 2017, regarding her absence for August 2 – 5, 2017. The appellant stated that she had just returned from an absence from work and was not feeling well and that since it was during her "leave week" she did not see any issues "since it was permissible to change your leave if you become ill during that time." The appellant stated that she was not aware she only had a few hours of annual leave and that when she had a conversation with her TSM when she returned, as far as she was aware, she and her TSM had a plan to build her leave back up and "rectify the situation."

A second TSM submitted a statement on August 23, 2017, stating that he met with the appellant on that day to discuss her use of compensatory time for leave. The TSM stated that he asked the appellant why she used compensatory time that was just worked in the same pay period and was not yet available in her leave bank and that the appellant replied that there must have been

"misinformation" between her and the other TSM. The TSM stated that the appellant told him that she asked the other TSM if she could use compensatory time she earned to take leave and that the TSM told her that she could. The TSM stated that he told the appellant that her leave was being charged as AWOL and that the appellant stated that she understood.

The appellant submitted a second statement on August 24, 2017, regarding her absence on August 19, 2017. The appellant stated that she had a discussion with her TSM about coordinating her leave for a race that she had signed up for several months ago. She said she worked a shift swap with another STSO to work her Friday that week and that upon doing so, the TSM agreed to allow her the time off to go to the race. The appellant stated that she was told to complete a leave request and leave it on the TSM's desk. She stated that she was working towards building her leave back up with a coordinated plan by her TSM and that she was coming in early to work for compensatory time to not only help her, but also the organization. The appellant stated that she left a leave request form on the TSM's desk.

The appellant submitted a Request for Leave and Approved Absence (OPM-71) form, dated August 7, 2017, requesting accrued annual leave for 18 hours on August 4 and August 5 and accrued sick leave for 18 hours on August 2 and August 3, 2017. The OPM-71 was disapproved on August 12, 2017. The reason for disapproval noted on the OPM-71 was "no medical documentation provided to support SL request during AL bid week no annual leave to cover an annual leave bid week." The appellant submitted an OPM-71 on August 17, 2017, requesting compensatory time off for 9 hours on August 19, 2017. The OPM-71 was disapproved on August 19, 2017. The reason for disapproval noted on the OPM-71 was "no comp time accrual."

The appellant was issued a Notice of Proposed Involuntary Demotion on September 19, 2017. The appellant submitted a written reply dated September 26, 2017.

Management provided as evidence: statement of a TSM, dated August 23, 2017; statements of the appellant, dated August 17 and August 24, 2017; statement of a TSM, dated September 1, 2017; WebTA Certified T&A Summaries for pay periods 2017-15 and 2017-16; and OPM-71 forms, dated August 7 and August 17, 2017.

On appeal, the appellant stated, "When my Manager and I sat down to discuss my leave balances, to the best of my knowledge, we did not discuss any future leave that I was granted by Senior leadership." The appellant stated that she was granted the week of July 30 – August 5, 2017, in the second shift supervisors leave bid and that when she went to use the leave, she was ill on the days following her Regular Days Off (RDOs) and submitted an OPM-71 for sick leave instead of annual leave. She argued that she was not informed until later that her leave was denied, "due to a statement [her] Manager wrote, stating that he told [her] [she] could not take leave on that week." The appellant argued that she did not recall that coming up in her conversation with her TSM. She stated that her TSM sent her a text message telling her to leave her OPM-71 on his desk and that he would get to it either Friday or Saturday and argued that management is contending that she should have disregarded what her manager told her to do. The appellant stated that on July 26, 2017, she had a conversation with her TSM about working a deal with another supervisor to swap days off and whether he would approve the day off she needed for a race. The appellant stated that the TSM said she "was good to go" as long as she

had the other day covered by another supervisor. The appellant argued that she tried to do the right thing but that it seems she was "purposely stonewalled by Senior leadership, at every turn."

Management responded and argued that the leave the appellant states she was granted for the week of July 30 –August 5, 2017, in the STSO leave bid was not approved; the week was only reserved for her if she requested and was authorized the leave. Management argued that the instructions on the STSO summer leave bid were clear that the STSO must have either placed a leave request in the Airport Information Management System (AIMS) or submitted an OPM-71 prior to taking the leave. Management argued that the appellant did neither; that she only requested authorization upon her return from being gone, as evidenced by the OPM-71 she submitted on August 7, 2017. Management further argued that even if the leave had been approved, the appellant's TSM cancelled it during his meeting with the appellant on July 27, 2017. Management cited MD 1100.63-1, *Absence and Leave*, Section B. 5. (f) which states that management has the authority to cancel an approved leave request . . . when the employee has insufficient leave to cover the absence. Management argued that the TSM told the appellant she did not have sufficient leave to cover the August 19, 2017, absence or the week she had bid on. Management argued that the appellant's claim that she does not recall her TSM discussing any future leave with her is not credible. Management argued that the appellant remembers meeting with the TSM to discuss her taking leave on August 19, discussing her leave balance, and coordinating a plan to build her leave back up, all of which is consistent with the TSM's recollection and that it "highly improbable" that the discussion did not include the appellant's impending absence. Management also argued that "it is impossible" that the appellant was unaware she did not have sufficient leave to cover any impending absence.

Management argued that despite knowing that she had an insufficient annual leave balance and that her leave had not been approved, the appellant nonetheless chose not to come to work. Management argued that while the appellant claimed to have been sick for a portion of that time, she neither called in nor responded to her TSM's text to report that she was ill, nor did she bring in medical documentation that would have shown she was sick during that time.

With regard to the text message the appellant referred to wherein her TSM told her that she should leave her leave request on his desk, management stated that the appellant's argument seems to be that the TSM's knowledge that she intended to leave an OPM-71 on his desk in his absence meant that he would approve her leave for that day regardless of whether she had sufficient leave to cover the absence or not. Management argued that she had no leave for August 19 and that her request was correctly denied. Management argued that while the appellant may have assumed that the overtime she worked in the August 19 pay period would have accrued to cover the leave she requested for that day, her assumption was incorrect. Management argued that the appellant could and should have confirmed that she had leave to cover August 19 or simply reported to work if she was uncertain.

With regard to specification 1, the appellant was not entitled to leave until she submitted an OPM-71 and it was approved. The appellant did not have annual leave accrued to cover her absence; she did not submit medical documentation to support her request for sick leave; and further she did not submit her request for leave until after she returned from her absence, therefore, her leave was appropriately disapproved and her time coded as AWOL. The statement

of the TSM, the WebTA record, and OPM-71 form are preponderant evident evidence to support the specification. Therefore, specification 1 is SUSTAINED.

With regard to specification 2, although the appellant submitted an OPM-71 form it was not approved before she took the time off. The appellant used poor judgment when she took the day off without knowing whether her request for leave had been approved. Her leave was disapproved and her absence was charged as AWOL. The statement of the TSM, the WebTA record, and OPM-71 form are preponderant evidence to support the specification. Therefore, specification 2 is SUSTAINED.

Having sustained both specifications, the Charge, *Absent Without Leave (AWOL)*, is SUSTAINED.

Having sustained the Charge, 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.

On appeal, the appellant argued that the action was extreme and that her years of service and mitigating factors should have outweighed any aggravating factors. The appellant stated that she has been an exemplary employee since the start of her career with TSA in 2005 and has worked hard in everything she has done. The appellant stated that she made some bad choices but "served her sentence" and argued that management weighed an action that occurred over four years ago as an aggravating factor. She argued that she does not believe that every instance is handled the same and alleged that there were supervisors who were given Letters of Counseling instead of heavier discipline.

Management responded and argued that the aggravated penalty range for the Section of the Table pertaining to AWOL includes removal. Management also stated that the guidelines to the Table state that aggravating factors include type of position and prior disciplinary record and that demotion may always be considered as an option when the applicable penalty range includes removal. Management argued that given the appellant's supervisory status and her disciplinary record, a penalty in the aggravated range is appropriate. Management argued that a demotion is not only appropriate, but is charitable.

The Deciding Official considered the nature and seriousness of the offense and stated that employees are responsible for managing their leave and ensuring that they take only leave that has been approved. The Deciding Official considered that when employees take leave that is not approved, their coworkers are burdened with covering for them and performing additional duties, which may affect the efficient operation of the workplace. The Deciding Official considered the appellant's position as an STSO noting that the appellant is responsible for ensuring that her subordinates report to duty, follow leave request procedures, and have sufficient leave balances before approving their leave. She considered that as a supervisor, the appellant should understand and know the importance of managing her leave and adhering to TSA policies that

she is tasked to enforce. The Deciding Official also considered that a TSM put the appellant on notice that she had insufficient leave to take for the time in question and that the appellant failed to report to work despite being advised of the shortfall in her balances and despite not having received approval for her absences.

The Deciding Official stated that the appellant's actions caused her to question the appellant's decision-making, judgment, and trustworthiness. The Deciding Official stated that she does not have the confidence that the appellant has the qualities of a supervisory employee and found that she could not keep the appellant in a position of authority when she herself cannot follow policies and procedures.

As an aggravating factor, the Deciding Official considered the appellant's disciplinary history noting that on July 6, 2017, the appellant was issued a 10-day suspension for failure to follow standard operating procedures (SOP) and working at an unassigned checkpoint without authorization and that on August 14, 2013, the appellant was issued a 7-day suspension for agreeing to be financially responsible for the debt of a subordinate and entering into a landlord-tenant relationship with a subordinate. The Deciding Official considered that the appellant has not adjusted her conduct following the suspensions, both of which call into question her ability to act responsibly in a supervisory role and show the appellant's inability to be rehabilitated. The Deciding Official also considered that the appellant most recently acknowledged that she reviewed MD 1100.73-5 on November 20, 2016.

As a mitigating factor, the Deciding Official considered that that the appellant has been with the agency since 2005. She also considered that personal life events may have caused the appellant some anguish in the past. The Deciding Official did not find however that the appellant's personal problems were the reason for or contributed to issues in this case.

Under the Table, the recommended range for A.3 pertaining to AWOL from 1-5 workdays is a 2-day to 5-day suspension and the aggravated penalty range is a 6-day suspension to removal. The Guidelines of the Table state that a demotion may always be considered as an option when the applicable penalty range includes removal and that demotion may also be considered in appropriate circumstances when the applicable penalty does not include removal. Removal is within the aggravated range for the charge.

The Board found that the Deciding Official weighed the mitigating and aggravating factors and appropriately determined that the aggravating factors outweighed the mitigating factors. Additionally, the fact that the appellant had prior discipline, although for dissimilar conduct, gave management the right to consider a penalty in the aggravated range. The Board determined that the appellant's reduction in pay band and pay rate, although harsh, is in accordance with TSA policy and within the bounds of reasonableness. The penalty decision is SUSTAINED.

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

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-139

December 17, 2017

Issue: *Theft*

OPINION AND DECISION

On October 10, 2017, management removed the appellant from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on one Charge: *Theft*. 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 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(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 the Charge, *Theft*, on one specification. The specification alleged that on or about September 5, 2017, the appellant stole a cell phone from a transiting passenger at the West Passenger Checkpoint.

Management found that the appellant violated Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, and *Handbook*, which governs the conduct required of TSA employees.

The evidence provided showed that the appellant placed a twelve-year-old transiting passenger's cell phone into her pocket. The appellant was assisting passengers load their carry-on into bins to be placed into the x-ray machine. The twelve-year-old placed her cell phone in a bin. The appellant consolidated the bins and then placed the cell phone into her pocket. The twelve-year-old witnessed the appellant take the cell phone and place it into her pocket. The twelve-year-old and her family asked about the phone and the appellant denied taking the phone or knowing the whereabouts. The passengers and another TSO searched for the phone on the trays and belts. When the appellant returned, she again denied any knowledge of the cell phone and stated that she did not have it. The family demanded that the police be called and demanded to see the Closed Circuit Television (CCTV) footage. The appellant suggested that the passengers file a claim but they continued to insist on seeing the CCTV before leaving for their flight. The appellant went to the podium behind the STSO and came back to the passengers with the cell phone claiming it was in lost and found. The grandmother of the twelve-year old stated that there was no way that the phone could have been in lost and found as they stood at the conveyer belt the whole time and the only person that left the area was the appellant.

Management provided as evidence: a customer compliant, dated September 8, 2017; Interview of the twelve year old's grandmother, dated September 13, 2017, interview of a Transportation Security Officer (TSO), dated September 14, 2017; statement of a Deputy Assistant Federal Security Director-Screening, dated September 14, 2017; statement of a Deputy Assistant Federal Security Director - Threat Assessment Programs (TAP), dated September 9, 2017; statement of the appellant, dated September 20, 2017; statement of a Supervisory Transportation Security Officer (STSO), dated October 2, 2017; Memorandum of Interview of STSO, dated September 28, 2017; CCTV Footage; and CCTV timeline. .

On appeal, the appellant stated that she has been with TSA for fifteen years and had no intention of stealing a cell phone. The appellant argued that the placing of the phone into her pocket was an absent-minded mistake and that it was not her obligation to prove her innocence. The appellant argued that the evidence relied upon by management fails to demonstrate an intent to permanently deprive someone of their property. The appellant argued that the Charge of Theft requires proof of the "taking and possession of another's property in a manner inconsistent with the owner's rights and benefits with an intent to permanently deprive the owner of the possession of use of his property." The appellant argued that the evidence fails to prove an intent to permanently deprive.

The appellant argued that the grandmother did not observe the disappearance of the phone and thus her statement is largely hearsay and does not prove intent. Next, the appellant argued that the CCTV footage failed to show intent and in fact shows that she assisted the family in looking for the cell phone. She argued that the video shows a mistake, not an intent to steal, and that she immediately returned the phone once it was discovered in her pocket. The appellant argued that she did not permanently deprive the passenger of her phone nor did she intend to permanently deprive the passenger of her phone. Additionally, the appellant argued that management improperly read her statement as inconsistent with the CCTV and accounts of other witnesses. The appellant argued that the CCTV does show that she made an attempt to search for the phone. She stated that multiple parties suggested the use of the cell phone locator and thus, the statements are not contradictory. She also argued that just because the family asked to see the footage does not mean that she did not.

Management replied and cited Merit System Protection Board (MSPB) case law which states that exclusive and unexplained possession of another's property creates an inference of theft. Management also cited a case which found that if theft is charged and intent becomes material, the failure to follow proper procedures concerning the property is part of the circumstantial evidence to show intent. Management argued that there are no Standard Operating Procedures (SOP) that authorize an Officer to pocket a passenger's property. As to the appellant's argument that it was an absent minded-mistake and sort of a muscle memory response to holding a phone, management responded that whether an employee for one week or one decade, no security officer would or should have "muscle memory" of pocketing a passenger's property.

Additionally, management argued that the CCTV is the best objective witness and captured the actions of the appellant and passengers. The witness's character was considered and determined to be credible. The appellant's character was determined not to be credible and her honesty and veracity was questioned. Management argued that the appellant's version of the facts is at odds with the entirety of the opposing evidence. Management argued that there is an abundance of circumstantial evidence that proves the appellant's intent was to steal the passenger's phone. Management pointed out the inconsistencies in the appellant's story versus what the witnesses and CCTV showed.

As to the Charge, the Board carefully reviewed the actions of the appellant in order to determine whether the element of intent to permanently deprive the passenger was evident. The evidence shows that the appellant took possession of the passenger's phone and did not return the phone for over twenty minutes. During this time frame, she was repeatedly asked about the phone and never once felt in her pocket to determine if she had mistakenly placed the phone in her pocket. When asked by another TSA employee about the cell phone, the appellant threw her hands up in the air and said "I didn't have anything to do with the cell phone." The evidence also showed that the appellant did not ask the STSO to review the CCTV but rather another STSO contacted the STSO about reviewing the CCTV. The CCTV shows a shocked passenger watching the appellant place her cell phone in her pocket and then denying that she had possession of said phone. After the family insisted on seeing the CCTV, the appellant stated that she then pulled the phone out of her pocket and realized it was not her phone. This is contrary to what the family said in regards to her response. The family indicated that the appellant ignored their request to review CCTV and walked away. At some point, the appellant returned to the checkpoint and gave the family a claim card but the family refused to file it as they knew that the appellant had the phone. The appellant then walked away and headed to the supervisor's podium and within thirty seconds returned with the cell phone claiming that it was in Lost and Found. There is no reason to question the credibility of the family who lost the cell phone. The CCTV does not show a mistake on the part of the appellant but rather a deliberate intent to deprive a passenger of her cell phone. The evidence in the record overwhelmingly shows intent on part of the appellant. Management has proven the Charge by substantial evidence. Therefore, the Charge, *Theft*, 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 consistent with TSA policy.

The Deciding Official considered the penalty factors in coming to the conclusion of removal. The Deciding Official noted that the appellant was suspended for ten days on July 2, 2012, for

Failure to Perform Playbook; Misuse of Government Time; Failure to Cooperate with an Investigation; and Lack of Candor. He considered as mitigating factors that the appellant has been with TSA since August 18, 2002 and has had satisfactory performance.

Although management cited Section N.1 of the Table, the correct Section is N.3 of the Table for *Theft*. The recommended penalty range for N.3 states that "for TSOs: removal is mandatory." Additionally, TSA MD 1100.75-3, Appendix A (1) (3) requires removal for theft. A discussion of the penalty factors is not required for mandatory removals described in Appendix A.

The Board finds that management followed policy and policy requires removal for the Charge, *Theft*.

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

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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)

Master Transportation Security Officer (BDO)
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-140

December 18, 2017

Issue: *Felony Arrest*

OPINION AND DECISION

On October 18, 2017, management removed the appellant from her position of Master Transportation Security Officer (BDO) with the Transportation Security Administration (TSA) based on the charge: *Felony Arrest*. 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 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, *Felony Arrest*, on one specification. The specification alleged that on October 13, 2017, the appellant was arrested for Aggravated Assault with a Weapon, a felony offense.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Paragraph 5.D.(7) states that employees are responsible for "Observing and abiding by all laws, rules, regulations and other authoritative policies and guidance." Paragraph 6.E states "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, judgement or trustworthiness. Management referenced TSA Management Directive (MD) 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A, which allows for removal for the first offense for: 2. (g) an arrest for any of the following offenses: (xxvi) Felony involving (g) Aggravated assault.

On October 13, 2017, the appellant was arrested for Aggravated Assault with a Weapon. The appellant reported her arrest to her manager. The appellant told the Transportation Security Manager that she was fighting with her husband the evening of October 12, 2017, into the early morning of October 13, 2017. This fight resulted in a police response. The police cautioned her and her husband, and then departed without issuing any citations or making any arrests. The appellant stated that after the police had departed, she saw her husband moving around and/or manipulating firearms. The appellant stated that an additional argument ensued and she took possession of a firearm and struck her husband with one of them. The appellant's husband called the police department and the appellant was placed under arrest for Aggravated Assault with a Weapon, a felony.

A pre-decisional meeting was held with the appellant on October 18, 2017, and confirmed that she was arrested for Aggravated Assault with a Weapon.

Management provided the following evidence to support the Charge: statement of the appellant, dated October 18, 2017; and arraignment sheet.

On appeal, the appellant stated that her husband suffers from Post-Traumatic Stress Disorder (PTSD) and other unknown mental health issues and thus, she was alarmed by his behavior when he began removing firearms and taking them to his vehicle. She also stated that she has been physically abused by her husband in the past. The appellant argued that if her husband took any violent action against her she would not be able to defend herself, as he would have possession of all of the firearms. She stated that she asked her husband to give her the firearm, and took it from him when he began striking, pushing and then choking her; at which time she hit her husband with the butt of her handgun in order to free herself from her husband's grasp.

Management replied and stated that although the appellant disputes the facts in the charge, she still admits to the basic facts which formed the basis for the arrest. Management stated that however unfortunate, the fact is that the appellant was arrested for Aggravated Assault with a Weapon; a felony offense.

With respect to the Charge, the Board finds that the evidence in the record, to include the arraignment sheet, coupled with the appellant's admission to being arrested, is substantial evidence to support that the appellant was arrested for a felony involving aggravated assault. Therefore, the Charge, *Felony Arrest,* is SUSTAINED.

Having sustained the Charge, 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 considered whether the penalty factors listed in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct,* have been considered properly by the Deciding Official.

The appellant argued that the penalty was too harsh. She stated that she was arrested for a crime but that does not mean that she is guilty of the offense. The appellant argued that she did not break any laws. Once again, she argued that she was being vigorously assaulted and needed to defend herself against the actions of her husband. She argued that defending oneself against an assault is not against the law, nor does it negatively reflect against TSA. The appellant also argued that her reporting the event shows that she is trustworthy and she never attempted to conceal any information. The appellant argued that the actions of defending herself, have little to no relation to her ability to perform the responsibilities of her position. The appellant supported her appeal with photos of the injuries that she sustained and an affidavit provided by her husband.

Management stated that they considered the facts carefully, however a removal involving a felony arrest for aggravated assault is allowed per TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Handbook, Appendix A, Section 2.g.xxvi.g. Management stated that there is no requirement to either wait for final adjudication of the criminal charges nor determine whether the criminal charges are proven. Management also argued that due to the appellant's position as a BDO, an arrest involving weapons raises questions about her ability and willingness to comply with laws, rules and regulations and that her behavior calls into question her reliability, judgement, and trustworthiness and strikes at the very heart of the TSA Core Value of Integrity. Management also stated that to the best of their knowledge, the criminal case is still pending.

The Deciding Official considered both mitigating and aggravating factors. He determined that as a BDO, the appellant is held to a high standard of conduct because she is looked upon by the public as a trusted public servant as she carries out the security functions of her position. The Deciding Official determined an arrest for Aggravated Assault with a Weapon, a felony, raises questions about her ability or willingness to comply with laws, rules, and regulations.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA since September 12, 2004; that her overall performance has been satisfactory, and that she has received no prior discipline. However, the Deciding Official found that the nature and seriousness of her conduct far outweighs the mitigating factors and warrants removal from Federal service.

The Board notes that under TSA MD 110075-3, *Addressing Unacceptable Performance and Conduct*, Handbook, Appendix A, Section 2.g.xxvi.g, removal is allowed for the felony arrest of aggravated assault. Although harsh, the Board finds that management followed policy and policy allows for removal for the Charge, *Felony Arrest,* for the first offense.

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

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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,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-142

December 22, 2017

Issue: *Conduct Unbecoming; Failure to Follow Instructions*

OPINION AND DECISION

On October 25, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the two Charges: *Conduct Unbecoming* and *Failure to Follow Instructions*. The appellant filed a timely appeal of his 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, *Conduct Unbecoming*, on three specifications. Specification 1 alleged that on June 2, 2017, while working the passenger checkpoint, a TSO knocked a stack of bowls out of a female TSO's hand. The appellant walked by the female TSO and said "I'd love to see you bend over and pick those up" or words to that affect as he glanced at her buttocks.

Specification 2 alleged that on June 4, 2017, while working the passenger checkpoint, the appellant inappropriately touched a female TSO and made an inappropriate comment. Specifically, the appellant pulled on the belt loops of her pants to pull her back toward him and said to her, "Tell daddy what's wrong."

Specification 3 alleged that several female coworkers indicated that the appellant repeatedly poked or tickled them or other female employees while at work. During the Office of Inspection (OOI) interview on June 29, 2017, the appellant admitted to inappropriate touching in that he had snuck up behind coworkers and poked them in the ribs to scare them. The appellant told the investigator that this was done in a playful manner, and he admitted to doing it approximately 20 times.

Management based Charge 2, *Failure to Follow Instructions*, on one specification alleging that on June 29, 2017, the appellant was interviewed by Special Agents from OOI regarding allegations of inappropriate behavior and sexual harassment. A Special Agent (SA) instructed the appellant not to discuss the interview with anyone to protect the integrity of the investigation and had him sign a non-disclosure agreement as a part of the interview process. On or about July 3, 2017, the appellant approached another TSO and spoke with her about the investigation. On July 26, 2017, the appellant was re-interviewed by an SA and he admitted to violating the non-disclosure agreement by speaking to the TSO about the investigation.

Management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (2) states that TSA employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials. Section 5. D. (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.

Management also alleged that the appellant's conduct violated TSA MD 1100.73-3, *Prevention and Elimination of Sexual Harassment in the Workplace* (which was in effect at the time of the appellant's offenses), Section 6. A., which states that TSA is committed to maintaining a work environment free from harassing behavior for all its employees where employees maintain the public trust and are held to high standards of honesty, integrity, impartiality, and conduct. Sexual Harassment is a violation of these standards and therefore, sexual harassment of or by any TSA employees in any form is not acceptable and will not be tolerated. Section 5. A. states that TSA employees are responsible for: (1) maintaining a work environment free from sexual harassment, where employees maintain their public trust and are held to high standards of honesty, integrity, impartiality, and conduct; (2) ensuring that his or her conduct is not sexually offensive to other employees, contractors, job applicants, or the public; and (3) cooperating with inquiries into complaints of alleged sexual harassment. The Handbook to MD 1100.73-3 (which was in effect at the time of the appellant's misconduct occurred), Section C., lists examples of misconduct of a sexual nature as (1) verbal conduct: (a) sexual jokes, suggestive verbal communication, or innuendoes . . .; (2) nonverbal conduct: (d) unwelcome and deliberate touching such as patting, stroking, rubbing, biting, pinching, grabbing, bumping, back/neck rubs, and unsolicited clothing adjustments; or (e) conduct to encourage, invite or suggest physical contact, such as blocking a passageway.

A female TSO made a complaint to management about the appellant regarding incidents that allegedly occurred on June 2 and June 4, 2017. On June 14, 2017, the matter was referred to OOI for investigation. The female TSO was interviewed by and provided a written statement to OOI Special Agents. In her written statement, the female TSO stated that on June 2, 2017, she was checking bags at the checkpoint when another TSO knocked some bowls out of her hands.

She stated that the appellant came by and told her to pick up the bowls and then glanced at her buttocks. Another TSO present at the time of the incident submitted a statement in which he said he heard the appellant say "I'd love to see you bend over and pick those up" to the appellant after the bowls were knocked out of her hands. Another TSO interviewed by OOI Special Agents stated that he witnessed the appellant inappropriately touching, using vulgar language, and teasing female TSOs at the checkpoint and gave as an example witnessing the appellant drop things on the floor so that the females would bend down to pick up the items while he "watched their back sides."

The female TSO also stated that on June 4, 2017, the appellant grabbed her by the belt loops several times. The female TSO stated that she informed the appellant that she did not want to talk to him and began to walk away through the Advanced Image Technology (AIT) machine and that the appellant grabbed her by her belt loops and prevented her from passing through the machine. She stated that she told the appellant to stop but he would not stop and she physically removed his hand from her pants and continued to pass through the machine. The female TSO stated that the appellant said to her, "tell Daddy what is wrong." In a written statement, dated June 5, 2017, the appellant stated that he noticed the female TSO was in a "depressed mood" so when they were working together in the AIT he was pressing her about what was wrong. The appellant stated that the female TSO did not answer and that as she turned to walk away he "pulled her back by the belt loop to pull her back." He also stated, "I did jokingly said [sic] to her tell daddy what's wrong."

During interviews with the OOI Special Agents, several female employees indicated that the appellant came up behind them and poked them in the sides and several witnesses said that they had seen the appellant come up behind female coworkers and tickle or poke their sides. In the appellant's June 5, 2017, statement, he admitted that he touched male and female coworkers by poking them in the sides from behind to scare them in a playful manner and disclosed that this occurred approximately 20 times.

On June 29, 2017, the appellant signed a non-disclosure agreement and was told that he could not talk about the investigation. On July 26, 2017, the SAs interviewed a TSO and she provided a written statement. In a summary of the interview with the TSO, the SAs stated that the TSO admitted that the appellant approached her on or about July 3, 2017, and spoke about the investigation. The TSO also stated that the appellant requested that she speak on his behalf, as a character witness if interviewed or asked by OOI investigators.

The appellant was issued a Notice of Proposed Removal (NOPR) on October 6, 2017. The NOPR advised the appellant of his right to reply orally and/or in writing. The appellant requested a 10-day extension to reply which was granted and the appellant provided an oral and written reply on October 23, 2017.

Management included as evidence: OOI Report of Investigation and attachments; and Closed Circuit Television (CCTV) video.

On appeal, the appellant argued that management failed to prove the charges by preponderant evidence. With regard to Charge 1, specification 1, the appellant denied that he said "I'd love to see you bend over and pick those up" or words to that effect. He argued that the CCTV video provides no audio, nor can his lips be read to make out that phrase. The appellant argued that

management rejected his account of the incident because they claimed he is "self-interested" and accepted the statements of the female TSO and her boyfriend as true. The appellant admitted to specification 2 of Charge 1 and to breaking his Non-Disclosure Agreement as specified in Charge 2, and argued that his admission of those incidents lowers the chance that he would lie about specification 1 simply out of self-interest. The appellant stated that the TSO who allegedly overheard the comment is the female TSO's boyfriend and that it is he who has a self-interest in supporting his romantic partner's allegations. The appellant argued that there were no witnesses to the event described in Charge 1, specification 1, who were truly unbiased.

The appellant also argued that because management charged him with Conduct Unbecoming due to violations of TSA's sexual harassment policy, that encompasses Title VII standards, management is required to prove the violation under Title VII standards in which sexual harassment is defined as, "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The appellant argued that management failed to do so; he argued that given that his conduct "was not extremely serious and consisted of teasing," he does not meet the Title VII threshold of sexual harassment as directed by the Supreme Court.

With regard to Charge 2, the appellant argued that management failed to prove the charge by preponderant evidence because they applied the incorrect Table of Penalties category. He argued that D.2 pertaining to failure or refusal to follow instructions more accurately reflects the specified misconduct and that because management applied F.2; they did not prove the charge by preponderant evidence because there is no evidence that he actually interfered with an official investigation or intended to interfere with any investigation. He argued that even if intent is considered as part of the charge, under F.2 management still did not provide preponderant evidence because the only evidence in the record that reflects his intent is his affidavit and the affidavit of the TSO he spoke to. He argued that these affidavits illustrate that he tried to solicit a character witness from the other TSO while in an emotionally difficult place and that unfortunately his distress with the situation got the best of him and he "over-shared."

Management responded and argued that with regard to specification 1, the statement of the female TSO is corroborated by a TSO who indicated that the appellant stated, "I'd love to see you bend over and pick those up." Management also referenced a statement by another TSO who indicated that he had seen the appellant knock things out of female employee's hands to watch when they bent over to pick them up. Management argued that the CCTV video corroborates the description provided by the female TSO, noting that while it does not contain audio, the statement of the female is more believable than the appellant's blanket denial. Management argued that the video shows that at 11:01:57 the bowls were knocked out of the female TSO's hand and that at 11:02:20 the appellant walks by the bowls, looks down at the bowls near another TSO's feet and then looks at the female TSO and says something to her. Management noted that at that point the TSO who stated that he heard the appellant's comment was unlatching a gate about eight feet away and then walks up, bends down and picks up the bowls and puts them on the x-ray. Management argued that the three sworn statements and CCTV video are preponderant evidence that the appellant engaged in the conduct unbecoming

described in specification 1. With regard to specifications 2 and 3, management noted that the appellant admitted to the misconduct.

Management argued that the appellant was not charged with sexual harassment; he was charged with Conduct Unbecoming and that it is clear that the appellant engaged in several instances of misconduct which violated the provisions of MD 1100.73-3 which was in effect at the time of the appellant's offenses. Management argued that TSA employment matters are governed by TSA Management Directives and their accompanying handbooks and that MD 1100.73-3 includes conduct that is inappropriate even if not of a severity or frequency to constitute sexual harassment.

Management also noted that the appellant admitted to the misconduct described in Charge 2; the appellant admitted that, contrary to the instructions given to him by the Special Agents and the non-disclosure agreement, he spoke to another TSO and told her that he had been interviewed; that another TSO had been interviewed; and that the video only showed him pulling the female TSO's belt loops. Management argued that any sharing is "oversharing" when an individual has been directed not to share any information while an investigation is pending. Management argued that TSA policy requires employees to follow instructions and that it is consistent with TSA policy to charge an employee with failure to follow instructions under F.2 of the Table when employees knowingly do not follow the instructions of an investigator conducting an official inquiry and release information about the inquiry that they know they should not release.

The Board notes that the appellant was not charged with sexual harassment. TSA policy defines the standard under which the appellant was charged. The policies cited make it clear that the behavior described is a violation of the policies. Management was not required to prove the charge under Title VII. Management was required to prove that the appellant violated TSA policy.

With respect to Charge 1, specification 1, it is clear from the CCTV footage that the appellant said something to the female TSO after the bowls were knocked out of her hand; the CCTV follows what is described by the female TSO in her statement. The Board found that the CCTV footage, the statement of the female TSO and the statement of the TSO who witnessed the incident is preponderant evidence to support the specification. Therefore, specification 1 is SUSTAINED.

With respect to Charge 1, specification 2, the appellant admitted to pulling the female TSO by the belt loops and making the comment. The appellant's admission, the female TSO's statement and the CCTV footage are preponderant evidence to support the specification. Therefore, specification 2 is SUSTAINED.

With respect to Charge 1, specification 3, the appellant's admission that he touched male and female coworkers by poking them in the sides from behind to scare them in a playful manner approximately 20 times is preponderant evidence to support the specification. Therefore, specification 3 is SUSTAINED.

Having sustained all of the specifications, the Charge, *Conduct Unbecoming*, is SUSTAINED.

With respect to Charge 2, the appellant admitted to failing to follow the instructions specified in his non-disclosure agreement. The Board gave no merit to the appellant's argument regarding Interference with an Investigation, as he was charged with Failure to Follow Instructions. F.2 does not require proof of interference or an intent to interfere with an investigation. The appellant was fully aware that he was being interviewed as part of an official inquiry and told not to discuss the interview. These instructions were provided by OOI as part of an investigation. The appellant's statement and the statement of the TSO he spoke to about the investigation are preponderant evidence to support the Charge. Therefore, the Charge, *Failure to Follow Instructions*, is SUSTAINED.

Having sustained the charges, the remaining question is whether the removal is consistent with the TSA Table of Offenses and Penalties (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considered whether the penalty factors listed in the TSA Handbook to MD 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 a reasonable penalty. He stated that management failed to properly weigh his past work record and military service, the consistency in which similarly situated employees were disciplined for conduct towards the female TSO, the clarity of notice management provided him regarding the rules violated, his potential for rehabilitation, and the adequacy of alternative sanctions to deter such behavior via progressive discipline.

The appellant argued that management did not give proper consideration to his "outstanding performance as a TSO" for over 15 years. He stated that his performance reviews were consistently "exceeded expectations" and that he volunteered for extra duties and responsibilities. The appellant noted that management did consider that he had no disciplinary history but also considered that TSOs bid for shifts so that they did not work with him. He argued that the mitigating portion of his "lengthy, patriotic service" should outweigh the two instances management referred to, especially considering the circumstances as a whole. The appellant also argued that management failed to consider his prior military service.

The appellant noted that a TSO stated that he initially reported to a supervisor that the appellant's behavior was inappropriate and that TSO then bid out of the appellant's shift. The appellant argued that management neither disciplined him as a result of the TSO's report nor took any other sort of corrective action. He also argued that management did not even inform him of any alleged problems. The appellant argued that the circumstances surrounding the TSOs' bid for shifts outside of his shift prove the existence of several mitigating factors, including management's acceptance of misbehavior and failure to address professionalism problems promptly.

The appellant stated that management was forced to address the working environment at the airport as a result of the female TSO's report of multiple instances of inappropriate conduct by male TSOs and argued that he was treated differently than another TSO named in the female TSO's complaint. The appellant argued that management allowed behavior to get out of control with regards to "high school" cliques and unprofessionalism during the a.m. shift. He argued

that management knew of and condoned the high-school-like behavior of multiple officers and allowed problems to escalate and then decided to take action only after an officer made an explicit complaint. The appellant argued that had management acted earlier, none of this would have happened. He stated that he and the female TSO were friends and that his actions should be viewed in that context.

The appellant also argued that the clarity with which he was on notice of any rules violated in committing the offenses is a significant mitigating factors. The appellant argued that not only was he not put on notice that his actions were inappropriate, but that management knew of and condoned the high-school-like behavior that occurred at the checkpoint. He argued that he was not on notice that his actions were inappropriate because management "consistently tolerated and encouraged his playful behavior."

The appellant argued that management disregarded his potential for rehabilitation and characterized his "imperfect attempt to defend his employment" as proof that he denies responsibility for his actions. The appellant argued that he took full responsibility for his actions and committed to act in a completely professional manner. The appellant argued that employees are allowed to respond to disciplinary actions and to submit character witnesses and stated that he let his emotions get the best of him and shared beyond what the non-disclosure agreement allowed when soliciting a character reference.

Management replied and argued that the Deciding Official listed each penalty factor and considered both mitigating and aggravating factors. Management argued that the appellant did not put forth any comparable employees to support his claim that he was treated differently; noting that the employees mentioned did not engage in the same conduct as the appellant as they did not touch the female TSO repeatedly and did not fail to follow the instructions of two Special Agents investigating their misconduct. Management argued that the appellant's length of service and military service was considered by the Deciding Official but did not outweigh four proven acts of misconduct. Management also argued that when confronted about his behavior, the appellant expressed remorse for the trouble he was in but not his behavior which is an indicator that he is not a good candidate for rehabilitation.

Management argued that the penalty is consistent with the Table noting that the recommended penalty for B.3 is a 3-day to 14-day suspension and the aggravated range is a 15-day suspension to removal. Management argued that given the multiple specifications and the serious nature of the appellant's misconduct including multiple instances of physical contact with female coworkers, the aggravated range is appropriate for the charge. Management argued that Section F.2 of the Table addresses the charge of Failure to Follow Instructions related to an investigation and recommends a penalty of removal. Management further argued that the Table provides that in cases where an employee commits more than one offense, the Proposing and Deciding Officials may consider whether the penalty should be in the Aggravated Penalty Range column corresponding to the most serious offense being charged. Management argued that the Table states that management officials have the discretion to go outside the ranges listed in the guide if they determine that circumstances warrant. Although TSA policy favors progressive discipline, where appropriate, if the misconduct is egregious enough, or is accompanied by sufficiently aggravating circumstances, progressive discipline may be inappropriate and removal or other severe action would be warranted on the first offense.

The appellant replied to management's reply and reiterated the arguments in his appeal.

The Deciding Official considered the nature and seriousness of the offense and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. The Deciding Official considered that the appellant's repeated inappropriate conduct and failure to comply with TSA policy adversely affected his team's morale and TSA's security mission. He also considered that, as reflected in the witness statements, several of the appellant's coworkers claim this is how the appellant behaved on a regular basis and this was not a one-time lapse in judgment. He also considered that the appellant was instructed by a Special Agent conducting an investigation not to talk to others and he specifically did the opposite. The Deciding Official also considered that the appellant's efforts to get a witness to speak on his behalf during her interview was completely inappropriate and found the appellant's misconduct to be serious and aggravating.

The Deciding Official considered the appellant's job level and type of employment noting that the appellant is expected to follow all policies, procedures and instructions and is expected to conduct himself in a professional manner. He considered the nature of the appellant's conduct to be troubling and unprofessional. The Deciding Official also considered that the appellant's inappropriate actions were performed while at the checkpoint, in uniform and well within the public view.

As mitigating factors, the Deciding Official considered the appellant's employment with the agency since September 8, 2002, and that he had no prior disciplinary actions. He also considered that the appellant had satisfactory technical performance, but found that the type of repeated interaction with fellow workers has caused several to bid for shifts or locations so that they are not working with the appellant. The Deciding Official considered it a mitigating factor that there was no notoriety outside of the agency to the appellant's offenses.

The Deciding Official considered the clarity on which the appellant was on notice of any rules violated in committing the offenses. He considered that the requirement to act professionally and courteously is stated in MD 1100.73-5 as is the requirement that employees must follow the instructions and cooperate with investigations. The Deciding Official found it aggravating that the appellant deliberately spoke with someone who he knew would be interviewed, even after having been instructed and warned not to by the OOI Special Agents. The Deciding Official noted that the appellant acknowledged reading TSA MD 1100.73-5 on January 5, 2017, and found that the appellant's responsibilities and expectations were sufficiently clear and communicated.

The Deciding Official considered that the appellant did not accept responsibility for his actions and attempted to minimize the seriousness of the incidents. The Deciding Official considered that even after being told of the allegations, the appellant disregarded the instructions of the Special Agents in an attempt to lessen the findings against him and provide a character witness. The Deciding Official considered that the appellant acknowledged in his written statement that his conduct was not appropriate and that he committed to eliminate horseplay while on duty but found that the appellant's comments to a TSO that the charge against him was "bullshit" undermine his claims and efforts. The Deciding Official found that the appellant is not a good candidate for rehabilitation.

The Deciding Official considered whether a lesser penalty may be appropriate and determined that a suspension is untenable because retention as a TSO is not reasonable and would adversely affect the efficiency and orderly operations of the operation. The Deciding Official considered the effect of the offense on management's confidence in the appellant's ability to perform the duties of the TSO position and determined that the appellant's conduct in this matter eroded his confidence in the appellant's integrity, trustworthiness, and ability to act professionally. The Deciding Official considered that the appellant has significantly contributed to a work environment that is not hospitable, resulting in several good employees choosing to bid for work locations away from the appellant. The Deciding Official also considered that the appellant's disregard for the non-disclosure agreement alone warrants removal under the Table of Penalties.

The Deciding Official found that the nature and seriousness of the misconduct and other aggravating factors far outweigh the mitigating factors and that removal is appropriate under either charge.

Under Section B. 3, pertaining to Conduct Unbecoming, the recommended penalty range is a 3-day to 14-day suspension and the aggravated penalty range is a 6-day suspension to removal. Under Section F.2, pertaining to Failure to Follow Instructions related to an official inquiry, investigation, or administrative or adjudicatory proceeding, the recommended penalty is removal. The Board determined that F.2 is the appropriate section of the Table for Charge 2 given the circumstances of the charge. F.2 specifically addresses the situation as it cites failure to follow instructions relating to releasing information regarding an official inquiry or proceeding when one knows or should know not to do so. Section D.2 does not more accurately describe the misconduct involved. The Guidelines of the Table state that in cases where an employee commits more than one offense, the Proposing and Deciding Official may consider whether the penalty should be in the Aggravated Penalty Range column corresponding to the most serious offense being charged. Additionally, the Guidelines state that management officials have the discretion to go outside the ranges listed in the guide if they determine that circumstances warrant. Although TSA favors progressive discipline, where appropriate, if the misconduct is egregious enough or is accompanied by sufficiently aggravating circumstances, progressive discipline may be inappropriate and removal or other severe action would be warranted on the first offense.

The Board found no merit to the appellant's argument that he was not on notice that his actions were inappropriate. The Board found the appellant's misconduct to be troubling and egregious. TSA employees, while on or off-duty, 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. TSA employees are also expected 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 and for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials. The appellant was aware of those requirements and clearly failed to abide by them on multiple occasions. The appellant repeatedly touched coworkers - behavior that is clearly inappropriate in the workplace. The behavior occurred while the appellant was in uniform, performing his duties, and at a checkpoint that is within view of the public. Additionally, the appellant failed to abide by the provisions of the non-disclosure agreement; he was given a

specific order not to discuss the investigation and he deliberately had a discussion about the investigation with another employee. The Board found that in light of the multiple instances of inappropriate behavior, and the egregious nature of the misconduct, management was not required to follow progressive discipline.

Removal is within the aggravated penalty range for Charge 1 and the recommended penalty for Charge 2. The Board finds that management's decision to remove the appellant from his 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=0876087875.TSA
Date: 2017.12.22 15:30:10 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

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