

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Respondent.

DOCKET
NUMBER
OAB—18-046

April 27, 2018

Issue: Jurisdiction (Untimely)

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to terminate him from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). For the reasons stated below, the appeal is DISMISSED.

BACKGROUND

On September 22, 2016, management terminated the appellant based on the Charges, *Workplace Violence, Unauthorized Recording, Failure to Cooperate in an Agency Investigation, and Inappropriate Comments*. An appeal was not received by the TSA Office of Professional Responsibility Appellate Board (Board) until March 26, 2018.

ANALYSIS AND FINDINGS

The Handbook to TSA Management Directive 1100.77-1, *OPR Appellate Board*, states that appeals must be filed no later than 30 days after the action is affected. It goes on to state that failure to file within 30 days, without a demonstration of good cause, will result in dismissal of the appeal as untimely. The appellant was notified of management's actions on September 23, 2016, and did not file an appeal with the Board until March 26, 2018. The appellant's representative contacted the Board on or February 25, 2018, requesting an update on the appellant's appeal. The Board was unable to find any evidence of a submission of an appeal by the appellant and notified the appellant's representative of their findings. In response, the appellant's representative submitted emails, dated October 24, 2016 and November 2, 2016, which appeared to be addressed to the Board. The Board contacted the Office of Information Technology (OIT) to seek recovery of all emails sent to the OPR.AB mailbox during October

and November 2016. The recovered emails do not show that an appeal was submitted to the Board in 2016 by the appellant's representative. On March 26, 2018, an appeal was submitted to the Board.

Conclusion. The appellant failed to file his appeal within 30 days and there is no demonstration of good cause to accept said appeal.

Order. The appeal is untimely and therefore, it is DISMISSED.

FOR THE BOARD:

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Chair
OPR Appellate Board



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—18-032

v.

April 20, 2018

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

Issue: Sleeping on Duty

OPINION AND DECISION

On February 15, 2018, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Sleeping on Duty*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Sleeping on Duty*, on one specification alleging that on August 29, 2017, at approximately 2300 hours the appellant was working in Terminal 5, Checkpoint 10 at the exit lane when she was observed sleeping while on duty.

Management alleged that the appellant's actions violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and observing basic on-the-job rules. These rules include, among others, reporting to work mentally and physically capable of performing their duties; responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; and abiding by all laws, rules, regulations and other authoritative policies.

Management also cited TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, which states, under Appendix A, that removal is required if a TSO sleeps on duty while assigned to a security activity.

In a Memorandum dated August 30 2017, a Transportation Security Manager (TSM) stated that on August 30¹, 2017, between 2310 and 2315, he arrived at the Terminal 5, Checkpoint 10 exit and witnessed the appellant sleeping while manning the exit. The TSM stated that the appellant “was sitting in the chair behind the podium with her eyes closed and head laid back.” The TSM stated that he woke the appellant up “when [he] tapped on the wall and said ‘hey.’” The TSM stated that the appellant “jerked awake and said ‘Oh [name of another individual] I am so tired.’” The TSM stated that he responded, “I am not [name of another individual] and you should stand up.” The TSM stated that he noted that the radio was placed next to the other chair as he walked through the exit door. The TSM stated that he went to the checkpoint and instructed a Lead Transportation Security Officer (LTSO) to have the appellant relieved of exit duties and that she was not to be placed on the exit until further notice. The TSM also stated that he pulled the Closed Circuit Television (CCTV) footage for the appellant’s time on the exit and that the CCTV “clearly shows [the appellant] struggling to stay awake from 2304 until my arrival at 2312:13.”

A pre-decisional discussion was held with the appellant on August 30, 2017. The appellant provided a written response in which she stated that she was on a rotation that required sitting at the exit. She stated, “my manager came through – before reaching the podium he told me to stay awake.” The appellant stated that as a solution, if she felt herself dozing off, she should have called to be tapped out and given her exit time to another team member.

The appellant was issued a Notice of Proposed Removal (NOPR) on October 11, 2017. On October 19, 2017, the appellant was given a letter informing her of a change of the Deciding Official due to the sudden and unexpected deployment of the original Deciding Official. The appellant was given an additional seven days in which to respond. The appellant requested and was granted an extension. The appellant met with the Deciding Official on November 4, 2017, and provided a written reply dated November 3, 2017. In her response, the appellant argued that the TSM’s account of the incident was not consistent with the CCTV video.

Management submitted a Request for Exception for Mandatory Removal through the Regional Director to the Deputy Assistant Administrator (DAA) for the Office of Security Operations (OSO). The DAA denied the request and upheld the action requiring the appellant’s removal on January 17, 2018. Management issued the Decision on Proposed Removal on February 15, 2018.

Management provided as evidence: Summary of Event by TSM, dated August 30, 2017; Pre-Decision Discussion with Oral Reply, dated August 30, 2017; Written statement of the appellant, dated August 30, 2017; appellant’s timecard for August 28, 2017 through September 2, 2017; CCTV footage and timeline of CCTV footage.

On appeal, the appellant argued that in the NOPR, “[the TSM] uses descriptors such as ‘appearing to nod off...’ and ‘possibly asleep,’” which the appellant argues indicated that the TSM was not sure whether the appellant was asleep.

¹ The TSM’s statement said August 30, 2017, but evidence in the record shows that the incident took place between 11:10 and 11:15 p.m. on August 29, 2017.

Management responded and argued that in addition to the TSM's statement, it also provided evidence, articulated through a video recording, that the appellant met the definition of sleeping by her lack of awareness, reflex, and deeper breathing, as shown. Management also argued that the appellant was given every opportunity to refute the Charge of *Sleeping on Duty*.

The appellant responded to management's reply and argued that the video footage shows her "tired, drained of strength, and fatigued to the point of exhaustion" but that it does not show her sleeping as described by management. She argued that the TSM's description of the events lacked the clarity and precision necessary to come to a concrete determination that she was, in fact, sleeping.

The appellant also argued that the ambiguity of her actions is further demonstrated by the fact that she was allowed to continue in her position of TSO until early January 2018 – over four months after the incident. She argued that there is not preponderant evidence of the infraction as evidenced by the fact that management believed she was retainable months after the incident took place, and that she was able to competently carry out the responsibilities of the job.

With regard to management's contention that she had every opportunity to refute the Charge, the appellant argued that in her written response to the NOPR, dated November 3, 2017, she refuted the charge of sleeping while on duty. She argued that she clearly stated that she was tired and explained the unique and unfortunate circumstances surrounding her exhaustion. She argued that she reiterated this point a second time during a meeting with the Deputy Assistant Federal Security Director (DAFSD)

The Board found that the CCTV video footage, along with the statement of the TSM, is preponderant evidence to support the Charge. Throughout the CCTV video, up until the point when the TSM enters the exit area, the appellant's head repeatedly bobs, signifying that she had fallen asleep. Prior to the TSM approaching her, the video also shows the appellant slouched in the chair with her head tilted back and eyes closed. During this period, the appellant was responsible for monitoring the exit. Therefore, the Charge, *Sleeping on Duty*, is SUSTAINED.

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

On appeal, the appellant argued that the penalty is too harsh. She referenced the fact that the Federal Security Director (FSD) and DAFSD made a request through the Regional Director that she be given a 14-day Suspension instead of termination. The appellant noted that the FSD and DAFSD cited relevant mitigating factors to be considered and the fact that they both still had confidence in her as a TSO. She also argued that she was allowed to continue to perform her job responsibilities up until removal which demonstrates her trustworthiness and ability to be retained.

The appellant also alleged that there was another TSO caught sleeping by the TSM the same night as her incident; yet no discipline was taken against that TSO. She alleged that the TSM gave that TSO an opportunity she was not given by removing the chair from the exits and bringing the issue to the attention of the TSO and supervisor. The appellant argued that there was a lack of fair and equitable treatment by the TSM toward her.

Management responded and argued that the appellant again, as in her response to the NOPR, directed attention to another employee who was presumed to be sleeping and that this was addressed in the Decision letter and was found to be without merit. Management argued that the

penalty of removal is required by policy, that attempts to lessen the penalty were rejected, and that the treatment shown the appellant was fair and equitable. Management argued that they, along with OSO leadership, considered the matter as a whole and determined that removal best serves TSA and its mission.

The appellant responded and continued to argue that management did not address the other TSO whom she alleged was dozing off nor her argument that the penalty against her was unfair.

The appellant argued that her removal was not based on the preponderance of the evidence but on the denial of the Exception to the Mandatory Removal request by OSO leadership. She argued that management recognized that there were many mitigating circumstances that help demonstrate that management would still have confidence in her ability and that it is their opinion that she should continue to carry out her job responsibilities, which she did from August 29, 2017, to January 4, 2018.

While the Deciding Official did discuss some of the penalty factors, MD 1100.75-3, Section G (Note) states that penalty factors do not apply to mandatory removals. The Board noted that in the Decision letter the Deciding Official considered the time elapsed from the appellant's violation to the issuance of the Decision. The Deciding Official stated that that the delay was necessary to perform proper fact-finding, to give due consideration to the appellant's responses, the two extensions the appellant requested and was granted, and because the original Deciding Official had to be reassigned due to being pulled from work to aid in hurricane recovery efforts. The Deciding Official stated that the Decision was further delayed due to the FSD submitting an allowable exception request to the DAA of OSO. The Board also noted that the Deciding Official stated that management made the decision to allow the appellant back into the screening location during the process out of necessity due to her position as a TSO on the overnight shift where staffing is critical and often limited.

The record shows that management requested an Exception to Mandatory Removal through the Regional Director to the DAA of OSO and that the request was disapproved by the DAA.

The Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A (1)(f), requires removal for the offense of sleeping on duty while assigned to a security activity. Additionally, under Section M.5 of the Table, the recommended penalty for sleeping on duty while engaged in security duties is removal. The preponderance of the evidence shows that the appellant was sleeping on duty. Removal is required under the MD.

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:



**Transportation
Security
Administration**

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OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Robert Miller
Acting Chair
OPR Appellate Board

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—18-011

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

April 10, 2018

Issue: Negligent Performance of Duty

DECISION ON RECONSIDERATION

On February 26, 2018, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's demotion from Supervisory Transportation Security Officer (STSO) to Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about March 13, 2018, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. 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

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Robert Miller
Acting Director
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—18-030

v.

April 15, 2018

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

Issue: Sleeping on Duty While Assigned to a Security Activity

OPINION AND DECISION

On February 12, 2018, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Sleeping on Duty While Assigned to a Security Activity*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management based the Charge, *Sleeping on Duty While Assigned to a Security Activity*, on one specification alleging that on November 18, 2017, between approximately 2320 and 2345 hours, at the D Security Checkpoint, Terminal 1, while serving as the Exit Lane Monitor, the appellant was observed sleeping at her duty post.

Management alleged that the appellant's actions violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (1) states that employees are responsible for reporting to work mentally and physically capable of performing their duties and 5. D. (7) requires employees to abide by all laws, rules, regulations and other authoritative policies. Section 6. B. requires employees to perform their duties in a professional and business-like manner throughout the workday and 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.

Closed Circuit Television (CCTV) footage from November 18, 2017, shows that while the appellant was on duty as the Exit Lane Monitor, at multiple intervals between approximately 2320 hours and 2345 hours, the appellant had her eyes closed while her head moved back and forth. The CCTV footage also shows that at approximately 2345 hours, a Supervisory Transportation Security Officer (STSO) approached the appellant at the podium and observed her sleeping. The STSO stood next to the appellant and held up fingers for the CCTV, showing that he was counting as the appellant sat with her eyes closed, unaware of his presence. The STSO submitted a statement on November 18, 2017, in which he stated that at approximately 2345, he observed the appellant "nodding her head while at the D exit in the manner that someone is falling asleep." The STSO stated that he walked out to the exit and stood right next to the appellant at the exit. The STSO stated that he "observed that her eyes were shut and appeared to be sleeping." He stated that he started to count with his hand in front of the podium and that he got to over a minute. The STSO stated that he observed that passengers were close to exiting so he woke the appellant not wanting passengers to find her asleep.

The appellant also submitted a statement on November 18, 2017. In her statement, the appellant stated that she was very uncomfortable and cold and that she sat at the exit for six hours without rotating to another location. The appellant stated that it was extremely cold and the light was dim. The appellant stated that it appears on the CCTV that she was "drifting and looked very sleepy." In another written statement, the appellant stated, "On November 18, 2017, I failed TSA because I was drifting off to sleep. It is my duty to ensure the safety of passengers at all times. It was freezing at D exit and I wore two jackets trying to stay warm. I would like very much to prevent this from happening again."

A pre-decisional discussion was held with the appellant on November 21, 2017. The appellant stated that it was not her intention to fall asleep. She stated that she fell asleep because of the conditions – low light and quiet conducive to being sleepy. The appellant stated she was on the Exit for three hours straight. She stated that her actions were not intentional and that she had informed two STSOs that she was very cold and wanted to move around. The appellant stated that to prevent this from happening in the future, she would be insistent that she be moved to another location.

The appellant was issued a Notice of Proposed Removal (NOPR) on January 4, 2018. She was granted an extension to reply to the NOPR and provided a written reply on January 21, 2018. In her reply, the appellant stated that on November 18, 2017, she was sitting at the exit podium with her arms drawn into the jacket up against her body due to how cold she had gotten. The appellant stated that she had come to work dressed to sit at the exit by wearing a long sleeve uniform shirt and two jackets. She stated that the D exit is the coldest exit in the airport and that multiple officers can attest that the exit is "continuously freezing cold" and that officers wear multiple layers of gloves, socks, shirts, and jackets when they know they will be assigned the D exit because it is too cold for them during the short 30-minute block of time they are sitting there. The appellant stated that she had been at the exit roughly three hours and had gotten so cold that she was displaying visible signs of hypothermia. The appellant alleged that review of the CCTV showed that she was visibly shivering while at the exit and that later she is shown no longer shivering, and that "drowsiness and fatigue had begun to set in because her body is starting to shut down." She stated that she called supervisors several times on the radio and asked to be taken off and moved to another exit because she was too cold, only to be told the other exits were occupied and she had to stay where she was. The appellant argued that had the supervisors known the signs of hypothermia and cold stress, and

knew the type of conditions that could potentially lead to hypothermia and cold stress, they might have taken her requests to be moved to another exit and her complaints of being too cold more seriously. She stated that she in no way intentionally violated TSA's Management Directives or Standard Operating Procedures. The appellant stated that the incident was purely unintentional and due to the extreme conditions to which she was exposed.

Management provided as evidence: Summary of oral response to Pre-Decisional Discussion, dated November 21, 2017; appellant's written response to Pre-Decisional Discussion, dated November 22, 2017; appellant's written statement, dated November 18, 2017; statements from an STSO, dated November 18 and 25, 2017; statements from an STSO, dated November 25 and December 29, 2017; and CCTV footage from November 18, 2017.

On appeal, the appellant argued that she had notified an STSO of the conditions at the D exit and provided email correspondence to support her claim. She argued that she has been an outstanding worker for 11 years and that she has performed Lead Transportation Security Officer (LTSO) duties; has never had a customer complaint; is vigilant and people-oriented; and has detected hundreds of prohibited items on persons and property.

Management responded and argued that while the appellant claimed that environmental factors were the primary cause of her actions, she admitted that she "was drifting in and out." Management argued that the CCTV footage is clear. The appellant is seen sleeping and unaware in an active security lane. Management argued that the clarity is not simply based on the CCTV footage, but on the statements of the STSO who stood next to the appellant and watched her as she slept, unaware of his presence. Management argued that the evidence further showed that while the appellant claimed "extreme cold" and "signs of hypothermia," she was seated for the duration of her actions and made no effort to stay awake by standing or moving about during the period she claimed she "was drifting in and out." Management argued that one minute is a long time for the STSO to stand next to the appellant without her knowing of his presence and that lack of awareness for any amount of time is sufficient to compromise security measures and procedures at the appellant's post.

The Board found that the CCTV video footage, along with the statement of the STSO and the statements of the appellant, is preponderant evidence to support the Charge. It is clear from the CCTV footage that the appellant's head was bobbing back and forth and that she was unaware of the STSO standing in front of her at the podium. Additionally, the appellant acknowledged that she was drifting in and out and that she "fell asleep" because of the conditions. Therefore, the Charge, *Sleeping on Duty while Assigned to a Screening Activity*, is SUSTAINED.

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

The Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A (1)(f), requires removal for the offense of sleeping on duty while assigned to a security activity. Additionally, under Section M.5 of the Table, the recommended penalty for sleeping on duty while engaged in security duties is removal. While the Deciding Official did discuss the penalty factors, MD 1100.75-3, Section G (Note) states that penalty factors do not apply to mandatory removals. A preponderant of the evidence showed that the appellant was sleeping on duty. Removal is required under the MD.

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:

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Debra S. Engel
Chair
OPR Appellate Board



**Transportation
Security
Administration**

OFFICIAL: Office of Professional Responsibility
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DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
OFFICE OF PROFESSIONAL RESPONSIBILITY
APPELLATE BOARD

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—18-031

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

April 16, 2018

Issue: Failure to Submit Accurate Information on a TSA Employment Eligibility Document

OPINION AND DECISION

On February 9, 2018, management removed the appellant from her position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the charge, *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*. The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*, on three specifications. Specification 1 alleged that on June 26, 2017, the appellant completed, initialed, signed and dated the *Transportation Security Officer Medical Questionnaire*, a TSA Employment Document for reemployment with TSA for the position of Transportation Security Officer as a condition of employment, and was asked in Question #1 “Have you been refused employment, dismissed from a job, or unable to stay in school due to any medical condition or excessive absenteeism?” The appellant answered the question “No”

when in fact she had been removed from TSA on June 1, 2015, for being found medically unable to perform the duties of a Transportation Security Officer.

Specification 2 alleged that on June 26, 2017, the appellant completed, initialed, signed and dated the *Transportation Security Officer Medical Questionnaire*, a TSA Employment Document for reemployment with TSA for the position of Transportation Security Officer as a condition of employment, and was asked in Question #7 “Have you ever had any illness, injury, or condition other than those already noted above?” The appellant answered that question “No” when in fact she had been removed from TSA on June 1, 2015, for being found medically unable to perform the duties of a Transportation Security Officer.

Specification 3 alleged that on June 26, 2017, the appellant completed, initialed, signed and dated the *Transportation Security Officer Medical Questionnaire*, a TSA Employment Document for reemployment with TSA for the position of Transportation Security Officer as a condition of employment, and was asked in Question #9, “Anemia, YES ___ NO ___,” to which the appellant stated “No.” The question goes on to ask, “Anemia, If YES, MO/YR of onset ___, MO/YR last occurrence ___. Has it resolved? YES ___ NO ___.” The appellant answered that question “No” when in fact she had been removed from TSA on June 1, 2015, for being found medically unable to perform the duties of a Transportation Security Officer.

Management alleged that the appellant’s conduct violated TSA Management Directive (MD), 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D., states that employees are responsible for behaving in way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (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. Section 6. A. states, in part, that TSA 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. 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. This applies whether the conduct is legal or tolerated within the jurisdiction it occurred. Management also alleged that the appellant’s conduct violated the Handbook to MD 1100.73-5, Section F. (1) which states that employees are responsible for providing truthful, accurate, and complete information in response to matters of official interest and providing a written statement, if requested to do so. Employees must follow established TSA and DHS procedures when responding to such requests for information or testimony.

On September 17, 2017, the appellant was re-hired as a TSO. During the re-hiring process, it was determined that she was a previous TSO at another airport, and that on June 1, 2015, she received a Non-Disciplinary Removal from her TSO position at that airport because of her Medical Inability to Perform.

On June 26, 2017, the had appellant completed, initialed, signed and dated the *Transportation Security Officer Medical Questionnaire* (Medical Questionnaire) which was provided to her to take to her medical provider to complete as a condition of employment and to determine her

eligibility for employment as a TSO. After review by the Office of the Chief Medical Officer (OCMO) on October 17, 2017, it was discovered that the answers the appellant provided on the Medical Questionnaire were inaccurate, untruthful, and inconsistent with the Department of Health and Human Services Fitness for Duty Report, dated May 5, 2014, which was a basis for the appellant's Non-Disciplinary Removal in June 2015.

On December 8, 2017, a Human Resources Specialist (HRS) met with the appellant to discuss the discrepancies. The appellant submitted a written response in which she stated, "It has been brought to my attention that I misunderstood and incorrectly answered questions asked during the application process for TSA. I was asked medical questions that I did not feel were pertaining to me."

The appellant was issued a Notice of Proposed Removal (NOPR) for *Lack of Candor* on December 13, 2017. That NOPR was rescinded on January 26, 2018, and the appellant was issued a NOPR, dated January 26, 2018, for *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*. The NOPR advised the appellant of her right to respond. The appellant responded in writing on January 30, 2018.

Management provided the following evidence to support the Charge: appellant's statement, dated December 8, 2017; appellant's Transportation Security Officer Medical Questionnaire, pages 1, 2, and 9, dated June 26, 2017; Department of Health and Human Services Determination Letter, dated May 5, 2014; Notice of Proposed Removal (Non-Disciplinary), dated June 10, 2014; Decision Letter, dated June 1, 2015; email correspondence from the Chief Medical Officer, dated October 17, 2017; and email correspondence between Human Resources Specialists (HRS) at appellant's recent and former duty stations/airports.

On appeal, the appellant argued that management committed reversible error by failing to respond to the appellant's request for a meeting prior to the issuance of the Decision. She also argued that pre-employment medical inquiries are prohibited under the Rehabilitation Act.

The appellant further argued that there is no proof of the requisite intent to support a lack of candor allegation. She argued that she previously acknowledged that she misunderstood the medical questions which were posed to her and that she failed, without an ill-intention, to answer the questions correctly. The appellant argued that at the applicable time, she did not feel that the medical questions actually pertained to her, since she had applied for medical leave under the Family and Medical Leave Act (FMLA) which had been approved by management. She argued that she believed her medical disqualification was not an issue since her symptoms had resolved and she was fully capable of performing the essential functions of the TSO position. The appellant argued that a misunderstanding based upon her excused absences is not sufficient evidence to prove lack of candor.

Management responded and stated that the NOPR for the Charge of *Failure to Submit Accurate Information on a TSA Employment Eligibility Document* was issued to the appellant on January 26, 2018, and that the appellant had until February 2, 2018, to submit an oral and/or written reply to the NOPR. Management stated that on January 30, 2018, the appellant, through counsel, by email submitted a written response to the NOPR to the Deputy Federal Security Director (DFSD). Management argued that there was no mention of a request for an oral reply in the transmittal email and attached a copy of the email to their response. Management also attached a

Declaration by the Human Resources Specialist (HRS), dated March 21, 2018, in which the HRS declared that from January 26, 2018, to the date of the Declaration (March 21, 2018), he had not received any telephonic or written request for an oral reply to the Deciding Official on the NOPR from the appellant or her representative,

With regard to the appellant's argument regarding medical inquiries, management argued that the Aviation and Transportation Security Act (ATSA), Public Law 107-71 - November 19, 2001, Section 111, (d) SCREENER PERSONNEL states, "Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of Title 49, United States Code." Management argued that the statutory language "Notwithstanding any other provision of law" preempts the Rehabilitation Act of 1973. Management argued that pursuant to the Under Secretary's exclusive authority under ATSA, Congress recognized that in order to ensure that Federal screeners are able to provide the best security possible, the Under Secretary must be given wide latitude to determine the terms and conditions of employment of screeners. Management further argued that ATSA grants the Under Secretary, also referred to as TSA's Administrator, the authority to establish hiring criteria for use in determining the qualification of individuals seeking employment as security-screening personnel. Management referenced 49 U.S.C. 44935 (e) (3) including, without limitation, the statutorily-specific requirement for visual color perception, aural acuity, physical coordination and motor skills required by 49 U.S.C. 44935 (f).

Management stated that Equal Employment Opportunity Commission (EEOC) Guidance, with respect to pre-employment inquiries and disability, provides that the employer may not ask questions about the nature or severity of a disability pre-conditional offer. However, after making a conditional job offer, an employer may ask any disability related questions or require a medical examination as long as all individuals selected for the same job are asked the same questions or made to take the same examination. Management argued that since a conditional job offer was issued to the appellant by TSA, on November 10, 2016, which preceded the request to the appellant to complete the Medical Questionnaire on June 26, 2017, as is done for all TSO candidates, TSA did not violate the Rehabilitation Act with respect to the appellant's application for TSA employment or discriminate against her based on a disability under the law.

With regard to the appellant's argument that there is insufficient evidence to prove the existence of lack of candor, management argued that the Charge which resulted in the appellant's removal from employment with TSA effective on February 12, 2018 is *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*, not *Lack of Candor*. Management argued that while the appellant discussed requisite intent to support a *Lack of Candor* charge, specific intent is not an aspect of the Charge of *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*. Management argued that there are no plausible explanations for the appellant's failure to correctly answer "yes" or "no" questions.

The appellant replied to management's response and continued to argue the points she made in her appeal. She alleged that it is undisputed that she had initially requested an oral reply meeting regarding the initial NOPR and that the substantive issues contained in the first and second actions "were, in fact, precisely the same," namely that she allegedly showed a lack of candor

regarding her prior medical condition. She argued that the parties were dealing with precisely the same issues, which were merely packaged in a somewhat different manner and that when dealing with largely the same legal issues, allegations and conclusions, the Agency has an obligation to grant an oral reply meeting to assure compliance with its own policies and procedures.

The appellant argued that the Agency's contingent job offer did not state that the offer was contingent on a medical examination, but rather, it indicated that other requirements existed, such as a credit check, and a criminal background check. The appellant cited several court cases and argued that the courts have held that such an incomplete offer did not constitute an "offer" and that hence, conducting a medical examination would not be proper, or lawful, after making such an "offer." She argued that therefore, the offer was not real and the medical inquiry was premature and the Agency cannot punish her through a dismissal by making a subsequent medical inquiry.

The appellant also continued to argue that management did not meet its burden of proof to establish the lack of candor by a preponderance of the evidence.

With regard to the appellant's arguments, the Board found that the appellant was issued a NOPR for the current Charge on January 26, 2018. The appellant's representative responded on her behalf via email to the Deciding Official on January 30, 2018. The subject of the email was "Response of [appellant] to Notice of Proposed Removal" and that email stated, "In response to the Amended Notice of Proposed Removal, dated January 26, 2018, I am attaching our response on behalf of [local Union] and [the appellant]. A signed representation form was previously sent to you last month." The appellant provided a written response to the NOPR and there was no request for an oral reply in the email correspondence to the Deciding Official. Therefore, the Board determined there was no failure by management to reply to a request for an oral reply.

Consideration of EEOC claims is not within the Board's jurisdiction. The Board found that the Agency's hiring process was properly followed. Additionally, the specifications are not based on the appellant's personal medical condition or on pre-employment medical questioning by TSA but rather regarding the fact that the appellant failed to submit accurate information on the TSA Employment Eligibility document she completed. During the standard background review process, it was discovered that the appellant had been previously terminated from TSA for non-disciplinary reasons related to a personal medical condition and the appellant failed to accurately answer questions on the Employment Eligibility document to reflect that.

Although the appellant repeatedly argued that the *Lack of Candor* was not proven, it is clear that that the appellant was not charged with *Lack of Candor*. The initial NOPR was rescinded on January 26, 2018, and the appellant received a NOPR for the current charge, *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*, on January 26, 2018.

With regard to specifications 1, 2, and 3 of the Charge, the Board found that the evidence in the record is preponderant evidence that the appellant failed to accurately answer the questions on the TSA Employment Eligibility Document. The questions from the document, as described in each specification are clear and the appellant's answers are contrary to the documentation in the record related to her previous employment with TSA. Therefore, the Charge, *Failure to Submit Accurate Information on a TSA Employment Eligibility Document*, 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 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 penalty is too severe and must be mitigated. She argued that a lack of candor offense does not fall under the heading, pursuant to MD 1100.75-3 (1) (2), for offenses where removal is required or for which removal is permitted for the first offense. The appellant argued that since it was "inadvertent conduct" and not "lack of candor," management failed to consider various components under the penalty factors to determine if mitigation was warranted. She also argued that management failed to adequately weigh and/or consider other lesser possible penalties which would have corrected the employee's allegedly proscribed workplace behavior.

Management responded and argued that the Deciding Official considered a number of factors as referenced in the Decision letter.

The Deciding Official considered both mitigating and aggravating factors. He considered the nature and seriousness of the appellant's offense and its relationship to her duties and responsibilities as a TSO. The Deciding Official considered that the appellant knowingly withheld information related to her previous removal from TSA and provided less than candid, truthful, accurate or complete information on a Transportation Security Officer Medical Questionnaire. He considered that as a TSO, the appellant is required to uphold, with integrity, the public trust involved in her position; he found that the appellant's actions demonstrated a lack of integrity and good decision-making ability. The Deciding Official considered that the appellant's position requires her to demonstrate integrity and honesty, by behaving in an honest, fair, and ethical manner and to show consistency in words and actions, and model a high standard of ethics. He found the appellant's failure to provide accurate information and withholding information on an official government document to be extremely serious, as it goes to the heart of the appellant's honesty and integrity. The Deciding Official considered the appellant's actions to be especially egregious and inexcusable as she acknowledged on the Transportation Security Officer Medical Questionnaire statement an understanding regarding falsification, misrepresenting and/or falsifying information on the form, yet she proceeded and provided inconsistent information on the form without regard to the statement.

The Deciding Official considered the effect of the offense upon the appellant's ability to perform at a satisfactory level and its effect upon supervisors' confidence in her ability to perform assigned security related duties. He considered that the fact that the appellant provided less than candid, truthful, accurate or complete information on her pre-employment paperwork caused her management team to lose all confidence in her ability to perform her duties and responsibilities in a professional and ethical manner, where integrity, truthfulness, and candor are critical in a security screening environment.

The Deciding Official considered the consistency of the penalty with those imposed upon other employees for the same or similar offenses and noted that per the Table, Section E.1, the

recommended penalty range for Failure to Submit Accurate Information on a TSA Employment Eligibility Document is removal.

The Deciding Official considered that the appellant's Online Learning Center (OLC) records indicate that she completed the New Hire Training Program Code of Conduct class on November 22, 2013, and that she reviewed TSA MD 1100.73-5 on November 22, 2013. He noted that she signed acknowledgment and understanding of possible penalties in regard to the falsification of information on a government form, which is punishable by fine and/or imprisonment and may be grounds for disqualification from TSA employment or disciplinary or adverse action if employed, on her Transportation Security Officer Questionnaire form, dated June 26, 2017. The Deciding Official considered that the appellant therefore, knew or should have known of TSA policy regarding expected behavior and of the specific policies she violated.

As mitigating factors, the Deciding Official considered that since the appellant's re-employment with TSA, she has had no counseling or discipline of record and had an otherwise satisfactory performance record since on-boarding. He also considered the appellant's appointment to TSA in February 2005, her otherwise acceptable performance, promotion to the F Band in August 2007, as well as her awards record. However, he found that the nature and seriousness of the appellant's misconduct outweighs the mitigating factors and warrants removal. The Deciding Official considered that the appellant was on notice with respect to her prior medical disqualification from TSA employment in 2015. He also found that the appellant's dishonest conduct of withholding information in completing official government documents indefensible, causing management to lose confidence in her ability to perform screening duties.

The Deciding Official stated that he does not believe that the appellant's behavior can be corrected with lessor discipline or adverse action and that removal is appropriate and warranted. He noted that MD 1100.75-3 outlines TSA's philosophy of utilizing progressive discipline to address employee misconduct but also states that nothing prohibits management from removing an employee after the first event when the misconduct is so serious as to warrant removal. The Deciding Official stated that he has no confidence in the appellant's potential for rehabilitation.

Under Section E.1 of the Table, the recommended penalty for *Failure to Submit Accurate Information on a TSA Employment Eligibility Document* is removal. The Board found that the Deciding Official properly considered the penalty factors. The Deciding Official concluded that management has lost confidence in the appellant's integrity and trustworthiness and that the nature and seriousness of the Charge outweighs the mitigating factors and determined removal to be the appropriate penalty. The Board agrees with the Deciding Official's conclusions.

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

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

FOR THE BOARD:

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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,

DOCKET NUMBER
OAB—18-033

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

April 24, 2018

Issue: Absence Without Leave (AWOL)

OPINION AND DECISION

On February 2, 2018, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Absence without Authorized 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 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, *Absence Without Authorized Leave (AWOL)*, on one specification alleging that the appellant was continuously absent from work without approved leave since October 19, 2017.

Management alleged that the appellant violated TSA MD 1100.73-5. *Employee Responsibilities and Code of Conduct* and the accompanying Handbook. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic on-the-job rules. These rules include observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section BB. (1) of the Handbook states that employees are expected to schedule and use earned leave in accordance with established procedures. The Handbook also provides that, whenever possible,

employees must obtain prior approval for all absences including leave without pay (LWOP). Employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in call-in procedures for their organization, to request and explain the need for unscheduled leave. Exceptions to this requirement include when the employee is incapacitated or when there are other exigent circumstances. In such instances, the employee, a family member or other individual should, as soon as is reasonably practical, notify the employee's supervisor of the unplanned leave. Repeated unscheduled absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA.

On December 1, 2017, the appellant was sent a Letter of Intent (letter) via certified mail and first class mail to notify him that his attendance record indicates that he is unable to maintain a regular work schedule and that he has been either recorded as leave without pay (LWOP) or absent without authorized leave (AWOL) since October 19, 2017. The letter also stated that the appellant's manager attempted to contact him via telephone on various occasions at the phone number listed in the Airport Information Management (AIM) system but there was no response from the appellant.

In addition, the letter stated that from June 29, 2017 through August 13, 2017, the appellant's time was recorded as LWOP and that from August 16, 2017 through October 15, 2017, the appellant took leave under the Family and Medical Leave Act (FMLA). The appellant was scheduled to return to work on October 18, 2017, at which time he presented medical documentation that did not indicate an end date of his restrictions. Management stated that the appellant was given a Light Duty Assignment Request form by a Human Resources Specialist (HRS) and was informed that his medical provider needed to indicate that his restrictions were short term in nature and that he should then apply for light duty. The letter also stated that the appellant was instructed to request leave through his terminal manager to cover his absence from duty. The appellant failed to comply with the directions and did not provide administratively acceptable medical documentation for a light duty assignment. The letter stated that the appellant's failure to report for duty, to follow established leave and call-off procedures, and to provide acceptable medical documentation for his recent absences resulted in him being charged with AWOL. The letter stated that management had attempted to contact the appellant at all three of his contact numbers listed in AIM but was unsuccessful.

In a Memorandum by a Transportation Security Manager (TSM) dated December 25, 2017, the TSM stated that the appellant contacted him on December 5, 2017, via telephone, and requested an explanation for the Letter of Intent he received. The TSM stated that he advised the appellant of the purpose of the letter and of management's inability to make contact with him via the telephone numbers he provided. The TSM stated that he also advised the appellant of his current AWOL status due to his failure to follow established leave and call-off procedures and his failure to provide administratively acceptable medical documentation for his absences. The TSM stated that the appellant told him that his previous telephone numbers listed were not active or available anymore and that he had just acquired a new phone with a new number. The TSM stated that the appellant claimed he was not aware that he was being marked AWOL and that he assumed he was just in an LWOP status until his case with the Department of Labor (DOL) was resolved. The TSM noted that he asked the appellant why he had not reached out to anyone in human

resources or management to follow up and that the appellant responded that the human resources supervisor told him they would eventually reach out to him. The TSM noted that he advised the appellant that he would continue to be marked AWOL until he brought in administratively acceptable medical documentation. The TSM also indicated that he advised the appellant of the criteria for administratively acceptable medical documentation. The TSM concluded that the appellant had not provided any administratively acceptable medical documentation for his absences and continued to fail to report for duty after their December 5, 2017, telephone conversation.

On January 8, 2018, a Notice of Proposed Removal (NOPR) was mailed to the appellant by both first class and certified mail. The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant provided a written reply on January 19, 2018, and was scheduled to meet with the Deciding Official for an oral reply on January 23, 2018. At the January 23, 2018, meeting the appellant's representative informed the Deciding Official that the appellant was having a plumbing issue at home and would not be attending the meeting.

Management provided as evidence in support of the Charge the Memorandum from the TSM, dated December 25, 2017; Letter of Intent, dated December 1, 2017; WebTA Certified Time and Attendance Summaries for Pay Periods 2017-21 through 2017-25; OPM-71 forms, covering November 12 through December 23, 2017; and a KRONOS automated time and attendance report.

On appeal, the appellant argued that the Charge is improper because it is inconsistent with the TSA Collective Bargaining Agreement (CBA). He argued that Article 3, Section D. 1. (b) of the CBA provides that "bargaining unit employees will be informed in writing or by email of any charge(s) of AWOL prior to the completion of payroll for the pay period within which the AWOL occurred." The appellant argued that review of the documents provided with the NOPR show that there is no indication of this CBA-required notification. The appellant argued that absent the CBA-required notification, the AWOLs should not have been considered. He also argued that management failed to provide supporting leave forms for October 19, 2017, through November 11, 2017.

Management argued in response that the record contradicts appellant's contention that management failed to properly put him on notice of his AWOLs. Management argued that the appellant was not at work and was not reachable by phone. Management further argued that when the appellant received the Letter of Intent, which resulted in him contacting the TSM, he failed to take any steps to address his AWOL status and continued his protracted absence from work.

Management argued that the evidence establishes that appellant received the Letter of Intent on December 5, 2017, and contacted the TSM acknowledging receipt of the letter. Management argued that the evidence also established that when management apprised appellant that it had been trying to contact him, the appellant admitted that his listed telephone numbers were no longer active or available. Management also argued that the appellant admitted that in his December 5, 2017, conversation with the TSM, the TSM requested the submission of administratively acceptable medical documentation that could address the AWOLs. Management reiterated that the appellant failed to submit medical documentation and continued to fail to report for duty.

The appellant responded to management's reply and continued to argue that the Charge was not supported by a preponderance of the evidence.

The Board noted that the appellant does not dispute that he was absent from duty beginning October 19, 2017; that he received the Letter of Intent, dated December 1, 2017; and that he called the TSM on December 5, 2017, acknowledging receipt of the Letter of Intent. Notwithstanding his receipt of the letter, follow-up conversation with the TSM, and even his receipt of the Notice of Proposed Removal, the appellant to date has provided no administratively acceptable documentation to support his continued extended absence, or to establish when, or if, he will be able to return to work. Instead, the appellant's sole argument is that management improperly charged him with AWOL without notifying him in advance during each pay period. The Board does not find this to be a basis to reject the Charge. Section L. 1. (a) of the Handbook to MD 1100.63-1, *Absence and Leave*, explicitly provides that an employee's time may be charged as AWOL when an employee fails to report for duty without prior approval, has an unauthorized absence from the workplace during the workday, or does not give proper notification for an absence. Further, Section L. 1. (i) provides that if an employee provides administratively acceptable documentation to substantiate an absence previously documented as AWOL, the charge to AWOL on the time and attendance report may be changed to the appropriate leave category. To be considered, the employee must submit the documentation before the end of the pay period immediately following the pay period in which the AWOL charge occurred. The appellant failed to provide medical documentation to support his absence throughout the disciplinary process. The WebTA Summaries and KRONOS report in the record are preponderant evidence that the appellant was in an AWOL status beginning October 19, 2017, and did not return to duty. Therefore, the Charge, *Absent Without Authorized 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.

In determining the appropriateness of the penalty, the Deciding Official considered a number of factors. He considered the appellant's satisfactory job performance, lack of prior discipline, and 12 years of service with TSA. The Deciding Official stated that notwithstanding these positive aspects of the appellant's record, his extended period of absence without approval is a serious matter because it is disruptive to the operation and impedes management's ability to provide adequate staffing for security functions. The Deciding Official stated that he did not give significant weight to the appellant's performance record because the appellant was not present to perform, nor was he likely to be present in the foreseeable future. The Deciding Official considered the seriousness of the appellant's conduct, the clarity with which he was on notice of the policy he violated, his work and disciplinary history, any mitigating circumstances and the guidance outlined in the Table.

The Deciding Official considered that as a TSO, the appellant is in a position of trust and held to a high standard of conduct and integrity. He considered that the success of the operation

depends upon every team member reporting for duty and arriving on time. The Deciding Official considered that the appellant's unacceptable attendance negatively impacted screening operations and placed an undue burden on the appellant's fellow officers. He considered that the appellant's actions undermined his confidence in the appellant's ability to perform his duties in a reliable and consistent manner.

The Deciding Official determined that in light of the extended length of the appellant's AWOL and his apparent abandonment of his position, the penalty falls within the aggravated penalty range. The Deciding Official also found that the appellant's continued failure to follow TSA policy and procedures resulted in a loss of confidence in the appellant's potential for rehabilitation.

Under Section A.4 of the Table, pertaining to AWOL for a period of more than five work days, the recommended penalty range is a 2-day to 10-day suspension and the aggravated range is an 11-day suspension to removal. The Guidelines of the Table state 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 Board finds that, given the appellant's extended period of AWOL, management had the right to consider a penalty in the aggravated penalty range. The appellant was instructed to provide administratively acceptable medical documentation to support his absence and to follow leave procedures and he failed to do so. The Board finds that removal is in accordance with TSA policy and within the bounds of reasonableness, and therefore, SUSTAINS the penalty decision.

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

FOR THE BOARD:

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Robert Miller
Acting Chair
OPR Appellate Board



Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—18-037

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

April 27, 2018

Issue: Tardy; Absence Without Leave

OPINION AND DECISION

On February 21, 2018, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two Charges: *Tardiness* and *Absence Without Authorized 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 means that a fact is more likely to be true than untrue. In this matter, the Board must determine whether the Charges, *Tardiness* and *Absence Without Authorized Leave*, are proven by a preponderance of the evidence.

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Tardiness*, on nine specifications which alleged that the appellant was tardy nine times between October 7, 2017 and December 10, 2017, ranging from one minute to two hours and thirty-four minutes.

Management based Charge 2, *Absence Without Authorized Leave*, on one specification alleging that on November 25, 2017, the appellant reported for duty at 0634 hours, two hours and thirty-four minutes after the start of her assigned scheduled shift. The appellant's request for leave was disapproved, and she was recorded as absent without authorized leave (AWOL).

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct* and the accompanying Handbook. Section 5. D. (1) of the MD states, in part, that employees are responsible for reporting to work on time and ready, willing, and able to perform the duties of their position. Section 5. D. (7) states that all employees are responsible for observing and abiding by all laws, rules, regulations, and other authoritative policies and guidance, written and unwritten. Section BB (1) of the Handbook states that employees are expected to schedule and use earned leave in accordance with established leave procedures. Whenever possible, employees must obtain prior approval for all absences including leave without pay (LWOP). Employees are required to contact their supervisor as far in advance of their scheduled tour of duty as possible, or by the time established in the call-in procedures for their organization, to request and explain the need for unscheduled leave. Exceptions to this requirement include when the employee is incapacitated or when there are other exigent circumstances. In such instances, the employee, a family member or other individual should, as soon as is reasonably practical, notify the employee's supervisor of the unplanned leave. Repeated unscheduled absences may negatively reflect on the employee's dependability and reliability, and may adversely affect TSA's mission. Unapproved absences will be charged as absent without leave (AWOL). AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA. Section BB (2) states that tardiness includes delays in reporting to work at the employee's scheduled starting time, returning late from lunch or scheduled break periods, or returning late to the employee's work site after leaving the workstation on official business or leave. Unexplained and/or unauthorized tardiness shall be charged as AWOL.

The appellant was issued a Notice of Proposed Removal (NOPR) on January 12, 2018. The NOPR advised the appellant of her right to make an oral and/or written reply. The appellant submitted a written reply on January 19, 2018. In her written reply she stated that she "accepts responsibility for her tardiness as alleged in the Charge" for Charge 1 and that she "accepts responsibility for her absence without leave" for Charge 2.

Management supported the Charge with: Summary of Pre-Decisional Discussion by Transportation Security Manager (TSM), dated November 25, 2017; statement from the appellant, dated November 25, 2017; Memo to File from Supervisory Transportation Security Officer (STSO), dated November 25, 2017; AWOL Notification email, dated November 25, 2017; Request for Leave or Approved Absence form (OPM-71), dated November 25, 2017; WebTA Certified Time and Attendance Summary for November 12, 2017 to November 25, 2017; and Punch Origin report covering October 5, 2017 through December 18, 2017.

On appeal, the appellant argued that management did not prove the charges by a preponderance of evidence. Specifically, she stated that "for reasons presented in her written reply, Management did not prove the charges against [her] by a preponderance of the evidence."

The Board notes that the appellant stated that she "accepts responsibility" for her tardiness and absence without leave in her written reply which contradicts her statement in her appeal. The Board finds that the Punch Origin report is preponderant evidence that the appellant arrived late for her shift for the time specified on each of the dates listed in the nine specifications of Charge 1. However, the Board found that the date and time specified in specification 7 is the same date and time used as the basis for Charge 2, wherein the appellant was charged with AWOL for 2 hours and 34 minutes on November 25, 2017. The appellant should not be charged as both tardy

and AWOL for the same timeframe. Therefore, specification 7 is NOT SUSTAINED. Specifications 1, 2, 3, 4, 5, 6, 8 and 9 are SUSTAINED and therefore, Charge 1, *Tardiness*, is SUSTAINED.

With regard to Charge 2, the Board finds that the WebTA Summary, OPM-71 form and the Punch Origin report are preponderant evidence to prove the Charge. Therefore, Charge 2, *Absence Without Authorized Leave*, is SUSTAINED.

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

On appeal, the appellant argued that her removal is unduly harsh and unreasonable. She argued that in her written reply, she presented mitigating factors which included acknowledging her tardiness, as well as the effects of her tardiness on operations. The appellant stated that each instance of tardiness was the result of an unavoidable ongoing chronic medical condition. The appellant argued that she has two different chronic conditions that were diagnosed in 2006 and 2014 but did not provide any information regarding the alleged conditions. The appellant stated that she requested a reasonable accommodation until she was able to get the necessary Family and Medical Leave Act (FMLA) documents from her medical provider. She also stated that she made efforts to remedy her tardiness, specifically by making arrangements with her medical provider to get the necessary FMLA paperwork that she claimed would have excused her tardiness over the past several months. The appellant stated that her appointment with her medical provider was scheduled for January 31, 2018, and that she now has the FMLA paperwork completed by her medical provider but failed to include any evidence related to FMLA paperwork with her appeal.

Management responded and argued that the appellant's issues with tardiness are well-documented and lengthy, noting that prior to her removal action, the appellant received a 14-day suspension for tardiness; a 7-day suspension for tardiness; three Letters of Counseling; and a Leave Restriction. Management argued that the penalty of removal, based on the appellant's prior misconduct for tardiness, is clearly appropriate and in accordance with the Table.

The Deciding Official stated that she considered the seriousness of the appellant's misconduct and its relationship to her position; the clarity with which she was on notice of the policies she violated; the effect of her conduct on the Deciding Official's confidence in the appellant's ability to perform her assigned duties; her work and disciplinary history; her potential for rehabilitation; and the consistency of the penalty with those imposed upon similarly situated employees for the same or similar offenses. The Deciding Official also considered the Table.

The Deciding Official considered that as a TSA employee, the appellant is expected to meet high standards of conduct, reliability and dependability and that the appellant's actions failed to uphold that standard. The Deciding Official considered that the success of the operation depends upon every team member reporting for duty and arriving on time and that the appellant's continued tardiness reflects her repeated failure to comply with TSA policy.

As mitigating factors, the Deciding Official considered the appellant's satisfactory job performance and six years of service with TSA. The Deciding Official found however, that the appellant's performance and length of service are not sufficient to outweigh the severity of the offense.

As an aggravating factor, the Deciding Official considered that management had previously attempted to correct similar misconduct through numerous disciplinary and corrective actions including a 14-day suspension on June 16, 2017, for 18 occurrences of tardiness and a 7-day suspension for tardiness and AWOL on October 20, 2016. Although not disciplinary, the Deciding Official also considered that the appellant received a Letter of Counseling on September 21, 2017, for failure to follow proper call-off procedures; a Letter of Counseling on July 17, 2015, for unscheduled sick leave; and a Letter of Counseling on April 27, 2014, for unscheduled absences. She also considered that the appellant was placed on a Leave Restriction on August 19, 2017. The Deciding Official considered that each of these actions placed the appellant on notice that further misconduct may lead to more severe disciplinary action, up to and including removal from Federal service.

The Deciding Official also considered that reporting late for duty becomes a burden to co-workers and may diminish the quality of security. She considered that management made a reasonable and sufficient attempt to correct the appellant's behavior through disciplinary and corrective actions without success, such that further attempts would be futile. The Deciding Official determined that based on the appellant's repeated violations of attendance policies in the face of recurrent discipline, the appellant has no potential for rehabilitation.

The Deciding Official considered that the appellant's failure to report for duty, as scheduled, is disruptive to the operation and negatively impacts her supervisors' ability to effectively manage the staffing needs of the airport. The Deciding Official also considered that the appellant has shown unreliable attendance as a TSO while employed with TSA.

Under Section A. 1 of the Table, pertaining to Tardy, the recommended penalty range is Letter of Reprimand (LOR) and the aggravated penalty range is a 1-day to 5-day suspension. Under Section A.2, pertaining to AWOL of one workday or less, the recommended penalty range is an LOR to 2-day suspension and the aggravated range is a 3-day suspension to removal. The Guidelines of the Table state that for second and/or successive offenses, the penalty should generally fall within the aggravated penalty range column. The Guidelines state that examples of aggravating factors include prior disciplinary record and prior warning and/or advisement not to commit misconduct. Additionally, as cited by management in their response to the appellant's appeal, the Guidelines of the Table also state that management has the discretion to go outside the ranges listed in the guide if they determine the circumstances warrant.

The Board finds that the appellant's removal, given her extensive history of discipline and corrective actions for similar misconduct related to attendance and leave, is within the bounds of reasonableness, and therefore SUSTAINS the penalty decision.

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:

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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,

DOCKET NUMBER
OAB—18-040

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Respondent.

April 20, 2018

Issue: Jurisdiction (Termination in Trial Period)

OPINION AND DECISION

On March 9, 2018, TSA management terminated the appellant's employment as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DISMISSES the appeal.

The appellant filed an appeal on April 2, 2018. Based on TSA Management Directive 1100.31, *Trial Periods*, management terminated the appellant during his trial period. The appellant commenced employment as a TSO on June 11, 2017. The preponderance of evidence indicates that the appellant was subject to a two-year trial period pursuant to Section 6.A (2) of the MD, and was still serving in his two-year trial period at the time of his termination. The **Note** to Section 7.B (1) of the MD provides that "[a]n employee who is terminated during his or her basic trial period does not have appeal, grievance, or peer review rights with regard to this termination."

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

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

FOR THE BOARD:

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Debra S. Engel
Chair
OPR Appellate Board



**Transportation
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OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598