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—17-116

October 31, 2017

Issue: *Inappropriate Conduct*

OPINION AND DECISION

On August 21, 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 three specifications. Specification 1 alleged that on April 5, 2017, at approximately 1415 hours, the appellant was performing Travel Document Check (TDC) duties at a checkpoint. A TSA Pre✓™ female passenger approached the appellant's position and the appellant said to her "I noticed you have an Adam's apple. How do you cover that thing up?"

Specification 2 alleged that on May 1, 2017, at approximately 1130 hours the appellant was in the walkway near a gate in Terminal 3. A passenger approached the appellant and said "Sir I have a question." The appellant responded, "leave me alone and go bother someone else."

When asked why he was being so rude, the appellant responded "leave me alone, I'm busy and I don't have time for you."

Specification 3 alleged that on May 9, 2017, the appellant was performing Security Officer (SO) duties at a checkpoint. A female passenger stepped into the AIT with a scarf around her neck. When the appellant asked her to remove it, she tossed it in his direction. The appellant threw it back at her above her shoulders while she was in the required arms raised position, then proceeded to argue with the woman.

Management alleged that the appellant's conduct violated TSA Management Directive 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. D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA.

On April 5, 2017, the appellant was working at the TDC position at the checkpoint. In a statement, dated April 11, 2017, a Supervisory Transportation Security Officer (STSO) stated that a female passenger approached him and informed him that an officer spoke to her inappropriately while she was having her boarding pass checked. The STSO stated, "the female passenger informed me that [the appellant] made an inappropriate comment to her referring to her having an adams [sic] apple and why doesn't she cover it up." The STSO stated that the passenger stated that the appellant followed up the comment with "April fools." The STSO stated that the passenger was visibly upset and "on the verge of tears" while explaining the situation to him. The STSO stated that he walked the passenger over to the area to identify the officer in question and that the passenger pointed out the appellant.

A second STSO submitted a statement, dated April 20, 2017. In her statement, the STSO stated that on April 5, 2017, at approximately 1415, an STSO referred a female passenger to her who had complained about an inappropriate comment the appellant said to her. The STSO stated that at the time the comment was made, the appellant was the TDC officer near two of the lanes. The STSO stated that when she asked the passenger what the comment the appellant made was, the passenger replied that the appellant said, "I noticed you have an Adam's Apple. How do you cover that thing up?" The STSO stated that the passenger also mentioned that the appellant said he was joking and that it was an April Fool's joke. The STSO stated that the passenger said that the date was April 5th and that April Fool's had passed. The STSO also stated that the passenger was visibly upset. The STSO stated that at 1630 she spoke to the appellant in the presence of another STSO and that the appellant said he was joking; that he was "only lightening the mood

and trying to make the woman smile." The STSO stated that the appellant "also realized the seriousness of the situation, accepted ownership and apologized for his use of words."

On May 1, 2017, the airport received an email to its "TSA Complaints" email address from a passenger who stated that he was with the "US Capitol Police." In the email, the passenger gave the appellant's first and last name and stated that he wanted to report an incident. He stated that on May 1, 2017, at approximately 1130 hours, he approached a uniformed officer (later identified as the appellant) outside the TSA checkpoint and told the officer that he had a question. The passenger wrote that the officer responded by saying "leave me along [sic] go bother someone else." The passenger stated that he asked the officer why he was being so rude; that he just had a simple question, and that the officer responded "leave me alone I'm busy I don't have time for you." The passenger stated that he then asked the officer for his name and the officer quickly walked away into the TSA screening area. The passenger stated that he was embarrassed by the way the appellant spoke to him and felt his behavior was completely unprofessional. He stated that he requested to speak to a manager and that a supervisor helped him locate the appellant and gave him the appellant's name.

On May 9, 2017, the appellant was assigned to the Advanced Imaging Technology (AIT) when a female passenger entered the AIT wearing a scarf. An incident arose where both the passenger and the appellant each alleged that the scarf was thrown at them by the other. An STSO on duty at the checkpoint on the date of the incident submitted a statement dated May 11, 2017. The STSO stated that on May 9, 2017, at approximately 1925 hours, she approached the AIT and saw the appellant and a female passenger arguing. The STSO stated that the passenger told the appellant that she wanted his name and that the appellant responded by saying, "No, I want your name, I want your name, I want your name!" The STSO stated that the appellant then told her that the passenger threw her scarf in his face; that he was assaulted and wanted police called. The STSO stated that she asked the passenger to step out of the screening area of the AIT to speak to her and that the appellant walked along with the passenger and stood beside them until she asked him to step back into the AIT to continue screening passengers. The STSO stated that the passenger stated "I have been on a plane since 4 am and just travelled from London. I am tired of people yelling at me and telling me what to do. I'VE HAD IT!" The STSO stated that the passenger also stated that the appellant's "directions were rude and unprofessional." The STSO stated that she asked the passenger if she had thrown her scarf in the appellant's face as he claimed, to which the passenger replied "of course, not." The STSO stated that about five minutes after the passenger left the checkpoint, the passenger's husband returned and said that he would like to file a complaint and requested the appellant's name. The STSO stated that the passenger's husband stated that the appellant "was completely rude to his wife and did not provide clear instructions on what she should do during screening." The STSO stated that after the passenger's husband left, she asked the appellant what happened and that the appellant stated that the passenger threw her scarf in his face when he asked her remove it and told her he would hold it for her.

The appellant submitted a written statement on May 11, 2017, regarding the incident. He stated that he told the passenger to step into the yellow prints, as he tells all of the passengers, and that she reluctantly did so. The appellant stated that he asked the passenger to let him hold her scarf so a pat down could be avoided. He stated "she gave me a mean look and flung the scarf at my face." The appellant stated, ". . . when I said she threw her scarf at me, she started yelling and having a tantrum. I called for the STSO."

The appellant submitted a second statement on May 11, 2017, regarding the incident. In his second statement the appellant stated, "It's been a stressful time for me and I did something I should not have done. I threw the scarf back at her. Even though it was very disrespectful for her to throw her scarf at me, I should not have thrown it back."

The appellant was issued a Notice of Proposed Removal (NOPR) on June 26, 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 July 10, 2017, and gave an oral reply.

Management included as evidence: statement from the appellant, dated April 5, 2017; statement from an STSO, dated April 11, 2017; statement from an STSO, dated April 12, 2017, statement from a Transportation Security Manager (TSM), dated April 20, 2017; statement from an STSO, dated April 20, 2017; statement from an STSO, dated May 7, 2017; statement from a TSO, dated May 9, 2017; statement from the appellant, dated May 9, 2017; statement from an STSO, dated May 11, 2017; two statements from the appellant, dated May 11, 2017; email from a U.S. Capitol Police Special Agent, dated May 1, 2017; and Closed Circuit Television (CCTV) video from May 9, 2017.

On appeal, the appellant argued that the Decision should be overturned because management has not shown that his removal is legally sufficient because the Charge was not proven by a preponderance of evidence.

With regard to specification 1, the appellant stated that on April 5, 2017, he engaged a female passenger in friendly conversation; "jokingly" remarking that he could see the woman's Adam's apple. The appellant stated that when the passenger appeared offended he immediately assured her that his comment was made in jest.

With regard to specification 2, the appellant argued that management did not prove the specification by a preponderance of evidence. He argued that the only record of the remarks he allegedly made to the passenger were from an email statement that the passenger sent to management and that the uncorroborated statement does not establish by preponderant evidence that he made the statements. The appellant stated that he would never speak to a passenger in a rude manner and that he has repeatedly gone above and beyond to help passengers. He stated that he asked the passenger to "wait a moment" or words to that effect because he was momentarily preoccupied. He argued he is a dedicated employee and that there is no reason to distrust his word.

With regard to specification 3, the appellant stated that a female passenger stepped into the AIT with a silk scarf around her neck and that per his training, he asked her to remove it so he could inspect it by hand. The appellant stated that the passenger was "exhibiting a disrespectful countenance" and tossed the scarf at him. He stated that he "tossed it back to the passenger" after he inspected it.

Management responded and argued that the appellant's assertion that the Decision should be overturned because management did not show legal sufficiency is incorrect. Management argued that in the material relied upon for the NOPR, legally sufficient preponderant evidence

was provided for each incident. Management stated that for specification 1, specific statements from the STSOs corroborated that the female passenger was visibly upset and on the verge of tears over the Adam's apple comment made by the appellant. Management stated that for specification 2, the statement from the U.S. Capitol Special Agent, "credibility presumed," was very detailed, leading the Deciding Official to conclude that it was more likely than not that the incident occurred as documented. With regard to specification 3, management stated that the CCTV footage of the scarf incident shows that the appellant threw the scarf back at the passenger while she was in the AIT and that the appellant's actions caused the passenger to be sent back through a second time and her scarf was examined again by a female TSO. Management also noted that the CCTV footage shows the appellant exchanging words with the passenger after she exited the AIT.

The appellant responded and argued that a statement provided by police officers is not automatically afforded heightened credibility and that the presumption of credibility solely due to the witness's status as a police officer is misplaced. He argued that he has been with TSA for almost 15 years and has no history of untrustworthiness and that it is his statement, not the police officer's statement, that is more credible. The appellant argued that one statement from a passenger that is not corroborated is insufficient to prove specification 2.

The appellant also argued that in its reply to his appeal, management added two new facts to its account of the events described in specification 3. He noted that management stated that the appellant's actions caused the passenger to be sent back through a second time and that her scarf was examined by a female TSO. He argued that management failed to include these alleged facts in the NOPR or the Decision and thus he had no opportunity to address them. The appellant argued that the Board should not consider the new alleged facts as proof of the specification.

With respect to specification 1, the appellant admitted that he made the comment to the female passenger. The comment he made was clearly inappropriate. The appellant's statement along with the statements of the two STSOs who spoke to the passenger after the incident are preponderant evidence to support the specification. Therefore, specification 1 is SUSTAINED.

With respect to specification 2, the Board found that the email statement of the passenger is detailed and specific and that there is no reason not to believe the passenger, whether he is a police officer or not. The Board noted that the passenger took the time to seek out someone from TSA to find out the appellant's name and to file a complaint right after the incident occurred, which lends further credibility to the passenger's statement. The Board found that there is preponderant evidence to support that the appellant's conduct toward the passenger was inappropriate. Therefore, specification 2 is SUSTAINED.

With respect to specification 3, the Board found that the CCTV footage, clearly shows that the appellant threw the scarf at the female passenger as she was standing in the AIT. Additionally, the record shows that the appellant provided two statements regarding the incident, one before he watched the CCTV footage and one after he watched the CCTV footage. The appellant failed to mention that he threw the scarf at the passenger in his first statement. In his second statement, provided after he watched the CCTV footage, the appellant stated, "It's been a stressful time for me and I did something I should not have done. I threw the scarf back at her." The statement of the STSO indicated that the appellant responded to the passenger by saying "No, I want your

name, I want your name, I want your name!" She also indicated that the appellant told her that he was assaulted and wanted to call the police. The appellant's conduct toward the passenger was inappropriate. The Board did not need to consider the new facts presented by management in their reply. The CCTV video, the statement of the STSO and the appellant's statement is preponderant evidence to support the specification. Therefore, specification 3 is SUSTAINED.

Having sustained all of the specifications, 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 the penalty is unreasonable because management failed to abide by the doctrine of progressive discipline. He argued that in his more than 14 years of service with TSA, he has never been disciplined. He acknowledged receiving a Letter of Counseling (LOC) on March 1, 2017, but argued that it was merely a corrective action and does not constitute a disciplinary penalty.

The appellant also argued that management failed to properly weigh the mitigating factors. The appellant reiterated that he has no disciplinary history and argued that he has earned multiple awards and commendations from his colleagues and supervisors for his work as a TSO. The appellant also stated that he has maintained satisfactory performance evaluations. The appellant argued that he has enormous potential for rehabilitation. He argued that he was quick to self-report the interaction involving the scarf and stated that he takes responsibility and understands how to alter his behavior moving forward.

The appellant stated that there are also mitigating personal circumstances involved as during the period that he allegedly told the passenger that he was too busy to help him, he was managing the care of his mother who had recently been hospitalized and was using a heart monitor. He stated that he was very concerned about her condition and was dealing with his own personal health issues as well.

The appellant argued that a less severe, alternative sanction would be sufficient to deter him from behaving in a way that would warrant further disciplinary action. The appellant argued that removing him would deprive TSA of a valuable and dedicated Federal employee and that his career should not end for three alleged errors in judgment over the course of 14 years of service.

Management replied and argued that the Deciding Official found that the appellant's misconduct was extremely aggravating and that the appellant used extremely poor judgment. Management argued that the Deciding Official used the Table in its entirety, to include the guidelines which allow for management's discretion to go outside of the ranges listed; if management determines that the circumstances warrant. Management stated that the Deciding Official found that the appellant's frequently repeated misconduct was egregious in nature and is in direct conflict with TSA's effort and resources to be an organization providing world-class service and security.

The appellant replied and argued that management imposed a penalty in the aggravated range without justification. He argued that he did not receive any warnings prior to receiving the ultimate penalty of removal. The appellant stated that while it is true that the allegations brought against him are based on three different events, he was disciplined for all three at once, without an opportunity to reflect on his past behavior.

The Deciding Official considered the aggravating and mitigating factors including the seriousness of the appellant's actions and their relationship to his duties and responsibilities as a TSO. He noted that as a TSO, the appellant is entrusted with securing the lives and safety of the passengers. The Deciding Official considered that on March 1, 2017, the appellant received an LOC for inappropriate conduct with a passenger, noting that while a corrective action is not formal discipline, it is evidence of the appellant's failure to abide by agency policies, especially as related to the current charge. The Deciding Official considered that the appellant was aware of agency policies in regard to employee conduct and responsibilities as evidenced by a review of the appellant's Online Learning Center (OLC) history, which shows the appellant acknowledged he read and understood TSA MD 1100.73-5, as recently as March 14, 2017.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA since November 10, 2002, has received satisfactory performance reviews and does not have a history of formal discipline. The Deciding Official found however, that the aggravating factors far outweigh the mitigating factors.

The Deciding Official found the appellant's misconduct and treatment of passengers to be serious and extremely aggravating. The Deciding Official also found it aggravating that the appellant never took responsibility for his actions, especially regarding the incident involving the scarf. The Deciding Official found that the appellant exercised poor judgment and that he continued to fail to conduct himself in accordance with agency policies and therefore, considered the appellant's potential for rehabilitation to be poor.

Under Section B. 5, pertaining to Inappropriate Conduct, the recommended penalty range is a Letter of Reprimand (LOR) to a 5-day suspension and the aggravated penalty range is a 6-day suspension to removal. 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. The Guidelines also state that examples of aggravating factors include prior warning/advisement not to commit misconduct; notoriety and impact on reputation of agency; and public awareness. 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 the appellant's misconduct to be troubling, particularly the fact that there were three incidents of misconduct involving passengers between April 5 and May 9, 2017. The Board also noted that the appellant was given a corrective action for similar misconduct, also involving a passenger, in March 2017. 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 on three occasions. The appellant made an offensive comment to a passenger when she approached him while he was performing TDC duties; he was rude and dismissive to a passenger who approached him for assistance; and he threw a scarf at a passenger while she was being screened in the AIT. The appellant, in his position as a TSO, has direct contact with the traveling public and all of the incidents involved direct contact with the traveling public. Employees must perform their duties in a professional and business-like manner throughout the workday and in these instances, the appellant failed to do so. The Board found that in light of the multiple instances of inappropriate conduct involving passengers, and the particularly egregious nature of the misconduct described in specification 3, wherein the appellant threw something at a passenger in a security environment, management was not required to follow progressive discipline.

Removal is within the aggravated penalty 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

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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,
Respondent.

DOCKET NUMBER
OAB—17-108

October 3, 2017

Issue: *Jurisdiction (Termination in Trial Period)*

OPINION AND DECISION

On August 3, 2017, 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 September 2, 2017. Based on TSA Management Directive 1100.31-1, *Trial Periods*, management terminated the appellant during his trial period. The appellant commenced employment as a TSO on May 1, 2016. On appeal, the appellant argued that he is only subject to a one-year trial period because he is a Veteran. The applicable Section is 6.A.(2)(a), which states that the basic trial period is one (1) year from the effective date of the appointment for full time and part-time employees who are eligible for veteran's preference. In addition, Section 6.A.(2)(c) states that if an employee attains eligibility for veteran's preference while serving a basic trial period of two (2) years, the basic trail period is immediately reduced to one (1) year.

Management replied and argued that there is no evidence that the appellant is a preference eligible employee. Pursuant to Section 6.A.(2)(a), employees who are eligible for veteran's preference serve a basic trail period of one year from the effective date of appointment. Section 4.H defines Veteran's Preference Eligible as "An individual who meets the requirements for veteran's preference as defined in 5. U.S.C.§ 2108." There are numerous ways to qualify for a veteran's preference, if honorably discharged, such as serving on active duty for more than 180 consecutive days, receiving a campaign badge, or having a service-connected disability.

Management submitted as evidence a Standard Form (SF) 144, *Statement of Prior Federal Service*, which shows that the appellant served in the Army from November 18, 2008 to May 7, 2009 and received an honorable discharge. Based on the dates in the SF 144, the appellant served in the military for a total of 171 days. Management also indicated that they requested the appellant's DD214, to show his eligibility for veteran's preference but have not been provided this information.

The appellant provided no proof that that he qualified for a veteran's preference and the evidence shows that he did not serve more than 180 consecutive days. 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:

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)

Lead Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-115

October 3, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

On or about September 3, 2017, the Transportation Security Administration (TSA) demoted the appellant from his position as a Lead Transportation Security Officer (LTSO) to the position of Transportation Security Officer (TSO). On September 19, 2017, the appellant appealed the demotion to the TSA Office of Professional Responsibility Appellate Board (Board). On October 3, 2017, the appellant's representative withdrew the appeal before the Board.

Based on the foregoing facts, the Board is divested of jurisdiction to consider the appellant's appeal.

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

FOR THE BOARD:

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—17-106

October 12, 2017

Issue: *Failure to Follow Direction; Absence Without Leave (AWOL); Failure to Follow Sick Leave Restriction; Failure to Follow Absence Reporting Procedures; Unauthorized Absence*

OPINION AND DECISION

On August 1, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on five Charges: *Failure to Follow Direction; Absence without Leave (AWOL); Failure to Follow Sick Leave Restriction; Failure to Follow Absence Reporting (Leave) Procedures;* and *Unauthorized Absence.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Failure to Follow Direction,* on three specifications. Specification 1 alleged that on May 2, 2017, while assigned to the checkpoint, the appellant spoke briefly with a Transportation Security Manager (TSM), after which time the TSM directed the appellant back to the screening floor to which the appellant failed to comply. A few moments later, the appellant was instructed again to return to the screening floor, this time by a Supervisory Transportation Security Officer (STSO). The appellant failed to comply with the instructions given by the STSO as well.

Specification 2 alleged that on March 8, 2017, while assigned to the checkpoint, the appellant was directed to screen a female passenger by a Lead Transportation Security Officer (LTSO). The appellant ignored the instructions given to her and instead walked away from the screening floor without authorization towards the supervisor's podium.

Specification 3 alleged that on March 8, 2017, while assigned to the checkpoint, at approximately 3:34 p.m., the appellant was present at the supervisor's podium at which time she was directed back to the screening floor by an STSO. The appellant falsely replied to the STSO that an LTSO had given her permission to be there and did not comply with the STSO's instructions. The STSO again directed the appellant back to the screening floor. The appellant failed to respond until asked by an Expert Transportation Security Instructor (ESTI) to which she complied.

Management based Charge 2, *Absence without Leave (AWOL)*, on three specifications that were upheld by the Deciding Official of the original 12 specifications charged by the Proposing Official. Specification 1 alleged that on January 24, 2017, the appellant's assigned tour of duty was 12:00 p.m. to 8:30 p.m. The appellant reported for duty at 3:07 p.m. The appellant's leave request was subsequently denied and the appellant was charged as AWOL for three hours. Specification 2 alleged that on January 18, 2017, the appellant's assigned tour of duty was 12:00 p.m. to 8:30 p.m. The appellant reported for duty at 12:48 p.m. The appellant's leave request was denied and she was charged as AWOL for 45 minutes. Specification 7 alleged that on October 19, 2016, the appellant's assigned tour of duty was 11:00 a.m. to 7:30 p.m. The appellant reported for duty at 11:45 a.m. The appellant's leave request was denied and she was charged as AWOL for 45 minutes.

Management based Charge 3, *Failure to Follow Sick Leave Restrictions*, on two specifications. Specification 1 alleged that on January 21, 2017, the appellant did not report to work due to illness. Upon the appellant's return to duty, she failed to submit administratively acceptable documentation as per the stipulations of her Letter of Sick Leave Restriction. Specification 2 alleged that on January 20, 2017, the appellant did not report to work due to illness. Upon the appellant's return to duty, she failed to submit administratively acceptable documentation as per the stipulations of her Letter of Sick Leave Restriction.

Management based Charge 4, *Failure to Follow Absence Reporting (Leave) Procedures*, on 34 specifications alleging that on 22 occasions between October 28, 2016 and May 19, 2017, the appellant reported her inability to report for duty between 4 minutes and 3 hours and 1 minute after the start of her scheduled shift and on 12 occasions between December 27, 2016 and May 17, 2017, the appellant reported her inability to report for duty between 4 minutes and 45 minutes prior to the start of her scheduled shift.

Management based Charge 5, *Unauthorized Absence*, on one specification alleging that on May 10, 2017, at approximately 4:00 p.m., the appellant was sent to the training room to participate in Practical Skills Evaluation (PSE) refresher training. While still in training, at approximately 7:30 p.m., the appellant took her 30-minute meal break. Between 8:00 p.m. and 8:30 p.m., the appellant was not present in training or her assigned screening location and was unaccounted for until approximately 8:30 p.m. at which time the appellant clocked out for the end of her shift. The appellant did not request leave, nor was she authorized the additional 30 minutes that she was absent from duty.

Management found the appellant's conduct violated TSA Management Directive (MD) No. 1100.73-5, *Employee Responsibilities and Code of Conduct.* Section 5. D states, in part, that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (2) responding promptly to and fully complying with directions and instructions received from their supervisors or other management officials, and (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. E states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred. Section BB (1) of the accompanying 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 from duty including leave without pay (LWOP). Employees are required to contact their supervisors 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. 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.

Management also found that the appellant's conduct violated MD 1100.63-1, *Absence and Leave*. Section 5. C. states, in part, that employees are responsible for (1) following established leave procedures and policies; (2) managing their leave and (3) minimizing requests for unscheduled leave. Section B. 4 of the Handbook to MD 1100.63-1 states that employees are expected to report to work on time and fit for duty and are expected to be on duty at all times during their tour of duty except during meal breaks and approved absences. Section D. 1 states, in part, that designated management officials may place an employee in an AWOL status if the employee is required to substantiate an absence with administratively acceptable documentation and fails to do so. Section L. 1 states that an employee may be charged as absence without leave (AWOL) when an employee fails to report to duty without prior approval, has an unauthorized absence from the workplace during the workday, or does not give proper notification for an absence. Section O. 5. (e) states that employees requesting FMLA leave are responsible for following established leave requesting procedures, including procedures for requesting unscheduled leave.

Additionally, management referenced MD 1100.63-1, Section B. 1. (e). which states, in part, that employees requesting unscheduled leave are required to follow local notification procedures. Generally, employees must notify management 60 minutes prior to the start of the employee's scheduled shift. In the event the employee is presented with circumstances that would reasonably preclude him/her from contacting management, notification should be made as soon as possible. Management also referenced that Collective Bargaining Agreement (CBA), which states, in part, in Article 3, *Attendance Management Process*, that bargaining unit employees should notify management at least 60 minutes prior to the start of the bargaining unit employee's scheduled shift to request unanticipated leave. In the event the employee is presented with

circumstances that would reasonably preclude him/her from contacting management, notification should be made as soon as possible.

On May 2, 2017, the appellant was speaking to a TSM and was told by the TSM to return to the floor. The appellant did not return to the floor as directed by the TSM. An STSO also instructed the appellant to return to the floor to work and the appellant refused. In the STSO's statement, dated May 2, 2017, the STSO stated, "After a long discussion with [the appellant] I heard [the TSM] instruct [the appellant] to go on the floor. After instructing [the appellant] numerous times she continued to disobey and didn't move from the podium area. At [the TSM's] request I also asked [the appellant] to go on the floor to resume screening functions and she refused to comply." In the TSM's statement, also written on the date of the incident, the TSM stated, regarding the appellant, "I asked her to wait until tomorrow and to please go on the floor. She stood there and refused. I asked if she was refusing to follow the instruction, and she stood there without moving."

On March 8, the appellant was asked by an LTSO to screen a female opt-out passenger on the floor and failed to do so. In a statement from the LTSO, dated March 8, 2017, the LTSO stated that the appellant approached her and asked if she could join a meeting taking place at the podium. The LTSO stated, "I told her that she needed to talk to the supervisors, and that I really needed her to take a female opt-out on the floor." The LTSO stated that the appellant continued to argue with her after she told the appellant that she could not join the meeting. The LTSO stated that the appellant "relocated herself near the supervisor's podium and appeared to have joined the meeting; and never followed the instruction to screen the female." A statement in the record from a TSM, dated March 23, 2017, states that on March 8, 2017, the LTSO called her to discuss the incident with the appellant as described in the LTSO's statement. An STSO present at the podium taking part in the meeting, submitted a statement on March 9, 2017. In her statement, the STSO stated that she noticed the appellant standing in the meeting and asked her to go back to the lane. The STSO stated that the appellant told her she was drinking her water and took a sip of water and went back to the lane. The STSO stated that the appellant then appeared by the podium a second time and tried to join the meeting. The STSO stated that she again asked the appellant to return to the lanes. The STSO stated that the appellant told her that the LTSO gave her permission to come to the meeting. The LTSO, in her statement, denied giving the appellant permission to join the meeting. The STSO stated that she asked the appellant to return to the lanes again and that the STI also then motioned the appellant back to the lanes.

On three occasions, the appellant reported to work after the start of her assigned shift and her leave requests were denied. The appellant was charged as AWOL for 3 hours on January 24, 2017; 45 minutes on January 18, 2017; and 45 minutes on October 19, 2016.

The appellant was placed on a Sick Leave Restriction on January 12, 2017. As part of the Sick Leave Restriction, for every instance that the appellant requested sick leave for an unscheduled absence, regardless of the amount of time requested, the appellant was required to provide proper medical documentation to support her absence upon her return to duty. The appellant called in on January 20 and 21, 2017, and failed to provide the medical documentation as required by her Sick Leave Restriction upon her return to duty.

On 22 occasions between October 28, 2016 and May 19, 2017, the appellant reported her inability to report for duty between 4 minutes and 3 hours and 1 minute after the start of her scheduled shift and on 12 occasions between December 27, 2016 and May 17, 2017, the appellant reported her inability to report for duty between 4 minutes and 45 minutes prior to the start of her scheduled shift.

On May 10, 2017, the appellant was instructed by an STSO to go to the training area to complete training courses and then return to the checkpoint. The appellant did not return to the checkpoint until she arrived to swipe out at the end of her shift at 2030 hours. The appellant was absent from duty and unaccounted for between 2000 and 2030 hours. The STSO submitted a statement on May 10, 2017, and stated, "I instructed [the appellant] to go to training at 1548 hours, complete both courses, and come back to the checkpoint so I could send other officers." The STSO stated that at approximately 2015 hours she called the TSM to advise her that the appellant did not return from the training room. The STSO stated that during her conversation with the TSM, the appellant walked into the checkpoint at 2030 to swipe out. The TSM advised the STSO to follow up with training to verify that the appellant was present and had completed her courses. A statement from the Master Security Training Instructor (MSTI) present in the training room on the date of the incident stated that the appellant told her she was going on break and that shortly after the appellant's return to the training room, she told her she was heading back. The MSTI stated that she acknowledged the appellant and that the appellant left "close to 7 pm or close to the closing of the shift." The MSTI stated that she did not recall the exact time. A statement from the Training Specialist confirmed that there was no record of any Online Learning Center (OLC) activity for the appellant on May 10, 2017. The appellant submitted a statement in which she stated she was having issues with the computer and training programs. She stated that she went on break after 1930 hours.

The appellant was issued a Notice of Proposed Removal (NOPR) on June 20, 2017. The NOPR afforded the appellant the opportunity to reply orally and/or in writing within seven days. The appellant requested an extension which was granted. The appellant gave an oral reply on July 12, 2017.

Management provided as evidence: an email from a Transportation Security Manager (TSM), dated May 2, 2017; statement from a Supervisory Transportation Security Officer (STSO), dated May 2, 2017; Informal Administrative Inquiry, dated March 23, 2017; OPM 71, Request for Leave or Approved Absence forms; WebTA reports; Letter of Sick Leave Restriction, dated January 21, 2017; Absence Notification Sheets; and Informal Administrative Inquiry, dated May 30, 2017.

On appeal, the appellant argued that management failed to prove Charge 1; Charge 2, specification 7; Charge 3; and Charge 4 by preponderant evidence. In regards to Charge 1, specification 1, the appellant argued that she was on break at the time the directions were issued to her and that pursuant to Article 3 of the CBA, bargaining unit employees are entitled to a 15-minute paid rest break for every four hours of scheduled duty. She argued that management's direction that she return to work despite being on break were inconsistent with the CBA. The appellant argued that specifications 2 and 3 should be dismissed. She argued that although management alleged that she refused to perform a pat-down as directed by the LTSO, that order was never given. She argued that the assertion that she "falsely" claimed that she was given permission to leave the screening floor and walk towards the podium is equally uncorroborated.

With regard to specification 3, the appellant argued that at 1534 the STSO and the STI both ordered her to return to duty at the same time and that management's own record reveals that she complied. The appellant argued that there is no evidence that she failed to comply with any orders beginning at approximately 1534 hours, which is when specification 3 begins.

With regard to Charge 2, the appellant argued that specification 7, which concerned AWOL on October 19, 2016, should be dismissed because it was already addressed by a Letter of Counseling (LOC) issued on November 8, 2016. She argued that the LOC covered alleged excessive use of unscheduled leave, including the absence on October 19, 2016. The appellant argued that the specification should be dismissed as duplicative.

With regard to Charge 3, the appellant argued that immediately submitting documentation for her absences on January 20 and 21, 2017, would have been either impossible or contrary to management's interests because she relies on a medical specialist to take care of her Crohn's Disease and appointments are not immediately available. The appellant argued that she could have either returned to work healthy but without medical documentation, or called out sick even though she wasn't sick in order to avoid violating the rules of her Sick Leave Restriction. She stated that she elected to return to work without the required documentation. The appellant stated that the soonest available appointment was January 26, 2017, and that she received and submitted documentation immediately thereafter. She argued that while this may have been a literal and technical violation of her Sick Leave Restriction, the Board should recognize the choice she faced and dismiss the Charge.

With regard to Charge 4, the appellant argued that management itself noted that Article 3, Section B. (3) of the CBA provides that bargaining units should notify management at least 60 minutes prior to the start of their scheduled shift. The appellant argued that "should" is precatory, not obligatory, and that an employee cannot be disciplined for failing to do something that is encouraged but not required. The appellant cited a Board decision where the Board found that there is no requirement under the CBA that an employee must notify management 60 minutes prior to the start of their scheduled shift. The appellant also argued that even under MD 1100.63-1, management has not shown that she committed the alleged misconduct. The appellant cited Section B (1)(e) of the Handbook to MD 1100.63-1 which provides that in the event the employee is presented with circumstances that would reasonably preclude him/her from contacting management, notification should be made as soon as possible. The appellant argued that on each and every occasion, she notified management as soon as she could. The appellant argued that flare-ups of her condition are intense and take priority over most other things and that it is neither fair nor reasonable to expect her to call out while experiencing a flare-up. She stated that she called as soon as she could, consistent with the MD.

Additionally, the appellant claimed that her due process rights were violated. She stated that she had an Equal Employment Opportunity (EEO) complaint against the Assistant Federal Security Director (AFSD) that was ongoing at the time he proposed her removal on June 20, 2017, and that she had an EEO complaint against the TSM that was ongoing at the time the TSM conducted two Informal Administrative Inquiries that were relied upon by management in this case. The appellant argued that management committed two serious due process violations; the first by delegating the roles of investigator and Proposing Official to management officials who were named as parties in an ongoing EEO complaint she had filed and the second due to the Deciding Official making a determination on Charge 1 prior to her providing a rebuttal to the NOPR. The

appellant alleged that on March 24, 2017, she emailed management stating her "concerns about the misunderstandings surrounding the March 8, 2017 incident." The appellant alleged that the Deciding Official, a Deputy Federal Security Director (DFSD) sent a reply email on July 7, 2017, informing her that he had already reached a decision regarding Charge 1, specifications 2 and 3. The appellant claimed that the DFSD wrote that "the incident that [the appellant] referred to in [her] March 24, 2017 statement has been resolved to [his] satisfaction." The appellant argued that based on the July 7, 2017, email, the DFSD "very clearly demonstrated that he had made up his mind regarding Charge 1" prior to her exercising her right to provide an oral or written reply to the NOPR.

Management responded in regard to Charge 1 and disagreed with the appellant's assertion that she was on break. Management argued that the record shows that when the TSM caught up with the appellant in the hall, the appellant was returning from her break and that when the TSM directed her back to the floor, the appellant refused. Management argued that the appellant never mentioned to the TSM that she was on a break. Management also argued that the STSO's statement clearly states that the appellant arrived at the checkpoint after her break. Additionally, management noted that the appellant never asserted that she was on a break when the infraction occurred during her reply to the Deciding Official.

With regard to specifications 2 and 3 of Charge 1, management stated that they again disagree with the appellant's assertion that she had permission to be at the supervisor's podium. Management argued that nowhere in the LTSO's statement does it state that she gave the appellant permission and noted that it when asked by the supervisors as to whether she gave the appellant permission to be at the podium, the LTSO stated that she did not. Management argued that the LTSO's intentions as to what she was requesting the appellant to do were clear. Management argued that it disagrees with the appellant's characterization that she was directed by the STSO and the ESTI at the same time. Management argued that the STSO's statement clearly states that she asked the appellant to return to the checkpoint and that the appellant did not comply, instead responding less than truthfully, that the LTSO gave her permission to be there. Management argued that the other STSO's statement confirms the first STSO's account and goes as far as detailing that when asked a second time to return to the checkpoint by the first STSO, the appellant did not move, until asked by the ESTI who is not in the appellant's chain of command.

With regard to Charge 2, management argued that the LOC the appellant referenced, with regard to the October 19, 2016, specification, is a non-disciplinary action used to address her overall excessive use of unscheduled leave. Management also argued that the review period that was used in support of the LOC was January 5, 2016 through October 1, 2016, which preceded October 19, 2016. Management argued that the AWOL charge on October 19, 2016, was never previously addressed with a disciplinary action so it was appropriately documented in the removal decision. With regard to the charges of AWOL on January 18 and 24, 2017, management argued that the appellant was clearly obligated, based upon her being on a sick leave restriction, to provide acceptable medical documentation upon her return to duty following any absences related to illness. Management argued that the appellant did not provide the required documentation upon returning to duty on January 24, 2017, and that the AWOL on January 18, 2017, was appropriate due to the appellant's excessive tardiness. Management also noted that on the appellant's OPM-71 for January 18, 2017, the appellant indicated her tardiness was due to "running late" and did not reference illness.

With regard to Charge 3, management argued that the stipulations of the appellant's sick leave restriction are clear and that the appellant could have made arrangements to see another health care provider but chose not to.

With regard to Charge 4, management argued that while the Board did not sustain this charge associated with similar circumstances in a past Decision, the circumstances in this case are different. Management argued that in the previous Decision, the Board considered three instances in which that appellant did not follow reporting procedures whereas in the appellant's case, it happened on 34 occasions. Management stated that it hoped that the Board could revisit its previous decision and qualify whether, in some instances, the misconduct may be outside the bounds of the intent of the CBA. Management argued that taking into account the guidance as codified in the current CBA, the number of instances in which the appellant reported her absence less than one hour from the start of her shift far exceeds what management would consider reasonable.

With regard to Charge 5, management argued that they disagree with the appellant's contention that she went on break at around 7:40 p.m. Management argued that in a statement from the MSTI, the MSTI wrote that the appellant told her she was going on break and that when she returned back to the training room, the appellant informed her that she was heading back to the checkpoint. Management stated that it was at approximately 7:00 p.m. Management argued that in the appellant's interview with the TSM, she stated that she went on break at about 7:30 p.m. and that it was not until later during her reply to the Deciding Official that the appellant stated she went on break at approximately 7:40 p.m. Management argued that the appellant's revised statement was self-serving, especially given the fact that she initially stated that she went on break at about 7:30 p.m. and that the STI stated that she went on break at 7:00 p.m., or soon after.

Management noted that the appellant alleged that management violated TSA policy because a TSM conducted two management inquiries in which she was the subject of, and that the TSM was also a named party in an EEO complaint filed by the appellant, thereby allegedly making the TSM unable to conduct a fair and unbiased investigation as it pertains to Charge 1, specifications 2 and 3, and Charge 5. In response, management stated that with regard to the first allegation, the incident date noted in Charge 1, specification 2 and 3, was March 8, 2017, and that the management inquiry was dated March 23, 2017, and argued that management was not made aware of an EEO complaint filed by the appellant until April 25, 2017, when the EEO Point of Contact (POC) was notified and that the EEO POC did not notify senior leadership until May 1, 2017. Management argued that there is no conflict because management was unaware of the EEO complaint prior to the conclusion of the investigation.

With regard to Charge 5, management noted that the incident occurred on May 10, 2017, and that the management inquiry is dated May 30, 2017, and admitted that the inquiry occurred after management was aware of the appellant's EEO activity. Management argued however, that the appellant failed to provide any evidence that the inquiry was not fair and impartial.

With regard to the appellant's concerns that the Proposing Official for the removal, the AFSD, was also a named party in her EEO complaint at least twice, management argued that the appellant failed to provide any evidence that he initiated the action as a retaliatory measure or

may have fabricated any of the information. Additionally, management argued that as part of the appellant's due process rights, the Deciding Official was responsible for the final action. Management also argued that the only allegation contained in the EEO complaint that management received on April 25, 2017, was one that involved the AFSD directing the appellant not to use her personal email for official business and that the second allegation made against the AFSD was based on an alleged incident that occurred on June 15, 2017, well after the original EEO complaint was received by management. In addition, management noted that the last page of the amended EEO complaint notes that the additional allegation against the AFSD was not submitted until June 27, 2017, a week after the proposed removal was issued.

Finally, management disagreed with the appellant's allegation that the Deciding Official had prematurely made a decision regarding Charge 1. Management stated that the appellant initially emailed a Human Resources Specialist (HRS) copied the Deputy Federal Security Director (DFSD), along with the Federal Security Director (FSD) on March 24, 2017, regarding some workplace concerns she had and that the HRS replied back to her the same day. Management stated that on July 6, 2017, the appellant followed up with her previous concerns by emailing the DFSD regarding what she believed was on-going retaliation by management and referencing her March 24, 2017, email. Management stated that the DFSD replied back to the appellant stating that the incident that occurred on March 24, 2017, had been resolved to satisfaction. Management argued that the DFSD's reply was referencing the fact that he believed that the appellant's issues had been resolved during the EEO mediation that occurred on June 1, 2017, in which all parties signed off on a settlement agreement. Management argued that in no way was the DFSD suggesting that he had reached a decision on the merits of Charge 1, specifications 2 and 3.

The appellant replied to management's response and repeated the arguments she made in her appeal.

With respect to Charge 1, specification 1, in the STSO's statement, dated the date of the incident, the STSO stated, "After a long discussion with [the appellant] I heard [the TSM] instruct [the appellant] to go on the floor. After instructing [the appellant] numerous times she continued to disobey and didn't move from the podium area. At [the TSM's] request I also asked [the appellant] to go on the floor to resume screening functions and she refused to comply." In the TSM's statement, also written on the date of the incident, the TSM stated, regarding the appellant, "I asked her to wait until tomorrow and to please go on the floor. She stood there and refused. I asked if she was refusing to follow the instruction, and she stood there without moving." Although the appellant claimed in her appeal that she was on a rest break at the time she was given the direction, the Board noted that she did not argue that prior to her appeal. Additionally, the statement in the record from the TSM states that that on her way to speak to the appellant the TSM was called and advised that the appellant was on a break. The TSM stated. "I ran into her in the hallway, and walked back to the checkpoint with her." The STSO, in her statement, stated, "After [the appellant's] brake [sic] she arrived into the checkpoint with [the TSM]. Both statements verify that the incident took place after the appellant's break. The statements of the STSO and TSM are preponderant evidence that the appellant was given clear direction by both the TSM and the STSO and failed to follow directions. Therefore, specification 1 is SUSTAINED.

With regard to Charge 1, specification 2, the LTSO's statement is clear that she gave the appellant specific instructions. The statement from the TSM in the record reinforces the LTSO's statement as the LTSO contacted the TSM right after the incident occurred. The statements of the LTSO and the TSM are preponderant evidence that the appellant was given specific directions and failed to follow those directions. Therefore, specification 2 is SUSTAINED.

With regard to Charge 1, specification 3, although the appellant argued that she complied with the order given by the STI present at the podium, it is clear from the statements of the others involved that she was told multiple times to return to the lanes before the STI told her to do so. The statement of the STSO present at the podium who instructed the appellant to return to the lanes at the checkpoint, the statement of the other STSO present at the podium who witnessed the STSO tell the appellant to return to the lanes, along with the statements of the LTSO and TSM are preponderant evidence that the appellant failed to follow the directions given to her by the STSO. Therefore, specification 3 is SUSTAINED.

Having sustained specifications 1, 2, and 3, Charge 1, *Failure to Follow Direction*, is SUSTAINED.

With respect to Charge 2, the OPM-71 forms and WebTA records are preponderant evidence that the appellant was AWOL on the three dates in specifications 1, 2, and 7. The Board gave no merit to the appellant's argument that the October 19, 2016, instance of AWOL was addressed by an LOC. Management provided evidence that the LOC issued addressed the appellant's attendance from January 5, 2016 through October 1, 2016; the date addressed in specification 7, October 19, 2016, occurred after that time period. Although the AWOL in specification 7 occurred several months before the instances in specifications 1 and 2, there is no question that she was AWOL on all three dates. Therefore, Charge 2, *AWOL*, is SUSTAINED.

With respect to Charge 3, it is clear from the Letter of Sick Leave Restriction the appellant was issued and signed on January 12, 2017, that the appellant was required to provide administratively acceptable medical documentation to support unscheduled absences immediately upon her return to duty. The appellant was aware of the requirement and failed to provide documentation upon her return from duty following her absences on January 20 and 21, 2017. Therefore, Charge 3, *Failure to Follow Sick Leave Restrictions*, is SUSTAINED.

With respect to Charge 4, the TSA Collective Bargaining Agreement (CBA), Section 3.B.3. states that employees should notify management at least 60 minutes prior to the start of the employee's scheduled shift to request unanticipated leave and that in the event the employee is presented with circumstances that would reasonably preclude him/her from contacting management, notification should be made as soon as possible. While the TSA Management Directive and local policy state that generally employees must notify management 60 minutes prior to the start of the employee's scheduled shift, there is no requirement under the TSA CBA that an employee must do so. The number of times the appellant allegedly failed to follow leave procedures is irrelevant. The language in the CBA is clear, therefore, Charge 4, *Failure to Follow Absence Reporting (Leave) Procedures*, is NOT SUSTAINED.

With respect to Charge 5, while the appellant alleged she had problems with the training computers, she did provide an account for her time after her break. The statements from the

TSM, STSO, MSTI and TS are preponderant evidence that she had a period of unauthorized absence on the date in question. Therefore, Charge 5, *Unauthorized Absence*, is SUSTAINED.

Having sustained Charges 1, 2, 3 and 5, 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 prove that removal is a reasonable penalty for the conduct alleged and sustained. She acknowledged that the Deciding Official considered her time in service with TSA and satisfactory work record but argued that he failed to recognize her Crohn's disease as a legitimate and significant mitigating factor. She argued that when considering all of the factors of the action, the Board should recognize that her illness is a substantial mitigating factor and find that removal is not within the bounds of reasonableness.

The appellant also argued that while she has some corrective actions taken against her, her disciplinary record is bereft of any suspensions in the last five years; noting that management imposed two Letters of Reprimand, one of them in lieu of suspension. She argued that therefore, management has not shown that progressive discipline is ineffective, as there has been no attempt in the last five years to increase the penalty to something other than corrective action or Letters of Reprimand.

Management responded and argued that with regard to following the tenets of progressive discipline, even after considering any mitigating factors, management considered the aggravated penalty. Management argued that the appellant had two 14-day suspensions of record and a Letter of Reprimand, all based on similar misconduct, and had numerous corrective actions issued to her. Management argued that the appellant was on notice of the consequences if she failed to correct her behavior.

The Deciding Official considered the nature of the appellant's misconduct and its relation to her duties. He considered that as a TSO, the appellant is part of a team that needs to be in place at a designated time in order to meet the mission requirement and that regular attendance at work is a condition of employment. The Deciding Official considered that the appellant's repeated unscheduled absences reflect negatively on her dependability and reliability and adversely affect TSA's mission. He considered that the appellant's AWOL and failure to follow leave procedures are serious and directly related to her job noting that when she failed to report to work and failed to report for work on time and without proper notification, her supervisor had to make quick adjustments to account for her unexpected absence by either directing someone to work overtime or to have someone take on additional duties. The Deciding Official stated that it goes to the heart of the TSA mission in that management must have appropriate staffing at each screening area in order to ensure a safe and secure environment for the traveling public. The Deciding Official considered that management must have the utmost confidence that the appellant will exercise due diligence and sound judgment. He considered that the appellant's misconduct caused him great concern regarding her reliability and her ability to perform her duties and responsibilities successfully as a TSO.

The Deciding Official also considered the appellant's commitment to TSA's mission and how she perceived the role she played in assisting in carrying out that mission. He considered that the appellant disregarded a lawful order to screen a female passenger and instead found it more important to insert herself into a discussion in which her union local vice-president was taking part. He considered that two supervisors directed the appellant away from the supervisor's podium and back to her assigned checkpoint position, yet she failed to follow their direction and it was not until she was directed by the union vice-president to return to the screening area that she finally moved away. The Deciding Official considered that at times, the appellant seemed unaware that she is a TSA Officer first and foremost and that while on duty her primary responsibility is to follow all TSA rules and regulations to include complying with any directions given to her by management.

The Deciding Official considered that the appellant was on clear notice as to how she is to conduct herself as a TSO; noting that a review of her Online Learning Center (OLC) learning history indicates that she acknowledged reading TSA MD 1100.73-5 on March 1, 2016, and most recently on December 22, 2016.

The Deciding Official considered that the appellant's misconduct is not an isolated incident and that she has been disciplined in the past for similar behavior. He considered that she received a Letter of Reprimand (LOR) in lieu of a 14-day Suspension effective October 8, 2016, for AWOL and failure to follow leave procedures; an LOR on January 5, 2016, for AWOL, failure to follow leave procedures and tardy; and a 14-day Suspension on September 12, 2012 for failure to follow Standard Operating Procedures, AWOL and failure to follow proper leave procedures. The Deciding Official also considered that the appellant was issued the following corrective actions: a Letter of Sick Leave Restriction on January 12, 2017; an LOC on November 8, 2016, for excessive use of unscheduled leave; an LOC on December 5, 2015, for failure to follow proper leave procedures; an LOC on September 23, 2015, for excessive use of unscheduled leave associated with tardiness; an LOC on September 23, 2015, for failure to follow leave procedures; an LOC on July 10, 2015, for failure to follow directions given by her manager; verbal counseling on December 14, 2014, for failing to punch in at the start of her shift as required; verbal counseling on November 5, 2014, for excessive use of unscheduled leave; verbal counseling on May 18, 2014, for reporting her absence after the start of her shift; and Letters of Leave Restriction on June 6, 2012, December 3, 2011, and August 3, 2010.

The Deciding Official also considered that the appellant was issued an LOR on February 24, 2015, for AWOL and Tardy. The Deciding Official considered that while no longer considered a part of progressive discipline, it is another example, along with the numerous corrective actions issued to the appellant, that place her on notice as to what management's expectations are.

The Deciding Official considered that in all of those instances the appellant was placed on notice that her failure to follow proper leave procedures, failure to reduce her instances of unscheduled leave and/or engagement in other misconduct could result in further disciplinary action up to and including removal from Federal Service. The Deciding Official considered that the appellant's actions have the potential for very serious consequences for both TSA employees and the traveling public as TSA Officers are entrusted with the responsibility of ensuring the safety and security of the flying public and are expected to adhere to high standards of professional conduct. The Deciding Official considered that the appellant's deliberate misconduct caused him to lose

all confidence in her judgement and commitment to the agency and her ability to discharge her duties as a TSA Officer.

As mitigating factors, the Deciding Official considered that the appellant has been employed with TSA since June 22, 2008, and that she has always attained at least a satisfactory performance rating.

The Deciding Official considered that management is entitled to expect that TSA employees will report to work as scheduled and, if they must be absent, that they will follow established leave procedures. He considered that TSA employees are expected to adhere to high standards of professional conduct and to be at work when scheduled. The Deciding Official considered that the appellant's unauthorized absences have placed an undue burden on her coworkers since they must cover her assignments when she fails to report for duty on time, noting that it is especially essential in the airport environment where TSA must maintain proper coverage at all times to fulfill its security mission to protect the traveling public. He considered that the appellant's numerous unauthorized absences seriously affect the ability of management to efficiently and effectively perform airport screening operations and negatively reflect on her dependability and reliability.

Under Section D.2 of the Table, for *Failure to Follow Direction*, the recommended penalty range is a Letter of Reprimand to 10-day suspension and the aggravated range is an 11-day suspension to removal. Under Section A.2, for *AWOL of one workday or less*, the recommended penalty range is an LOR to 2-day suspension and the aggravated penalty range is a 3-day suspension to removal. Under Section A. 5, for *Failure to Follow Sick Leave Restriction*, the recommended penalty is a 2-day to 10-day suspension and the aggravated range is an 11-day suspension to removal. Under Section A.1, for *Unauthorized Absence*, the recommended penalty is a Letter of Reprimand and the aggravated penalty range is a 1-day to 5-day suspension. The guidance in the Table of Penalties, states as examples of aggravating factors; "prior discipline record; prior warnings/advisement not to commit misconduct;" and "for second and/or successive offenses, the penalty should generally fall within the Aggravated Penalty Range column and may often include removal." The guidance also states 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.

The Board gave no merit to the appellant's argument regarding due process violations. There is no evidence that any of the investigations or inquiries had anything to do with preponderant evidence that proved the charges. The basis of the inquiries were statements by individuals who were present during each incident that occurred and were independent statements that supported the charges. The Board also found no evidence that the Deciding Official made a decision regarding Charge 1 before the appellant's response to the NOPR, as alleged.

The Board found that management appropriately weighed the aggravating and mitigating factors, gave the appellant multiple opportunities to correct her behavior and followed progressive discipline. Contrary to the appellant's argument that she was not suspended in the last five years, an LOR in lieu of suspension carries the weight of a suspension with regard to progressive discipline. The appellant has had multiple disciplinary actions and corrective actions for similar

offenses. The Board finds that the appellant's removal, given the multiple charges sustained and the appellant's disciplinary history, is in accordance with TSA policy and within the bounds of reasonableness.

Decision. Accordingly, 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—17-114

October 23, 2017

Issue: *Inappropriate Comment; Absent Without Leave (AWOL)*

OPINION AND DECISION

On August 11, 2017, management suspended the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) for 15 calendar days based on two charges, *Inappropriate Comment* and *Absent Without Leave (AWOL)*. 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

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

Management based Charge 1 on one specification alleging that on May 24, 2017, while on duty at the passenger screening checkpoint, the appellant stated to a TSA Lead Officer that if anyone turns a fan on him, he would "stomp them," or words to that effect.

Management based Charge 2 on six specifications alleging that on May 31, June 1, June 2, June 3, June 6 and June 7, 2017, the appellant was scheduled to report to work from 1200 to 2030 hours and the appellant called in sick for his shift but did not provide timely administratively acceptable medical documentation to substantiate his absence, as required. The appellant was charged with eight hours of AWOL for each of the days specified.

Management found the appellant's conduct 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 for observing the following basic on-the-job rules: (3) 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. Supporting and assisting in creating a productive and hospitable model work environment and (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. A. states that TSA employees must comply with all standards, responsibilities, and code of conduct 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. D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred. Section BB. 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.

Management also found the appellant's conduct violated the Handbook to TSA MD 1100.63-1, *Absence and Leave*. Section L. 1. (i) states 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. Section D. 3. (e) states that when medical documentation is required, it should apply only to the current medical condition that incapacitated the employee and at a minimum, provide the following: (1) date the medical condition began; (2) clearly state that the employee is/was incapacitated for duty; (3) provide information on how the condition affects the employee's ability to perform the duties of the position; (4) identify the expected duration of the employee's absence; and (5) have the signature of the employee's personal physician or authorized health care provider.

Management also cited the TSA Collective Bargaining Agreement (CBA), Article 3, Attendance Management Process, Section 2, e) ii. b) (1) which states that for sick leave absences of more than three (3) days, management may require a bargaining unit employee to submit a health care provider's certification that includes the duration of the bargaining unit employee's absence,

clearly states the bargaining unit employee was incapacitated for duty, and is signed and dated by the physician or authorized health care provider.

On May 24, 2017, the appellant was assigned to the checkpoint and made a comment regarding an incident with a fan that occurred earlier in the day. A Lead Transportation Security Officer (LTSO), present at the checkpoint at the time, submitted a statement, signed and dated July 6, 2017, in which she stated that after the incident, between the hours of 1800 and 1900, the appellant "walked down the aisle behind x-ray 2 making a comment something to the effect that he would stomp someone, in a joking manner referencing the earlier incident." The LTSO wrote, "I am paraphrasing his statement because I do not remember exactly verbatim what he said. I only remember that it was a comment of violence towards a non-specific person and that he did not mean it literally nor did I take it literally." The LTSO stated that she did not fear any personal danger by the comment the appellant made.

A Supervisory Transportation Security Officer (STSO) submitted a statement on May 24, 2017. The STSO stated that on May 24, 2017, at approximately 2123 hours, the LTSO questioned him regarding what she described as "threats of workplace violence" made earlier in the day by the appellant. The STSO stated that he informed the LTSO that he did not know what she was referring to and asked her to explain. The STSO stated that the LTSO reminded him of a discussion he had with the appellant at approximately 1924 hours by the x-ray lane where he told the appellant that he could be his own worst enemy by his actions and the things he says. The STSO stated that the LTSO then informed him that prior to his statement, the appellant made a comment. The STSO stated, "[the LTSO] states that [the appellant] made the statement prior to me stating to [the appellant] that he can be his own worst enemy and she clarifies that she is not perfectly clear on what [the appellant] stated exactly but it was something to the effect that 'the next person that turns a fan on on [sic] him will get curb stomped in the head' or 'kicked in the head.'" The STSO stated that the LTSO stated that she thought he heard the possible "threat of workplace violence" and that it was why he made the comment to the appellant that he did. The STSO stated, "I informed [the LTSO] that I did not hear any such statement or threat."

The appellant called in sick for his scheduled shifts May 25 through June 7, 2017, for a total of 10 days. The appellant was scheduled for Annual Leave June 8 – 10, 2017, and returned to duty on June 13, 2017. The appellant provided a medical excuse, dated May 30, 2017, which stated that he was seen in the medical office on May 30, 2017, and that he was to be excused from "5/30/2017 through 6/8/2017." In a letter dated June 20, 2017, the Deputy Assistant Federal Security Director (DAFSD) informed the appellant that the medical documentation he provided was not administratively acceptable and cited Section D. 1. (f) of MD 1100.63-1, which provides details required for administratively acceptable documentation. The letter from the DAFSD also informed the appellant that he was placed in an AWOL status for all of the leave requests for which medical documentation was requested. The letter also stated that the appellant's first three days of his absence, May 25, 26, and 27, 2017, were not considered eligible for self-certification and would be counted as AWOL until such time as administratively acceptable documentation is provided.

The appellant submitted a second medical excuse, dated June 27, 2017, which stated he was seen at a medical facility on June 15, 2017. The appellant submitted a third medical excuse, dated June 29, 2017, which stated "Please excuse [the appellant] from work from 5/25/2017 to 6/8/2017 as he was incapacitated for his duties during that time." In an email from a DAFSD, dated July 12, 2017, the DAFSD acknowledged receipt of the appellant's medical documentation

provided on June 30, 2017, but stated that the documentation still did not provide information on how the condition which caused the appellant's absence affected his ability to perform TSO duties and informed the appellant that his absences would remain in the AWOL status. The appellant replied via email on July 15, 2017, and cited the CBA, Article 3, Attendance Management Process, and argued that according to the CBA the documents he provided should be accepted. The DAFSD responded on July 17, 2017, and stated that while the appellant's documentation may be acceptable for an absence of more than three days; the CBA does not provide a specific timeframe to provide such documentation and referred the appellant to Section L. 1. (i) of MD 1100.63-1. The DAFSD stated that the absences occurred in pay periods 10 and 11, 2017, and that when the appellant brought in additional documentation on June 30, 2017, it was during pay period 13, which was outside the timeframe denoted in the MD. The DAFSD stated that since the appellant was not informed of the requirement to bring in a doctor's note until May 30, 2017, he would allow the appellant to self-certify for the first three days of his absence. The DAFSD stated that the remaining absences (May 31, June 1, 2, 3, 6, 7, 2017) would remain as AWOL "due to the submission of administratively acceptable documentation being untimely." The appellant was charged as AWOL for eight hours on each of the six dates specified.

The Board considered the evidence and arguments presented by both parties. As evidence, management provided a statement from the appellant, dated May 24, 2017; statement from an LTSO, dated May 24, 2017; statement from a Transportation Security Manager (TSM), dated May 24, 2017; statement of an STSO, dated May 24, 2017; statement of an STSO, dated May 24, 2017; statement of an LTSO, dated July 6, 2017; statement of an STSO, dated May 24, 2017; pictures of a fan and the approximate location of the fan prior to it being moved by the employee; Summary of Pre-Decisional Discussion, dated June 29, 2017; Time and Attendance Records for Pay Periods 10 and 11, 2017; Physician's notes, dated May 30, 2017, June 27, 2017, and June 29, 2017; OPM 71 forms, dated June 20, 2017; email and text correspondence between an STSO and the appellant; Letter from the Deputy Assistant Federal Security Director – Screening (DAFSD-S) to the appellant, dated June 20, 2017; and email between the DAFSD-S and the appellant, dated July 12 – 17, 2017.

On appeal, the appellant stated that with regard to Charge 1, he admits that he made a facetious comment about stomping whomever caused the fan to blow. The appellant argued however, that when considering the context, the charge cannot be sustained. He argued that the comment was clearly intended as a joke meant to diffuse tension on the screening floor. The appellant argued that the LTSO, the only officer who mentioned the comment to a management official, explicitly stated that the comment was not literal, was not supposed to be taken literally, and was simply a callback to the incident earlier in the day. He also argued that other officers nearby, if they heard the comment, did not think it serious or literal enough to report. The appellant argued that it was clear that management also concluded that the comment was nonthreatening since the local Workplace Violence Coordinator was never contacted and there was no investigation of the comment. Additionally, the appellant argued that the comment could only be heard by a few officers and no passengers; was specifically made to people who could tie the comment back to the fan incident earlier in the day and that it was delivered in a way such that people would not overhear or misinterpret the remark.

Regarding the second Charge, the appellant argued that it is undisputed that he submitted administratively acceptable documentation on June 30, 2017. He argued that management failed to prove the six specifications of AWOL because he submitted administratively acceptable

documentation and their disapproval of leave based on the alleged untimeliness of the documentation is impermissible for Bargaining Unit Employees (BUEs) pursuant to the CBA. The appellant cited Article 3, Section D (2)(c) of the CBA which provides that "[i]f a bargaining unit employee provides administratively acceptable documentation to substantiate an absence previously documented as AWOL, the charge of AWOL on the time and attendance report normally will be changed to the appropriate leave category." The appellant argued that the Handbook to MD 1100.63-1, Section (L)(1)(j), further provides that, "[o]nce an AWOL charge is rescinded and changed to an approved leave status, it cannot serve as the basis for a corrective disciplinary action." The appellant argued that management erred in sustaining the AWOL charge against him.

The appellant also argued that the timeliness requirement raised by management pursuant to Section (L)(1)(i) of the Handbook to TSA MD 1100.63-1 is inconsistent with Article 3 of the CBA, which does not set a time limitation for providing administratively acceptable documentation.

Management replied and argued that with regard to Charge 1, although the appellant stated he intended the comment to be a joke and thinks it was taken out of context, it was clearly inappropriate and unprofessional. Management argued that the appellant's intent is irrelevant. Management argued that a reasonable person would likely conclude that stating you would curb stomp someone who turns a fan on you, or words to the effect, is unprofessional and could potentially be intimidating to the recipient or anyone else who heard it. Management argued that any comments made at the checkpoint or in the vicinity of the traveling public have a possibility of being overheard by a passenger, thus reflecting negatively on the image of TSA.

With regard to Charge 2, management argued that they gave the appellant an ample amount of time to provide the requested medical documentation and that timeliness is the issue regarding the charge, not the validity of the documentation. Management argued that when the CBA is silent on issues, then the applicable MD must be followed. Management argued that in this case the CBA is silent on the timeliness of providing the documentation, therefore the MD is the precedent and states that employees must submit the documentation before the end of the pay period immediately following the pay period in which the AWOL charge occurred. Management argued that the appellant did not provide the documentation until June 30, 2017, and that the pay period immediately following the AWOL ended on June 24, 2017. Management argued that therefore, the AWOL charges were not removed and management was justified in charging the appellant with AWOL.

The appellant responded to management's reply and stated that he maintains all arguments raised in his original appeal. The appellant noted that management argued that any comments made at the checkpoint or in the vicinity of the traveling public have a possibility of being overheard by a passenger, thus reflecting negatively on the image of TSA. He argued that the Douglas or penalty factor at issue related to management's argument is "the notoriety of the offense or its impact upon the reputation of the agency," not the possibility of the notoriety of the offense or its impact upon the reputation of the agency. The appellant argued that a passenger either did or did not overhear the comment. He stated that he made the comment to only a select few people and that absent any evidence in the record indicating that a passenger overheard the comment, that the logical conclusion is that no passenger overheard the comment.

The appellant also argued that management began its discussion of Charge 2 by clarifying that "timeliness is the issue regarding this charge, not the validity of the documentation" thus admitting that the documentation was acceptable. The appellant further argued that the omission of a timing requirement in the CBA is not accidental. He argued that if the parties wanted a timing requirement for BUEs, they would have negotiated and written one into Article 3 of the CBA.

With regard to Charge 1, the specification refers specifically to a comment made to the LTSO. The Board noted that the LTSO, the only person known to have heard the appellant's comment, wrote in her statement that the comment was made "in a joking manner" and that the appellant "did not mean it literally nor did [the LTSO] take it literally." She stated, "I did not fear any personal danger by the comment he made." Additionally, the LTSO stated that the appellant made "a comment something to the effect that he would stomp someone" and the STSO wrote in his statement that the LTSO clarified that "she is not perfectly clear on what [the appellant] stated exactly" so although the appellant admitted to making a comment, he did not admit to misconduct and the exact comment is not known. The Board found that there is no evidence in the record that speaks to the environment at the checkpoint as far as the presence of passengers or stakeholders at the time the LTSO heard the appellant make the comment nor is there evidence of any other witnesses. The STSO wrote in his statement that he informed the LTSO that he "did not hear any such statement or threat." The STSO also included in his statement that at 1924 hours when "this conversation and possible 'threat of workplace violence' happened [the STSO himself] was standing outside the STSO office, [a TSO] was standing next to me, [the LTSO] was on Lane #2 X-ray and [the appellant] was immediately to her left side. [A TSO] and [a TSO] were at the SO position close enough to possibly hear the conversation and threat made" however, there were no statements in the record from the three TSOs mentioned by the STSO. The only person who heard the words or "words to the effect" the appellant said was the LTSO who made it clear in her statement that what was said was said "in a joking manner" and not taken or meant to be taken literally, therefore, the Board determined that what the appellant said does not rise to the level of an inappropriate comment and the Charge is NOT SUSTAINED.

With regard to Charge 2, the specifications clearly allege that the appellant did not provide "timely administratively acceptable" medical documentation to support his absences indicating that the documentation was both untimely and administratively unacceptable. The medical documentation provided by the appellant on June 30, 2017, is administratively acceptable per the CBA, Article 3. Management acknowledged both in the email from the DAFSD to the appellant, dated July 17, 2017, wherein the DAFSD states that the appellant's absences will remain as AWOL "due to the submission of administratively acceptable documentation being untimely" and in management's reply wherein they state that "timeliness is the issue regarding this charge, not the validity of the documentation." The Board does not need to address the timeliness of the medical documentation. Management did not prove by preponderant evidence that the appellant's medical documentation was both untimely and administratively unacceptable, as specified in the specifications. Therefore, Charge 2, is NOT SUSTAINED.

Decision. Accordingly, the appeal is GRANTED. The suspension is overturned. Further, the appellant will receive back pay from the effective dates of his suspension, 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)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-102

October 13, 2017

***Issue**: Indefinite Suspension*

DECISION ON RECONSIDERATION

On September 20, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal finding that management's decision to place the appellant on indefinite suspension was not consistent with TSA policy. On October 4, 2017, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On October 11, 2017, the appellant 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
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—17-127

October 23, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

On or about September 18, 2017, the appellant was removed from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about October 18, 2017, the appellant appealed her removal to the TSA Office of Professional Responsibility Appellate Board (Board). On October 23, 2017, management rescinded the removal action.

Based on the foregoing facts, the Board is divested of jurisdiction to consider the appellant's appeal.

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

FOR THE BOARD:

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—17-112

October 19, 2017

Issue: *Validated Failure of Drug Test*

OPINION AND DECISION

On August 28, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Validated Failure of Drug Test*. The appellant filed a timely appeal with TSA's Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is substantial evidence. Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. It is a lower standard than preponderance of the evidence. If the evidence establishes the 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, *Validated Failure of Drug* Test, on one specification alleging that on July 29, 2017, the appellant was subject to random drug testing pursuant to the Transportation Security Administration (TSA) Drug and Alcohol-Free Workplace Program. The initial results of the drug test, as indicated on the Medical Review Officer (MRO) Final Report dated August 6, 2017, showed that the appellant tested positive for amphetamine. The initial result was verified by the MRO on behalf of TSA and the MRO found no justified medical reason for this drug use. Subsequent to being informed by the MRO of the positive drug test results, the appellant then submitted to the MRO for review, a list of her medications and two medications that were not her prescribed medications, but were her daughter's prescribed medications. The appellant stated her daughter's prescribed medications were amphetamine based and that due to her being unable to swallow them,

she got them on her hands as she "separated and/or grind them up" to mix in her daughter's drinks. The appellant also stated her daughter had been taking one drug since she was five years old and the other since she was nine years old. The MRO reviewed the list and his review validated the initial positive drug test results and again found no justified medical reason for the amphetamine drug use.

The Aviation and Transportation Security Act (ATSA), Public Law 107-71, requires screeners to have the ability to demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication, or alcohol. Additionally, the Handbook to Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section O. (1) prohibits the use of illegal substances and the inappropriate use of legal substances and Section O. (2) (a) states that employees are prohibited from using illegal drugs. Also, TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, requires removal for screener offenses involving validated positive drug tests.

On July 29, 2017, the appellant was identified for random drug and alcohol testing. According to the MRO Final Report, dated August 6, 2017, the appellant's urine sample tested positive for amphetamine. The MRO Final Report also verified that the drug test was conducted in accordance with the U.S. Department of Health and Human Services (HHS) regulations. Management was notified that the appellant tested positive on August 10, 2017. Two pre-decisional meetings were held with the appellant; the first on August 10 and the second on August 23, 2017. The appellant provided a written statement in which she stated that she spoke to the MRO on the telephone regarding the results of her drug test.

Management provided as evidence: the appellant's statement, undated; Medical Review Officer Final Report, dated August 6, 2017; Federal Drug Testing Custody and Control Form, dated July 29, 2017; email correspondence from the Manager of the Drug and Alcohol-Free Workplace Program, dated August 21, 2017; Summary of Pre-Decisional Discussion, dated August 10, 2017; and Summary of Pre-Decisional Discussion, dated August 23, 2017.

On appeal, the appellant stated that on August 4, 2017, she received a voice message from the MRO and that she returned his call on August 5, 2017. She stated that the MRO told her that she tested positive for amphetamine and asked her why this might occur. The appellant stated that she gave the MRO a list of medications she was taking. She stated that the MRO asked her if she was taking medication for Attention Deficit Disorder (ADD)/Attention Deficit Hyperactivity Disorder (ADHD) and that she replied "no" but told him that her daughter takes two medications. The appellant stated that she told the MRO that her daughter has trouble swallowing and that she separates and grinds up her daughter's medication to go into a liquid. The appellant stated that the MRO did not ask her for any documentation.

The appellant stated that she met with management on August 10, 2017, and was asked if she had sent any documentation to the lab who did her random drug test. The appellant stated that she replied that she had not and that management recommended that she do so. The appellant stated that she put all of her documentation together and faxed it to the lab and that a lab representative confirmed receipt of the documentation. The appellant stated that the MRO called her and stated that the paperwork she had submitted would not change anything and that he would still have to call TSA management to report her positive test results.

The appellant argued that she strongly believes a false positive is possible and should be considered. She stated that since her removal she called the pharmaceutical company that distributes one of her medications, Zantac, and that a representative at the company told her there is a chance for a positive result. The appellant stated that the company representative stated that she could not give the appellant any documentation but that she set up a case number and that if the appellant's employer called them, she could give the employer the information. The appellant included with her appeal a list of her current medications, copies of her daughter's medications, photos of the medications she stated she handles daily, and an article from US Pharmacists Periodical issues 2016:41 (8) 26-30 listing Ranitidine, the main ingredient in Zantac, as a possible cause for a false positive.

Management replied and argued that the MRO rejected the appellant's explanation - that her positive urinalysis for amphetamines could have been caused by her handling of her daughter's medication - as the reason she failed the urinalysis and concluded that she did not have an acceptable reason for testing positive for amphetamine.

The Board found that the Medical Review Officer Final Report is evidence that the appellant tested positive for amphetamine. It is clear from the evidence in the record that the appellant spoke to the MRO and submitted documentation for his consideration but that the MRO's determination was unchanged. Therefore, the Charge, *Validated Failure of Drug Test*, is SUSTAINED.

TSA has defined "Fit for Duty" in Management Directive (MD) No. 1100.33-1, *TSO Daily Fitness for Duty*, as a "statutory requirement which mandates that a TSO cannot have…illegal drugs… in his or her system." The Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A and Section C.4 of the TSA *Table of Offenses and Penalties*, requires removal for a positive drug test. The Board has sustained the Charge of *Validated Failure of Drug Test* and removal for the sustained charge is required.

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

FOR THE BOARD:

DEBRA S ENGEL

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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—17-097

October 13, 2017

***Issue**: Indefinite Suspension*

DECISION ON RECONSIDERATION

On September 8, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's placement on an indefinite suspension from the Transportation Security Administration (TSA). On September 22, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On September 29, 2017, management submitted a response arguing that the request for reconsideration should be denied. The appellant's argument that the indefinite suspension should be rescinded due to management's failure to discuss the penalty factors is immaterial due to the fact that PERSEC's determination to suspend the appellant's clearance does in fact make it impossible for him to continue to work as a Master Transportation Security Officer. 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
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—17-119

October 27, 2017

Issue: *Unacceptable Performance*

OPINION AND DECISION

On August 29, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Unsatisfactory Performance of Duties*. The appellant filed a timely appeal of her 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 "Reason," *Unsatisfactory Performance of Duties*, on one specification alleging that the appellant failed to meet the Transportation Security Administration (TSA) requirement for continued employment as a Transportation Security Officer by receiving an Unacceptable Level 1 rating in the 2017 Transportation Officer Performance System (TOPS).

The record shows that the appellant entered into her 2017 Employee Performance Plan for TOPS on October 14, 2016. During her mid-year review on April 17, 2017, the appellant was advised that her

performance was at an Unacceptable level for Performance Goal 1- Security Functions, and Core Competency 2- Critical Thinking. Following a breach incident involving the appellant, management decertified the appellant from screening functions and placed her with a mentor to complete On-the-Job Training (OJT). The appellant's performance did not improve during the three (3) month mentorship. Subsequently, the appellant was placed on a ninety (90) day Performance Improvement Plan (PIP), which, after being extended due to an on-the-job injury (OJT) and limited duty, ended on July 26, 2017. Management documented that it met weekly with the appellant, gave her developmental assignments, including Online Learning Center courses, and provided feedback in an effort to assist the appellant in improving her performance. The appellant was advised on more than one occasion during the PIP that she was still performing at an unacceptable level. At the conclusion of the PIP, management found that the appellant's performance, with respect to Performance Goal 1 and Core Competency 2, to be unacceptable. On July 31, 2017, management notified the appellant of her final "Unacceptable" TOPS rating for 2017.

On appeal, the appellant provided a copy of her response to the Notice of Proposed Removal and a letter written to the Deciding Official in response to her meeting with him. In that response, she admitted that this has not been her best performance year. She argued that the predominant part of the PIP was positive and that 46 days were satisfactory with no noted errors. The appellant stated that her performance was impacted by a serious sciatica condition and with arthritis in her kneecap but these conditions are being addressed and that she is on the path to full recovery. She also argued that she has been dealing with personal issues at home. The appellant stated that she has worked for TSA since 2002 and until this last performance period, she has never experienced these kind of issues. Additionally, the appellant provided a note from her physician indicating that her sciatic nerve problem for 5 months has been resolved, and doctor's office notes discussing her right knee pain.

In its reply, management argued that the appellant's performance failures were regular and egregious, and despite devoting many resources to aid in her success and substantial opportunity to demonstrate acceptable performance, she could not rebound and pass her PIP and thus, was removed from Federal service. In response to the appellant's argument that she experienced a total of 46 days with no documented screening errors, management argued that her performance was deficient 39% of the time during her PIP- which is an unacceptable level of performance. Management also noted that the appellant's ongoing medical condition was not a negative factor in the decision to remove her from Federal Service.

In response to the appellant's argument that she had no performance issues before 2017, the Board notes that the Deciding Official indicated that the appellant's employment history included multiple informal corrective actions and formal disciplinary actions all revolving around failure to follow the SOP and/or inattention to duty. Although not relevant to a performance based action, the appellant had performance based issues before 2017 and had been made aware of TSA's expectations of how she was to perform.

The Board finds that management reasonably determined that the appellant's performance was "Unacceptable" and gave her ample opportunity to improve. The Board also finds that the well-documented record supported management's finding that, notwithstanding its significant efforts to assist her, the appellant failed to perform at an acceptable level. The appellant had thirty-three (33) documented deficiencies for Performance Goal 1 during the PIP and eleven (11)

documented deficiencies for Competency 2 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 her *Unsatisfactory Performance of Duties*.

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:

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—17-110

October 6, 2017

Issue: *Failure to Report Arrest; Off-Duty Misconduct*

OPINION AND DECISION

On August 8 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two (2) charges: *Failure to Report an Arrest* and *Off-Duty Misconduct.* 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, *Failure to Report an Arrest*, on one specification. The specification alleged that on February 25, 2016, the appellant was arrested for emergency telephone interference with 911 in violation of State Statute, and domestic assault in the 5th degree with bodily harm in violation of State Statute. The TSA's Personnel Security Division (PERSEC) notified management of his arrest on November 7, 2016. The appellant failed to notify management of his arrest prior to November 7, 2016.

Management based Charge 2, *Off-Duty Misconduct*, on one specification. The specification alleged that on February 25, 2016, the appellant was arrested for emergency telephone

interference with 911 in violation of State Statute, and domestic assault in the 5th degree with bodily harm in violation of State Statute. The appellant entered a guilty plea in County Court on August 25, 2016, and was sentenced to a two-year probation for misdemeanor domestic assault.

Management alleged that the appellant's conduct violated TSA Management Directive 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 for observing basic on-the-job rules. Section 5.D.(2) requires employees to respond promptly to and fully comply with directions and instructions received from their supervisor or other management officials. Section 5.D. (7) requires that employees observe and abide by all laws, rules, regulations, and other authoritative policies and guidance. Section 5 D. (8), states that employees are responsible for reporting all arrests, including summons or citations to appear before a court, to the immediate supervisor or to any manager in the chain of supervision within twenty-four (24) hours of the arrest or as soon as possible thereafter. In addition, Section 6.D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Section 6.E states that, while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment, or trustworthiness. This applies whether the conduct is legal or tolerated within the jurisdiction it occurred.

On November 7, 2016, PERSEC notified management that the appellant was arrested on February 25, 2016, for interference with an emergency telephone call/communication and domestic assault. The appellant met with management on November 7, 2016, and admitted that he was arrested and had not reported the arrest to TSA. TSA's Office of Investigation (OOI) subsequently opened an investigation into the matter and confirmed that the appellant was arrested on February 25, 2016, for Emergency Telephone calls/communications - interrupt, interfere, impede, and disrupt 911 call offense and Domestic Assault-Misdemeanor - Intentionally inflicts/attempts to inflict bodily harm on another, and failed to report the above - mentioned arrest to management. The appellant informed OOI that he knew of the requirement to report his arrest but failed to do so out of fear of losing his job and embarrassment. The appellant's case was resolved on August 25, 2016, resulting in a two-year probation for the misdemeanor domestic assault charge.

Management provided the following evidence to support the Charge: statement of the appellant, dated November 8, 2016; and OOI Report of Investigation, dated February 13, 2017.

With respect to Charge 1, the Board finds that the evidence in the record, to include the ROI, coupled with the appellant's admission that he knew of the requirement but failed to report the arrest, to be preponderant evidence. Therefore, the Charge, *Failure to Report an Arrest,* is SUSTAINED.

With respect to Charge 2, the Board finds that the evidence in the record, to include the statement of the employee and the police reports contained in the ROI, to be preponderant evidence. Therefore, the Charge, *Off-Duty Misconduct*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to establish that removal is a reasonable penalty. The appellant also argued that the decision is legally insufficient because management did not prove the existence of a nexus between a legitimate government interest and the alleged misconduct. The appellant argued that he was not on duty at the time of the incident, nor was he scheduled to be on duty that date and there is no direct connection between any legitimate government interest or the TSA mission and operations and his alleged off-duty misconduct. The appellant argued that management's assertion that they have lost confidence is belied by the fact that he was promoted in January 2017, in the middle of management's investigation. He also stated that he was allowed to continue in his on-the-job training (OJT) mentor role and at no point was he suspended or removed from contact with passengers or coworkers. The appellant argued that management could not have been concerned about his potential behavior since they left him in a screening role for over six months.

Management responded and argued that the appellant knowingly failed to report his arrest and did so because he was afraid that he would lose his job. Management argued that under the Table, the penalty of removal is authorized for either offense. In addition, management argued that the appellant's own actions in failing to report the arrest establish a nexus to the conduct. Management pointed out that the appellant pled guilty to misdemeanor domestic assault and that his actions and plea are clearly relevant in evaluating his fitness as a TSO. Management asserted that the appellant's assault has caused them to question his reliability, judgement and trustworthiness and that 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. Additionally, management asserted that when the appellant was arrested, the police knew that he was employed by TSA.

The Deciding Official considered both mitigating and aggravating factors. He considered the nature and seriousness of the offense, the appellant's prior disciplinary history, performance and tenure, whether the appellant was on notice of the policies he violated, the impact his behavior has on the Agency's mission and operations, mitigating factors, and the Table of Offenses and Penalties (Table). The Deciding Official stated that the appellant intentionally concealed his arrest hoping management would not eventually learn of it, thus casting doubt that he would not conceal other security violations that would place the traveling public in harm. The Deciding Official considered that the appellant had adequate notice of the policies he violated and noted that on November 9, 2015, and December 4, 2016, the appellant signed an acknowledgement of having read and received a copy of TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*. The Deciding Official also considered the appellant's lack of prior discipline, satisfactory performance with TSA, and tenure with TSA since 2012. The Deciding Official also noted a clear nexus between the misconduct and the efficiency of service.

Under Section G.24 of the Table, the recommended penalty range for *Off-Duty Misconduct* is a thirty-one (31) day suspension to removal and the aggravated penalty is removal. Under Section

K.1 of the Table, the recommended penalty range for *Failure to Report an Arrest* is a 3-day to 5-day suspension and the aggravated penalty range is a 6-day suspension to removal. The Table indicates 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 range for the most serious offense being charged. For second and/or successive offenses, the penalty should generally fall within the aggravated range, and may often include removal. In addition, TSA MD 1100.73-5, Section 5.A. (8), states that when an employee fails to report an arrest within 48 hours, the penalty may be in the aggravated range.

The appellant's acknowledgment of the requirement to report his arrest but failure to do so out of fear of losing his job casts doubt on his trustworthiness and duty to report security violations. The appellant did not report his arrest until confronted by management over seven months after the arrest and over two months after being placed on probation. The fact that management continued to allow the appellant to work after being notified of the charges was considered as a mitigating factor. However, this mitigating factor did not outweigh the aggravating factors. The appellant has the responsibility for screening the public; his placement on probation for assault clearly creates a nexus to his position. 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

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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)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-095

October 18, 2017

***Issue**: Off-Duty Misconduct*

DECISION ON RECONSIDERATION

On September 11, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal and reversing the removal action. The Board concluded that management failed to support the charge with preponderant evidence. Management filed a timely request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board,* arguing that the Board misapplied the facts and misapplied TSA policy. The appellant filed an opposition to the reconsideration request on October 2, 2017, arguing that the Board's decision should be upheld. In addition, the appellant argued that the request for reconsideration was untimely. I find that management timely submitted its request for reconsideration.

Requests for reconsideration are reviewed to determine whether the Board misinterpreted the facts or misapplied policy. For the reasons stated below, management's request for reconsideration is GRANTED, in part. This reconsideration decision finds that the Charge was supported by preponderant evidence and that the appropriate penalty is a fourteen (14) day suspension.

Analysis

This reconsideration decision finds that management showed that the Charge, *Off-Duty Misconduct*, was supported by preponderant evidence. The specification alleged that on April 1, 2017, the appellant approached an employee at a shoe store inquiring about a shoe that he attempted to show her on his cell phone. The appellant showed the employee his cell phone and while talking about the shoe, he scrolled through personal pictures of himself including approximately six naked photos, including two which exposed his penis. The Board did not uphold the Charge finding that there were discrepancies in the details of the initial telephone

conversation with the shoe store employee on April 9, 2017, summarized in the police report and the employee's statement written in late April 2017. The Board stated that these discrepancies created questions as to what happened on the date in question. I disagree with the findings of the Board and find that although not as detailed, the initial statements are not contradictory to the statement provided by the shoe store employee. I also disagree with the Board's assertion that viewing the photographs from an unusual angle while the shoe store employee checked the store's computer for the sneaker was of critical importance. Although it may have been from an unusual angle, the shoe store employee was clear in her description of what she saw on the appellant's phone. An independent investigation may have been helpful in this matter but not required since the statement of the shoe store employee is preponderant evidence to support the Charge. Therefore, the Charge, *Off- Duty Misconduct*, is SUSTAINED.

Penalty Determination

Having sustained the charge, the question becomes whether the imposed penalty is consistent with the TSA Table of Offenses and Penalties (Table) and whether it is reasonable.

In determining the appropriateness of the penalty, the Board would look to the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct* and the TSA *Table of Offenses and Penalties (*Table). The appellant has no previous discipline, has been with the Agency since October 26, 2008 and has a satisfactory performance record. The recommended penalty for Inappropriate and/or unwelcome verbal or physical conduct of a sexual nature is a 3-day to 14-day suspension. The mitigated penalty range is a Letter of Reprimand (LOR) to 2-day suspension and the aggravated penalty range is a 15-day suspension to removal. I gave great weight to the shoe store employee's initial statement to the police that she was not sure if the incident was accidental or on purpose. Without a showing of intent; I do not find that the Deciding Official articulated a case for use of the aggravated penalty range. After a review of the penalty factors, I gave great weight to the mitigating factors and have determined that a penalty at the high end of the recommended range is appropriate and is the least action necessary to promote the efficiency of the Federal service.

Decision. Accordingly, the reconsideration request is GRANTED, in part, and the penalty is MITIGATED to a fourteen (14) day suspension. 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.

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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,
Respondent.

DOCKET NUMBER
OAB—17-117

October 27, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to indefinitely suspend 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 June 27, 2017, the Chief Medical Officer (CMO) found the appellant temporarily not medically qualified. In response to this determination, management placed the appellant in a non-pay status. On September 1, 2017, the appellant was found medically qualified by the CMO and returned to full duty on September 6, 2017. The appellant argued that he was "effectively suspended indefinitely" and filed an appeal to the TSA Office of Professional Responsibility Appellate Board (Board) on September 22, 2017, seeking back pay and benefits from June 16, 2017, to September 6, 2017.

ANALYSIS AND FINDINGS

The Board has jurisdiction to review certain disciplinary actions involving TSOs.[1] Actions covered include suspensions of more than fourteen (14) days, indefinite suspensions, involuntary demotions for performance/conduct, furloughs of any length, and removals. The appellant was not placed on an indefinite suspension by management.

[1] TSA Management Directive (MD) 1100.77-1, *OPR Appellate Board*, September 30, 2013.

Conclusion. The Board lacks authority to decide the appellant's appeal because he has not been placed on an indefinite suspension.

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

FOR THE BOARD:

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)
Supervisory Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-109

October 16, 2017

Issue: Time and Attendance Fraud; Absent Without Leave (AWOL)

OPINION AND DECISION

On August 21, 2017, management reduced the appellant in pay band and pay rate from his position as a Supervisory Transportation Security Officer (STSO), SV-1802-G, to a Lead Transportation Officer (SV-1802-F), with the Transportation Security Administration (TSA) based on two Charges: *Time and Attendance Fraud* and *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 Charge 1, *Failure to Follow the Standard Operating Procedures (SOP)*, on five specifications. Specification 1 alleged that on April 30, 2017, with the intent to deceive, the appellant knowingly sent the payroll office an email falsely stating that he departed from duty on April 29, 2017, at 8:30 p.m., when in fact, he departed from his place of duty at approximately 5:41 p.m.

Specification 2 alleged that on April 28, 2017, with the intent to deceive, the appellant knowingly sent the payroll office an email falsely stating that he reported for duty on April 28, 2017, at 12:00 p.m., when in fact, he did not report for duty until approximately 12:26 p.m.

Specification 3 alleged that on April 28, 2017, with the intent to deceive, the appellant knowingly sent the payroll office an email falsely stating that he departed from duty on April 25, 2017, at 8:30 p.m., when in fact, he departed from his place of duty at approximately 6:30 p.m.

Specification 4 alleged that on April 23, 2017, with the intent to deceive, the appellant knowingly sent the payroll office an email falsely stating that he reported for duty on April 22, 2017, at 12:00 p.m., when in fact, he did not report for duty until approximately 12:48 p.m.

Specification 5 alleged that on March 4, 2017, with the intent to deceive, the appellant knowingly sent the payroll office an email stating that he reported for duty on March 3, 2017, at 12:00 p.m., when in fact, he did not report for duty until approximately 12:28 p.m.

Management based Charge 2, *Absent Without Leave (AWOL)*, on five specifications. Specification 1 alleged that on April 29, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. Despite this schedule, the appellant left his appointed place of duty at approximately 5:41 p.m. and failed to provide an acceptable excuse for his absence. Accordingly, he was charged two hours and 45 minutes AWOL.

Specification 2 alleged that on April 28, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. Despite this schedule, the appellant did not report for duty until approximately 12:26 p.m. and failed to provide an acceptable excuse for his absence. Accordingly, he was charged 15 minutes AWOL.

Specification 3 alleged that on April 25, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. Despite this schedule, the appellant left his appointed place of duty at approximately 6:30 p.m. and failed to provide an acceptable excuse for his absence. Accordingly, he was charged two hours AWOL.

Specification 4 alleged that on April 22, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. Despite this schedule, the appellant did not report for duty until approximately 12:48 p.m. and failed to provide an acceptable excuse for his absence. Accordingly, he was charged 45 minutes AWOL.

Specification 5 alleged that on March 3, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. Despite this schedule, the appellant did not report for duty until approximately 12:28 p.m. and failed to provide an acceptable excuse for his tardiness. Accordingly, he was charged 15 minutes AWOL.

Management alleged that the appellant's misconduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 6.E. requires employees to conduct themselves in a manner that does not adversely reflect on the 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. Section 5. D. (7) requires employees to observe and abide by all laws, rules, regulations and other authoritative policies and guidance. Management alleged that this includes complying with 18 USC § 1001 which makes it illegal to knowingly and willfully make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

Management also alleged that the appellant failed to follow attendance and leave procedures as spelled out in TSA MD 1000.73-5, and the accompanying Handbook. Paragraph 5.D.(1) requires employees to report to work on time and ready, willing and able to perform the duties of their position. The Handbook, Section BB. (1), requires employees to schedule and use earned leave in accordance with established procedures, that whenever possible, employees must obtain prior approval for all absences including leave without pay (LWOP), and that 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. The leave procedures are described in the airport's Hub Procedure, 1100.63-1, *Attendance and Leave Guidance*, which specifically states, "Requests for unscheduled leave must be made by contacting (the airport's Coordination Center) a minimum of 60 minutes prior to the start of the employee's scheduled shift" and "A completed OPM Form 71 must be submitted to the employee's supervisor or designated leave approving official on the first day the employee returns to duty." The Handbook to TSA MD 1100.73-5, section BB. (1), further states that unapproved absences will be charged as absent without leave (AWOL) and that AWOL may form the basis for administrative action, including discipline, up to and including removal from TSA.

On March 3, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. The appellant did not arrive at the airport parking lot until 12:28 p.m. He then failed to "clock-in" on the time clock and failed to notify any of his supervisors of his late arrival. In response to a March 4, 2017, Kronos Exceptions Report, the appellant responded back with an email indicating that he arrived at work at 12:00 p.m.

On April 22, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. The appellant did not arrive at the airport parking lot until 12:48 pm. He then failed to "clock-in" on the time clock and failed to notify any of his supervisors of his late arrival. In response to an April 23, 2017, Kronos Exception Report, the appellant responded back with an email indicating that he arrived at work at 12:00 p.m.

On April 25, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. The appellant departed his place of duty at 6:30 p.m.; two hours before his tour of duty ended. He failed to "clock-out" on the time clock as he was required to do and failed to notify any of his supervisors of his early departure. In response to an April 28, 2017, Kronos Exception Report, the appellant responded back with an email indicating that he departed at 8:30 p.m.

On April 28, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. The appellant did not arrive at the airport parking lot until 12:26 p.m. He then failed to "clock-in" on the time clock and failed to notify any of his supervisors of his late arrival. On April 28, 2017,

the appellant sent the payroll office an email which stated that he reported on-time to work at 12:00 p.m.

On April 29, 2017, the appellant was scheduled to work from 12:00 p.m. until 8:30 p.m. The appellant departed his place of duty at 5:41 p.m.; two hours and 49 minutes before his tour of duty ended. He then failed to "clock-out" on the time clock as he was required to do and failed to notify any of his supervisors of his early departure. On April 30, 2017, the appellant sent the payroll office an email which stated that he departed at 8:30 p.m.

The appellant was issued a Notice of Proposed Involuntary Reduction to Transportation Security Officer (TSO) on June 28, 2017. The appellant submitted a written reply on July 13, 2017, and gave an oral reply on July 19, 2017. On August 21, 2017, the appellant was issued a Notice of Decision wherein the Deciding Official decided to reduce the appellant in pay band and pay rate to a Lead Transportation Security Officer (LTSO).

Management provided as evidence: statement of a Transportation Security Manager (TSM), dated May 29, 2017; appellant's statement, dated May 9, 2017; addendum to appellant's statement, dated May 9, 2017; Door Access reports; WebTA Certified T&A Summary. PPs 4 and 8; email from appellant to the TSM, dated April 23, 2017; statement of a Supervisory Transportation Security Officer (STSO); photo of appellant, dated April 25, 2017; photo of appellant's car, dated April 25, 2017; email from appellant to timekeepers, dated April 28, 2017; email from appellant to timekeepers, dated April 28, 2017; statement from an STSO, dated May 11, 2017; photo of appellant, dated April 29, 2017; photo of appellant's car, dated April 29, 2017; email from appellant to timekeepers, dated April 30, 2017; 71s submitted by the appellant on March 3, 2017, May 15, 2017, and April 28. 2017; statement of a TSM; and exception pay roll report, dated March 4, 2017.

On appeal, the appellant argued that he never attempted to lie, cheat, or deceive; nor has he ever "forgotten" or purposely "failed" to clock in or out. The appellant stated that he never lied or fraudulently submitted an SF-71 and that none of the actions taken by him were done to intentionally deceive or defraud TSA. The appellant stated that he incorrectly sent emails to the timekeeping officers verifying his time for March 3, April 22, April 25, April 28, and April 29, 2017. The appellant argued that these discrepancies were not brought to his attention until May 9 and May 15 during closed door investigations. The appellant stated that he never denied that he took leave on the dates in question and was never given the opportunity to correct the errors. The appellant stated that he suggested to management that they go back and review the tapes indicating that he attempted to swipe in and out and also requested that management get statements from his co-workers attesting to the fact that he informed others of his leave. He argued that his actions were not of someone trying to sneak away or be deceptive.

The appellant submitted an addendum to his appeal admitting to incorrectly and untruthfully sending emails to the timekeepers. He stated that he failed to follow the established leave procedures but his intent was not to mislead, defraud, misrepresent, or lie to TSA in any fashion. The appellant stated that he has not been performing up to his own high standards for the last three months due to a variety of reasons, the first being the ongoing issue of his son's health. Secondly, he had to purchase another residence that is more handicap accessible for his son and

lastly, he has been juggling too much and recently resigned from a collateral duty due to divided attention at work. The appellant stated that for the above stated reasons, he did not ensure that his proper work hours were documented correctly. The appellant stated that he submitted leave forms to other supervisors but did not follow up to ensure that the leave forms were signed and submitted. This failure caused him to incorrectly, untruthfully, and improperly attempt to give the timekeepers his work hours. The appellant stated that he was deeply sorry for his actions and will never submit any time and attendance information without first going through his own management.

Management responded and stated that the appellant had numerous opportunities to present evidence but failed to provide any statements from witnesses. Management argued that STSOs are required to inform one of two TSMs of their absence from duty but the appellant's claim that he made "local management" aware is incorrect. Management noted that the appellant may have informed a fellow STSO of his absence but that does not satisfy the requirement that one of the two TSMs must be notified. The appellant did not inform either TSM that he arrived late or left early. In addition, management claimed that he failed to "punch-in" or "punch-out." Management also claimed that the appellant failed to submit a leave request and then reported to the payroll office that he was present for duty during his duty hours. Management argued that a preponderance of evidence supported the charges and specifications.

The appellant responded to management's reply and stated that management had evidence to support his claim that his actions were not intentional. The appellant argued that he never denied taking leave and provided management with the statements of two STSOs who validated his claim that STSOs were allowed to approve leave for other STSOs.

With regard to Charge 1, specifications 1, 2, 3 and 4, the Board was not persuaded by the appellant's arguments. Although statements in the record from other STSOs indicated that they knew he would be absent; they specifically stated that they were not asked to approve an SF-71. The evidence in the record shows as to specification 1, less than one day after his early departure, he responded that he was on duty at all times. As to specification 2, on the same day of the incident, he responded that he was on duty at all times. As to specification 3, he responded three days after the incident, that he was on duty at all times. As to specification 4, less than one day after the incident, the appellant responded that he was on duty at all times. These emails were all relatively close in time to the incidents and therefore, are proof that the appellant's actions were in fact intentional. The appellant certified in WebTA that he worked 8 hours on each of the days indicated in the specifications. Additionally, the Door Access reports provided evidence to show that the appellant left or arrived on the times indicated in the specifications. Therefore, specifications 1, 2, 3 and 4 are SUSTAINED.

With regard to specification 5, there is no evidence in the record proving intent, a key element of the Charge. Unlike the other specifications, there is no email from the appellant to the timekeeper confirming that he reported for duty at 12:00 p.m. Therefore, specification 5 is NOT SUSTAINED.

Having sustained specifications 1, 2, 3 and 4 of Charge 1, the Charge, *Time and Attendance Fraud*, is SUSTAINED.

With regard to Charge 2, the Board found that the WebTA Certified T&A Summaries and SF 71s to be preponderant evidence to support all specifications. The appellant was not on approved leave during any of the times indicated in the specifications. Therefore, Charge 2, *AWOL*, 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 he is a dedicated, hard-working, invaluable asset to TSA and that the demotion is unreasonably harsh, unprecedented, discriminatory, wastes tremendous resources and defies the policies to which TSA supposedly adheres. The appellant stated that he has been with the agency for over ten years and despite his tremendous record, to include "Achieved Excellence" every year and STSO of the year for FY2015; management has chosen to impose the second most severe punishment possible and demote him. The appellant argued that management failed to follow TSA's policy of progressive discipline and that the penalty imposed was meant as punishment rather than a corrective action. The appellant argued that management could have placed his discipline into the "mitigated" penalty range. The mitigated range for time and attendance fraud is a Letter of Reprimand (LOR) to a 4-day suspension and the mitigated range for AWOL is an LOR to a 1-day suspension.[1] The appellant argued that management did not correctly analyze the aggravating and mitigating factors in determining the appropriate penalty. The appellant argued that sufficient weight was not given to his impeccable work history, repeated displays of remorse, recent revelation that his son was dying and needed additional therapeutic assistance, ability for rehabilitation and lack of any prior corrective/disciplinary actions. Additionally, the appellant argued that his demotion does not promote the efficiency of the service and removing him from the STSO position would result in the loss of a valuable, acclaimed employee and a waste of years of training and money. The appellant suggested that the service would be better promoted by retaining him as an STSO and having him sign a S.M.A.R.T. agreement or issuing a Performance Improvement Plan (PIP). The appellant claimed that his demotion is disparate compared to other similarly situated employees.

Management responded and argued that the appellant's demotion was mitigated from TSO to LTSO. Management agreed that the appellant's prior work record was as depicted by the appellant. Management stated that all of the appellant's many accomplishments played a significant part in their decision to demote him rather than remove him. Management stated that it has been a past practice to initiate removal actions against employees for similar misconduct and that demotion instead of removal demonstrates that management exercised discretion to impose a lower level of discipline. Management claimed that appellant's allegation that other officers have been charged with more serious infractions but did not receive discipline is based

[1] The Board notes that the mitigated range for an AWOL of one workday or less is a Letter of Counseling (A-2).

completely on speculation. In addition, management stated that the appellant's demotion was further mitigated so that he could demonstrate rehabilitative potential as an LTSO instead of a TSO. Management claimed that they imposed a penalty which permits the LTSO to keep his job and continue to demonstrate his job knowledge but as an STSO, they can no longer trust him to oversee the time and attendance of subordinates.

The appellant responded to management's reply and stated that during his time as an STSO he had access to the State's "HR Tracker" which detailed HR related actions taken around the state. He stated that he has never come across an adverse action taken against an employee for their first offense. The appellant listed the names of various employees and the offenses they committed but alleged that they were never issued adverse actions. In addition, the appellant disagreed with management's assertion that he did not express remorse or regret and stated that he did in fact express remorse and was overwhelmed with tears and struggled to speak during the investigation. The appellant also stated that he still functions as the "de facto" STSO in charge on multiple occasions.

In considering the penalty, as mitigating factors, the Deciding Official considered the appellant's lack of prior discipline and favorable past performance reports, as well as his selection as STSO of the year, 2015, and STSO of the quarter in 2016. He also considered the personal hardships that the appellant was undergoing during the time frames of the late arrivals and early departures, and the effect they likely had on the appellant's state of mind. As aggravating, the Deciding Official considered that as an STSO, the appellant had an obligation to set the example of a higher standard of conduct. The Deciding Official notes that he has lost all confidence in the appellant's ability to supervise a TSA workforce, as his actions call into question whether or not he can be trusted to carry out the SOP, follow it, and report violations of it. The Deciding Official considered that the appellant has been placed on clear notice of the requirement to accurately report time and attendance for his employees, as well as for himself. The Deciding Official determined that the aggravating factors outweigh the mitigating factors and warrant an Involuntary Demotion. The Deciding Official mitigated the demotion to an LTSO rather than to a TSO, stating that this will still allow the appellant to use his proven skills without the responsibility for supervising and setting an example for others to follow.

Under Section E.1 of the Table, for Time and Attendance Fraud, the recommended penalty is a 5-day suspension to 14- day suspension; a mitigated penalty of an LOR and an aggravated penalty range of a 15-day suspension to removal. Management cited Section A.3 of the Table regarding AWOL. This is the incorrect Section since the appellant's AWOLs, although occurring on separate days, were in total under 8 hours. The correct Section of the Table to use is Section A.2, for AWOL of one workday or less. Under Section A.2, the recommended penalty is an LOR to a 2-day suspension; a mitigated penalty of an LOC; and an aggravated penalty of a 3-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. The Guidelines also states that when an employee commits more than one offense, the Proposing and Deciding Official may consider whether the penalty should be in the "Aggravated Penalty Range" corresponding to the most serious offense being charged. Removal is within the aggravated range for both charges.

The Board found that the Deciding Official weighed the mitigating and aggravating factors and appropriately determined that the aggravating factors outweighed the mitigating factors. The appellant's actions as an STSO place doubt in management's ability to continue to use him in that capacity. Management clearly considered the mitigating factors when they chose not to demote the appellant to a TSO but rather to demote to an LTSO.

The Board determined that the appellant's reduction in pay band and pay rate 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

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=087608 7875.TSA
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Transportation Security Administration

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OPR Appellate Board