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—18-009

February 16, 2018

Issue: *Reckless Conduct; Inappropriate Conduct; Failure to Follow TSA Policy*

OPINION AND DECISION

On December 21, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on three Charges: *Reckless Conduct*, *Inappropriate Conduct* and *Failure to Follow TSA Policy.* 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, *Reckless Conduct*, on one specification alleging that on September 29, 2017, the appellant was assigned to screening duties at the checkpoint at the airport. The appellant threw an empty bin over the x-ray machine rollers on Lane 2 which landed on the floor in between lanes 2 and 3. When instructed that he should not throw the bin, the appellant picked up the bin and responded the bin was "more cracked now."

Management based Charge 2, *Inappropriate Conduct*, on two specifications. Specification 1 alleged that on October 9, 2017, the appellant was assigned to screening duties in a baggage area at the airport. The bags were being screened by hand. The appellant commented that the

Explosives Detection System (EDS) at one of two airlines should be used. The appellant's pace of work was observed to be slower than his colleagues. Specification 2 alleged that on October 9, 2017, the appellant was assigned to screening duties in a baggage area at the airport. At approximately 1530 hours, the appellant made a comment about needing "sustenance." Soon thereafter, the appellant went to his lunch bag, pulled out an apple and leaned on/against a screening table and ate an apple. The appellant had not been released for his lunch break. The appellant's colleagues continued to screen bags while the appellant ate the apple.

Management based Charge 3, *Failure to Follow TSA Policy*, on one specification alleging that on October 9, 2017, the appellant was assigned to screening duties in a baggage area at the airport. At approximately 1609 hours, the appellant pulled out his cell phone and began scrolling on his cell phone while screening a bag. The appellant then left the screening area with his cell phone held to his ear. The appellant left an unscreened bag at the screening table when he walked out of the screening area. The appellant was not excused for a break at that time.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that 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: (1) reporting to work on time and ready, willing and able to perform the duties of their position; (2) responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials; (6) conserving, protecting and ensuring appropriate use of Federal resources, time, information and personnel (both Federal and contract); and (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. 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 conduct 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. Management also alleged that the appellant's conduct violated the Handbook to MD 1100.73-5, Section 5. D. 4., which states that TSA uniformed employees will comply with all policies relating to uniformed employees' appearance and responsibilities.

Management alleged that the appellant's conduct violated the Handbook to MD 1100.73-2, *TSO Dress and Appearance Responsibilities*, Section E. 9. which states that display and use of personal electronic devices (to include cell phones) is prohibited in identified TSA screening areas. Management also referred to a local policy that quoted paragraph E. 9. of MD 1100.73-2, as well as provided clarification on where the TSA screening areas are at the airport which include the entire checkpoint area as well as the baggage screening locations associated with a particular airline.

On September 29, 2017, the appellant was assigned to screening duties at the checkpoint. Management alleged that the appellant threw an empty bin over the x-ray machine rollers. A

Lead Transportation Security Officer (LTSO) submitted a statement, dated September 30, 2017, in which she stated that on September 29, 2017, she was by the podium looking over paperwork when she saw a bin "fly over the rollers of the second lane into the space between lanes two and three, and land next to lane three." The LTSO stated, "I looked up startled and then looked over to lane two to see what happened. [The appellant] was standing next to the rollers and said that the bin had been broken. I replied to him that no, that does not mean he should throw it." During a pre-decisional discussion, the appellant stated that the bins in question were cracked and that he was told to throw them away. The appellant stated, "hurling them under the x-ray rollers was probably not the way to have done it."

On October 9, 2017, the appellant was assigned to screening duties in the checked baggage area. Bags were being screened by hand and the appellant commented that the EDS system at an airline should be used. A Lead Transportation Security Officer (LTSO) submitted an undated statement in which he stated that the appellant was unenthusiastic about having to screen bags by hand and that he commented that they should be using the EDS system at one of the airlines. The LTSO also stated that the appellant's "pace was slow." At approximately 1530, the appellant ate an apple in the baggage screening area while his colleagues continued to screen bags. In his statement, the LTSO stated that the appellant "commented about needing 'sustenance' and soon after went to his lunch bag, pulled out an apple and leaned against a table to eat it while his colleagues continued to screen bags even though he had not been released for lunch." The LTSO also stated that he later saw the appellant "leave the bag room with his phone to his ear during screening." The LTSO stated, "Thirty to forty-five minutes later [the appellant] commented again about using the EDS system and wanted to call [a Transportation Security Manager (TSM)] about the situation at which point I got [the TSM's] phone number on the land line and told [the appellant] to lift the handset to make the call." During a pre-decisional discussion, the appellant stated that he used his cell phone to call a TSM to try to get some help in baggage.

The appellant was issued a Notice of Proposed Removal (NOPR) on November 8, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant requested and was granted two extensions and provided an oral and written reply on December 6, 2017.

Management provided the following evidence to support the Charge: statement from a Lead Transportation Security Officer (LTSO), dated September 30, 2017; statement from an LTSO, undated; Summary of Pre-Discipline Decision Discussion, dated October 10, 2017; notes from a Supervisory Transportation Security Officer (STSO), dated October 13, 2017; Closed Circuit Television (CCTV) footage and photos of CCTV footage; and a copy of Local Guidance on Use of Personal Electronic Equipment in the Work Place and appellant's acknowledgment of receipt.

On appeal, with regard to Charge 1, the appellant stated that after identifying two plastic bins with cracks in them, he tossed the bins under the x-ray machine rollers on lane two. He stated that the x-ray rollers are approximately three feet high and that he was standing approximately three feet from the rollers. The appellant stated that the bins landed partially under Lane 2. He stated that there were no passengers in the vicinity and that management failed to provide video evidence to support the charge. He argued that management relied on a statement from an LTSO who was doing paperwork at a podium and looked up to see what occurred when she heard the bins land and that she only noted a single bin in her statement. The appellant argued that if the

LTSO had to look up to see what happened, then she clearly did not have a first-hand account of what happened prior to being startled.

The appellant noted that B.6 of the Table of Penalties states that the nature of the offense involves "fighting, threatening, intimidating, attempting to inflict or inflicting bodily harm on another; harassing or provoking quarrel; engaging in horseplay; any violent, reckless or disorderly act, language, gestures, or conduct" and argued that it is clear that the section of the Table is about violence and/or risk of harm caused by an officer's actions. He argued that the evidence does not support that he engaged in reckless conduct the nature of which was violent and/or threatened the safety of the traveling public. The appellant reiterated that he tossed the bins under the rollers from a few feet away. He admitted that he could have placed the bins down more gently but argued that his conduct does not rise to the level of "recklessness." The appellant argued that there is no allegation by management that the traveling public and/or any other property was at risk as a result of his actions.

With regard to Charge 2, specification 1, the appellant argued that he and two other officers were responsible for screening bags for four airlines. He argued that management did not interview the two officers he was working with nor did they identify a timeframe during which he was performing too slowly. The appellant argued that management failed to indicate how slow he was working, which colleagues he was being compared to, during which timeframe he was working too slowly, how many bags he was screening an hour and how many bags he should have been screening in an hour. He also argued that management failed to identify a relevant policy or how fast he should have been screening bags.

With regard to Charge 2, specification 2, the appellant stated that his lunch should be at 1530 but that he often eats later due to the airport being short-staffed. He stated that half an hour after his scheduled lunch time, he told a coworker that he was feeling jittery and that she suggested he grab a bite to eat. The appellant stated that he grabbed an apple from his lunch box sitting a few feet away from him and ate the apple from between 1557 and 1559; two and a half hours after his previous break that had ended at 1327. The appellant argued that he began screening again before he even finished chewing the apple. The appellant did not dispute that he ate the apple but argued that management failed to provide any policy that prohibits an employee from taking a two-minute break to eat an apple. Additionally, the appellant argued that management has told officers that they can eat in the baggage screening area and noted that during the month of December 2017, there were regularly cookies, doughnuts, and/or other snacks in the baggage area.

With regard to Charge 3, the appellant stated that an airline representative expressed concern about getting bags screened in time and that at 1609, after evaluating the situation and recognizing that the officers needed help to get caught up, he took his cellphone out in an attempt to seek help from a TSM. The appellant stated that he began the call in the screening area but then realized that he should not be in the screening area so he walked away to finish the call. The appellant stated that the TSM did not answer and he returned to the baggage area 30 seconds after he left. The appellant stated that the TSM did arrive, along with several other officers, later in the afternoon, to help conduct screening. The appellant argued that it has been an airport policy to allow bargaining unit employees to use cell phones for work-related purposes. He argued that bargaining unit employees store computer passwords on phones, use cell phones when landlines are down, and use cell phones for other work-related purposes. The appellant

argued that his call to the TSM to try to get help in the baggage area is the definition of a work-related use of a cell phone.

Management responded and argued that with regard to Charge 1, B.6 includes charges such as disorderly conduct, disruptive conduct, exercising poor judgment, failure to comply with safety procedures and reckless conduct. Management stated that reckless is defined as lack of proper caution. Management argued that throwing bins into the middle of another lane is reckless behavior; noting that it is possible the bin could have hit a coworker or a member of the traveling public, or someone walking by could have tripped on the bin. Management argued that there is no CCTV of the incident and that management is allowed to make a credibility determination that the individual who observed this incident accurately portrayed what occurred. Management argued that the appellant's own statement indicated that he engaged in "hurling" the bin. Management argued that the damaged bins should have been placed in the trash, not "hurled" which is disruptive in the workplace and could result in injury.

With regard to Charge 2, specification 1, management argued that according to an LTSO, the appellant was unhappy about having to screen bags by hand and wanted to be able to load the bags on a cart and screen them through the EDS machine at one of the airlines. Management stated that because of this, the appellant "ensued screening bags at a slower pace than normal." Management argued that the Proposing Official reviewed the video of the incident and that it was clearly apparent to him that the appellant was working much slower than his coworkers or his usual pace.

With regard to Charge 2, specification 2, management stated that the appellant complained about not being able to go to lunch at 1530 and then grabbed an apple out of his lunch box and ate it from 1557 – 1559 while he watched his coworkers screen bags. Management argued that while the appellant claimed he was feeling jittery and needed something to eat, he never reported to the LTSO or any co-workers that he was having health issues.

With regard to Charge 3, management argued that there was an LTSO in charge of the area who would have made the call for help if she determined that help was needed. Management argued that the appellant was in the middle of screening a bag when the call was made and that he subsequently left the area with the bag still open on the screening table.

The appellant replied to management's reply and argued that there was never any allegation that he tossed the broken bins in the presence of passengers or other walking coworkers, and that management's speculation about what might have happened had there been passengers is irrelevant to what actually happened. They argued that the witness management relied upon did not mention any passengers being in the area.

The appellant argued that it is not against policy for an employee to suggest that screening with EDS would be better than screening by hand nor is it against policy for an employee to be less than happy. He also argued that management did not identify any particular evidence when it alleged that he was screening too slowly and did not define what the proper pace should have been or any other objective criteria by which to measure his screening pace.

The appellant argued that management did not dispute any of the evidence provided in the appeal that shows that food is regularly in the baggage area. He also argued that management did not

dispute any of the evidence provided in his appeal that bargaining unit employees have been permitted to use cell phones in the baggage screening area nor that he called the TSM and was making a work related call, not a personal call.

With regard to Charge 1, the Board found that while the appellant's conduct was inappropriate, it does not rise to the level of reckless conduct. Management did not provide any evidence to show that there was anyone in the area that was hurt or could have been hurt. The only evidence provided, the statement of the LTSO, does not prove that the appellant's actions were reckless; she did not mention that anyone was in the area or that anyone or anything was harmed by the appellant's actions. Management failed to prove the charge by preponderance evidence. Therefore, the Charge, *Reckless Conduct*, is NOT SUSTAINED.

With regard to Charge 2, specification 1, management alleged that the appellant was working slowly yet failed to provide any policy that states there is a requirement as to how fast an employee must perform his/her duties. There is no evidence in the record that reflects that the appellant had been notified that his pace of work was unacceptable. The Board determined that management was unable to show that the appellant's slow pace of work was inappropriate. Therefore, specification 1 is NOT SUSTAINED.

With regard to Charge 2, specification 2, management failed to cite a policy which states that employees are not allowed to eat in the baggage area. Additionally, CCTV video footage in the record shows other employees eating and drinking in the baggage area which supports the appellant's argument that it is normal and accepted at the airport. Management failed to cite a policy the appellant violated and therefore, the specification is NOT SUSTAINED.

With regard to Charge 3, the local policy provided as evidence supports the TSA policy regarding use of cell phones. The policy states that all electronics will continue to be prohibited in screening locations, as they serve as a distraction and a security threat. The policy lists identified screening areas as "the entire checkpoint area (including the exit lane, playbook areas and REFS areas) as well as baggage screening locations associated with a particular airline." The policy goes on to state that only supervisors may use such device for official business only. The appellant was in a baggage screening area when he used his cellphone and thereby, violated the policy. Therefore, the Charge, *Failure to Follow TSA Policy*, is SUSTAINED.

Having sustained Charge 3, 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 did not establish that removal is reasonable. He argued that management failed to take into account mitigating circumstances and factors, including how busy and understaffed baggage was on October 9, 2017, and the "extremely technical nature" of the infraction under Charge 3. The appellant argued that management did not acknowledge that airline representatives communicated concern about having their baggage screened in a timely manner at the time that he made the phone call to the TSM. He argued that management did not acknowledge that he used his phone for a work-related matter nor did management acknowledge that he used critical thinking to address a particular situation in which

the officers in baggage needed help and that the TSM did arrive with help later in the afternoon. The appellant argued that the infraction was technical in nature, not egregious, and not grounds for removing a fifteen-year employee.

Management responded and argued that the Deciding Official considered the applicable penalty factors, to include the nature and seriousness of the charges and their relationship to the appellant's work responsibilities and his past disciplinary history. Management argued that a significant amount of effort has been made to assist the appellant with understanding management's expectations and outlined the disciplinary and corrective actions the appellant has been given since 2012. Management argued that the appellant's actions were not inadvertent and were frequently repeated. Management argued that the Deciding Official concluded that the appellant had been on notice about his unprofessional conduct and noted that less severe corrective actions had not resulted in the appellant modifying his unacceptable behavior. Management stated that while the appellant is technically proficient in his screening duties, the Deciding Official concluded that his continued failure to adapt in response to corrective guidance had eroded management's confidence in his ability to change his behavior.

The appellant responded and argued that management is resting its case on his disciplinary history and that past misconduct is not proof of current misconduct. He argued that management ignored all mitigating factors which show a strong bias that clouded management's ability to fairly and objectively look at the present misconduct at issue.

The Deciding Official considered the nature and seriousness of the charges and their relationship to the appellant's work responsibilities noting that it is TSA's mission to protect the nation's transportation systems in order to ensure freedom of movement for people and commerce. He considered that the appellant's repeated unprofessional conduct and failure to comply with TSA policy adversely affected the team's morale and TSA's security mission. The Deciding Official found the appellant's misconduct to be serious and aggravating.

The Deciding Official also considered the appellant's formal disciplinary history noting that the appellant received a 5-day suspension for unprofessional conduct on December 21, 2016, and a 3-day suspension for failure to follow standard operating procedures on June 10, 2016. The Deciding Official considered that in each case, there were relevant factors exhibited, such as the appellant's disdain for leadership, refusal to follow orders, and lack of personal responsibility for his actions. The Deciding Official considered that these actions clearly put the appellant on notice that any future misconduct could result in further disciplinary action, up to and including removal from federal service.

The Deciding Official further considered the clarity with which the appellant was on notice of any rules violated in committing the offenses. He considered that on January 7, 2015, the appellant received a Letter of Reprimand (LOR) in lieu of 3-day suspension for refusing to perform a playbook play and that on February 7, 2014, the appellant received an LOR for inappropriate comments and insubordination. The Deciding Official considered that in July 2016, the appellant was verbally counseled regarding unprofessional interaction with leadership and that he received a Letter of Counseling (LOC) on December 17, 2012, for yelling. He considered that the appellant also received LOCs on November 13, 2015, and October 26, 2012, for failure to follow SOP. He noted that the appellant was verbally counseled in August 2012 for interfering with team drills and displaying disrespectful behavior toward fellow co-workers. The

Deciding Official considered that the appellant received Image Awareness Training in October 2013; Mission Essential Threat Mitigation that enforced professional behavior in August 2015; and recently acknowledged reading MD 1100.73-5 on February 16, 2017. The Deciding Official found that the appellant's responsibilities and expectations were sufficiently clear and communicated.

As mitigating factors, the Deciding Official considered the appellant's employment with TSA since September 29, 2002; his ability to perform at a satisfactory level; and his dependability. The Deciding Official found however, that the mitigating factors do not outweigh the seriousness of the appellant's misconduct.

The Deciding Official considered the appellant's rehabilitation potential and whether a lesser penalty would adequately address the appellant's conduct and found that the incident, coupled with the appellant's prior discipline demonstrate the appellant's refusal to adapt his conduct in response to corrective guidance. He considered that lesser actions have not resulted in modifying the appellant's unacceptable behavior. The Deciding Official stated that the appellant's recent unprofessional conduct combined with his history of uncooperative behavior in the workplace eroded his confidence in the appellant's ability to change his behavior.

Under Section D. 4 of the Table, the recommended penalty range for failure to follow TSA policy is a Letter of Reprimand to 14-day suspension and the aggravated range is a 15-day suspension to removal. The Guidelines of the Table state that examples of aggravating factors include prior disciplinary record and prior warning/advisement not to commit misconduct.

Although the Board only upheld one of three charges, the appellant's history of disciplinary and corrective actions shows that management has applied progressive discipline and had the right to consider a penalty in the aggravated penalty range. In light of the appellant's disciplinary history, the Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.16 11:23:53 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-010

February 27, 2018

Issue: *Inability to Maintain a Regular Work Schedule*

OPINION AND DECISION

On December 28, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Inability to Maintain a Regular Work Schedule.* 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. In this matter, the Board must determine whether the Charge, *Inability to Maintain a Regular Work Schedule,* is proven by a preponderance of the evidence.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Inability to Maintain a Regular Work Schedule,* on one specification which alleged that a review of the appellant's leave records shows that from January 8, 2017, through November 25, 2017, excluding any leave taken under his entitlement to the Family and Medical Leave Act (FMLA), the appellant has been absent from duty for a total of 693 hours. The appellant has utilized eight hours of annual leave. The appellant has been charged as absence without leave (AWOL) for 677 hours. Additionally, the appellant was approved for eight hours of leave without pay (LWOP). From January 8, 2017, through November 25, 2017, the appellant has been absent for 37% of his 1,840 scheduled hours of available work scheduled.

On July 21, 2017, the appellant was sent a Letter of Intent and Duty Status Update requesting that he contact management to discuss his intentions regarding returning to duty. The appellant submitted medical documentation indicating that he has several medical conditions and is unable to work. The medical information was sent to the Office of the Chief Medical Officer (OCMO) on August 15, 2017, to determine the appellant's fitness for duty. On October 17, 2017, the OCMO found the appellant temporarily unfit for duty based on his use of sedating medications for his sleep disturbance, anxiety and depression. The appellant did not meet the medical requirements for his job at the time and did not provide a narrative from his doctor indicating that he is no longer using those medications. The appellant was sent a letter on November 2, 2017, informing him of his status and the steps he needed to take to return to duty. The appellant did not respond to the November 2, 2017, letter.

The appellant was issued a Notice of Proposed Removal (NOPR) on December 19, 2017. The NOPR informed the appellant of his right to reply orally and/or in writing. The appellant gave an oral reply on December 24, 2017.

Management provided as evidence: WebTA Certified Time and Attendance Summaries; Letter of Intent and Duty Status Update, dated July 21, 2017; Notification of OCMO Determination (Temporarily Not Medically Qualified), dated November 2, 2017; and Fitness of Duty Determination, dated October 17, 2017.

On appeal, the appellant argued that he was medically disqualified for medication he takes for anxiety and Post Traumatic Stress Disorder (PTSD). He also stated that he suffers from back pain for which he still receives treatment and has FMLA for his autistic son. The appellant argued that he provided doctor's notes for every time he was out. The appellant argued that he was working with his doctors to switch medications and that management would not let him come back to work until he got his medication changed and provided two months of notes from a doctor stating that he no longer had PTSD.

Management responded and argued that the appellant had been submitting notes indicating that he would return to duty in July but he had not returned to work at the time he was issued the Letter of Intent and Duty Status Update. Management stated that the appellant was informed that he must return to work on a regular basis or management would consider a non-disciplinary removal. Management stated that the appellant submitted documentation indicating that he had medical conditions which made him unable to work, including PTSD, panic disorder, insomnia, depression with anxiety, and that he had become dependent on benzodiazepines since February 2015.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence; it is clear from the WebTA Summaries that the appellant has been and remains unable to maintain a regular work schedule. Additionally, the appellant did not dispute or deny that he has been unavailable for duty. The Board notes that the majority of the appellant's absences occurred before the OCMO letter finding him temporarily not medically qualified. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Inability to Maintain a Regular Work Schedule.*

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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Date: 2018.02.26 21:05:25 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-011

February 26, 2018

Issue: *Negligent Performance of Duty*

OPINION AND DECISION

On December 21, 2018, management demoted the appellant from his position of Supervisory Transportation Security Officer (STSO), SV-1802-G, to the position of Transportation Security Officer (TSO), SV-1802-E, with the Transportation Security Administration (TSA) based on the charge: *Negligent Performance of Duty.* The appellant filed a timely appeal of his demotion to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Negligent Performance of Duty*, on two specifications. Specification 1 alleged that on October 18, 2017, at approximately 0706 hours, while assigned at the Terminal 2 security checkpoint, a Transportation Security Officer (TSO) who was under the appellant's supervision, notified the appellant that an item in a carry-on bag had caused an Explosive Trace Detection (ETD) alarm. The appellant failed to ensure that the TSO performed proper alarm resolution

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procedures, and the appellant then directed the item, which contained simulant explosive material, to be cleared.

Specification 2 alleged that on October 18, 2017, at approximately 0707 hours, while assigned at the Terminal 2 security checkpoint, a TSO, who was under the appellant's supervision, notified the appellant that an item in a carry-on bag had caused an ETD alarm. The appellant did not review the x-ray image of the item, and the appellant failed to ensure that the TSO performed proper alarm resolution procedures for the item. The appellant directed that the item, which contained simulant explosive material, to be cleared.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5.D., which provides 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. (7) provides that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. E. provides that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgement or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred.

Management also alleged that the appellant's conduct violated the Screening Policies for Standard Operating Procedures (SOP), Chapter 20, Section 1.1 and 1.4; and Screening Checkpoint SOP, Chapter 13, Section 2.A.2.a. Chapter 20, Section 1.1. states that STSOs must ensure that all alarms are resolved and security screening has been completed before an individual or property is permitted into the sterile area of the airport. Section 1.4 states that STSOs must resolve situations concerning Possible Threat items and determine whether the items are allowed onboard the aircraft. Chapter 13, Section 2.A.2.a (ETD Alarm Resolution) states that the standard procedure is to (b)(3):49 U.S.C. § 114(r) or complete the search if it is already in progress.

The evidence shows that on October 18, 2017, the appellant was assigned as one of the STSO's overseeing the Terminal 2 security checkpoint. The TSO mentioned in specification 1 notified the appellant (b)(3):49 U.S.C. § 114(r) in a carry-on bag had caused an ETD alarm. After reviewing the x-ray image, the appellant directed the TSO to perform certain additional screening procedures. The appellant cleared the bag containing the item that alarmed. (b)(3):49 U.S.C. § (b)(3):49 U.S.C. § 114(r) At approximately the same time as he was addressing the alarm in specification 1, the TSO in specification 2 asked for his assistance analyzing an x-ray image on an alternate viewing station (AVS) that showed an item with an (b)(3):49 U.S.C. § 114(r). The appellant directed this TSO to check the bag and left the area. When the TSO performed (b)(3):49 U.S.C. § 114(r). The appellant did not (b)(3):49 U.S.C. § 114(r) and relayed to the TSO through another Officer that he should perform certain additional screening procedures, but did not tell her to (b)(3):49 U.S.C. § (b)(3):49 U.S.C. § 114(r) which was required. The appellant cleared the item, which also had simulant explosive (b)(3):49 U.S.C. § 114(r)

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On November 21, 2017, the appellant was issued a Notice of Proposed Demotion. An oral reply was held on November 30, 2017. The Deciding Official issued a decision on December 21, 2017, and demoted the appellant from the position of Supervisory Transportation Security Officer to the position of Transportation Security Officer.

Management provided the following evidence to support the Charge: memo from a Transportation Security Manager (TSM), dated October 29, 2017; email from the appellant, dated October 18, 2017; statement of the appellant, dated October 20, 2017; statement of a TSO, dated October 22, 2017; statement of an LTSO, dated October 29, 2017; statement of a TSO, dated October 29, 2017; statement of a TSO, dated October 22, 2017; email from a TSO, dated October 29, 2017; statement of an LTSO, dated October 29, 2017; and memo from an STSO, dated October 29, 2017;

On appeal, the appellant argued that the SOP section cited refers to a standard lane not an Enhanced Accessible Property Screening (EAPS) lane, which was the type of lane that he was working on at the time of the incident. However, the appellant admitted that in accordance with SOP Chapter 20, Section 1.1. and 1.4, he simply missed the alarm and has taken responsibility for this occurrence. In addition, the appellant argued that the matter in question is a performance-based matter. The appellant argued that he should have been allowed the opportunity afforded to all officers of the airport to be placed on the Threat Detection Training Plan (TDTP), and that management has foregone his ability to rehabilitate by not allowing him to participate in the TDTP program.

As to specifications 1 and 2, the appellant argued that management's claim that he had to perform (b)(3):49 U.S.C. § 114(r) As to specification 1, the appellant argued that the (b)(3):4 (b)(3):49 was an unconfirmed alarm and that there were no (b)(3):49 U.S.C. § 114(r). He also argued that the TSO did not bring up any other concerns to him. The appellant argued that per EAPS SOP Chapter 3.B.13.2(b)ii, with (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) the item can be cleared for transport. The appellant argued that during (b)(3):49 U.S.C. § 114(r). As to specification 2, the appellant admitted that he failed to see the alarmed item but was doing too many things at one time. The appellant stated that his actions were not deliberate but were due to doing too many things at one time and a lack of sleep. He admitted that had he (b)(3):49 U.S.C. § (b)(3):49 U.S.C. § 114(r). The appellant argued (b)(3):49 U.S.C. § 114(r) is not required under either EAPS or the Screening Checkpoint SOP. The appellant submitted evidence from the Training Specialist that you do not have to (b)(3):49 U.S.C. § 114(r)

Management responded to the appeal and argued that after (b)(3):49 U.S.C. § 114(r) caused an ETD alarm, the appellant directed the TSOs to clear the bags after performing (b)(3):4 (b)(3):49 U.S.C. § 114(r) Management argued that the appellant failed to instruct the TSOs to (b)(3):49 U.S.C. § 114(r) which was required by Screening Checkpoint Standard Operating Procedure (SOP), Chapter 13, section 2.A.2.a.

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Management argued that the EAPS SOP cited by the appellant, Section 2(3)2(b)(ii)[1] allows for a supervisor (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) Management alleged that the appellant failed to follow the EAPS section of the SOP that he cited.

Management also argued that appellant's actions rose to the level of negligence and thus, constitute misconduct.

The appellant responded to management's appeal and argued that other STSOs (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r), some multiple times, have been either placed within the new TDTP or have received corrective, or disciplinary actions, not to include adverse actions such as involuntary demotions or removal from position. The appellant requested that the Board confirm this allegation.

The Board does not hold the responsibility for proving that other STSOs, (b)(3):49 U.S.C. § 114(r) (b)(3):4 have either been placed within the new TDTP or have received corrective, or disciplinary actions. That responsibility belongs to the appellant. Additionally, management had the right to determine whether the appellant's actions were misconduct and not performance and proceed accordingly.

Although the appellant has argued and has shown that (b)(3):49 U.S.C. § 114(r) is not required on the (b)(3):49 U.S.C. § 114(r) is required. The SOP sections cited state that STSOs must ensure that all alarms are resolved and security screening has been completed before an individual or property is permitted into the sterile area of the airport. Section 1.4 states that STSOs must resolve situations concerning Possible Threat items and determine whether the items are allowed onboard the aircraft. Chapter 13, Section 2.A.2.a (ETD Alarm Resolution) states that the standard procedure is to (b)(3):49 U.S.C. § 114(r) complete the search if it is already in progress.

In specification 1, (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) the property was allowed into the sterile area. The appellant admitted in his statement dated October 20, 2017, (b)(3):49 U.S.C. § 114(r) The statement of the TSO, dated October 22, 2017, indicates (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) She noted that at that point a few officers gathered (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) (b)(3):49 The TSO complied with the directions given to her by the appellant and was told that the bag was clear. The TSO stated that she (b)(3):49 U.S.C. § 114(r)

[1] Management stated that the section cited by the appellant, 2.2(b)(ii) is incorrect, and the correct section is 2(e02(b)(ii).

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(b)(3):49 U.S.C. § 114(r) She stated that she did not feel comfortable questioning a supervisor call. In addition, in a statement, dated October 29, 2017, the TSO who performed the actual search of the bag stated that something didn't seem right (b)(3):49 U.S.C. § 114(r). He stated that after the appellant cleared the bag, something still didn't sit right with him or the other TSO.

As to specification 2, the appellant admitted that he failed (b)(3):49 U.S.C. § 114(r) (b)(3):4 In a statement, dated October 29, 2017, the X-ray operator (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) In a statement, dated October 22, 2017, the TSO in specification 2 clearly saw (b)(3):49 U.S.C. § 114(r). After following the appellant's directions, he still did not feel comfortable and reached out to a Lead Transportation Security Officer (LTSO) and another STSO. This STSO (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r). The appellant admitted in his statement, dated October 20, 2017, that after the other STSO looked at the item, he then looked at it and (b)(3):49 U.S.C. § 114(r) (b)(3):49 U.S.C. § 114(r) I then realized I didn't take a close look at it before. I was trying to do to many things at one time instead of calling on my co-supervisors for help, and ended up missing something." In both specifications, the appellant failed to further investigate the item and allowed a threat into the sterile area. Contrary to the appellant's assertion, the (b)(3):49 U.S.C. § 114(r) indicated that he did not follow the SOP for both assessments.

The Board found that the appellant's statements and the statements of the other TSA employees involved clearly show that the appellant failed to ensure that proper alarm resolution procedures were followed, and directed that an item which contained simulant explosive material be cleared. Therefore, the Charge, *Negligent Performance of Duty*, is SUSTAINED.

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

On appeal, the appellant argued that the penalty was not reasonable due to the fact that there were many mitigating circumstances surrounding the matter. The appellant argued that in light of his work record, lack of disciplinary history, acknowledgment of wrongdoing, acceptance of responsibility, and similarly situated employees (b)(3):49 U.S.C. § 114(r), it is not reasonable to reduce him in pay band and pay rate. The appellant also argued that his last position of record was an LTSO. The appellant argued that Section H.5 of the Table should have been used since there was never any potential threat to human life, revenue, or property; or actual damage, injury or loss. The appellant also argued that in light of the circumstances, the mitigated range should have been considered.

Management responded and argued that in light of appellant's multiple prior corrective actions involving failure to use due diligence in carrying out his supervisory duties, a reasonable determination was made that the incident should be treated as misconduct, not a simple threat detection failure.

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The appellant responded to management's reply and argued that management appeared to use the two failures as sufficient means to impose the penalty of involuntary demotion whereas the penalty determination factors actually contrast with that notion and instead point to the unusual circumstances factor to be considered. The appellant also argued that the TSM recommended a ten (10) calendar day suspension.

The Deciding Official considered both mitigating and aggravating factors. He considered the seriousness of the misconduct and its relationship to the appellant's position; the clarity with which he was on notice of the policies he violated; the effect of the appellant's conduct on his confidence in his ability to perform his assigned duties; whether the appellant's conduct was notorious; the appellant's work and disciplinary history; any mitigating factors; the appellant's potential for rehabilitation; and the consistency of the penalty with those imposed upon similarly situated employees for the same or similar offenses. The Deciding Official considered that as a supervisor, the appellant occupies a prominent leadership role and is expected to uphold the highest standards of attentiveness to his duties, especially where potential threat items were identified at the checkpoint. The Deciding Official noted that the appellant's negligent performance of his supervisory duties caused him to lose trust in his supervisory ability. He also noted that the appellant's decision making during both alarms had the potential to put the traveling public at risk.

The Deciding Official noted the appellant's corrective actions as aggravating since they all dealt with his supervisory duties. On July 17, 2014, the appellant received a Letter of Counseling for failure to follow instructions and failure to provide positive leadership. On June 30, 2015, the appellant received a Letter of Guidance and Direction for his lack of oversight on his operation to ensure that all breaks were completed prior to the last hour of an Officer's shift. On July 10, 2016, the appellant received a Letter of Guidance and Direction for his failure to follow instructions and failure to meet a deadline. On March 7, 2017, the appellant received a Letter of Guidance and Direction for his failure to monitor wait times at his security checkpoint and failure to contact management when there was a 20 minute wait time. On May 11, 2017, the appellant received a Letter of Guidance and Direction for his failure to maintain proper oversight of his operation when the efficiency was specifically below expectations. The Deciding Official noted that these actions put the appellant on notice that he needed to be fully engaged in his operations and that future failures could lead to disciplinary action, up to and including removal.

As mitigating factors, the Deciding Official noted the appellant's satisfactory job performance; that he has been employed with TSA for 15 years; and has no disciplinary record. However, he did not believe that these mitigating factors outweighed the seriousness of the offense.

Under Section H.6 of the Table, the recommended penalty range for inattention to duty, where there is a potential danger to human life, property, or revenue, or damage/injury/loss actually occurs is a 14-day suspension to removal. The aggravated penalty range is removal. Contrary to the argument by the appellant, management had the right to aggravate the penalty due to the two separate incidents of negligence on the part of the appellant. The two specifications were distinct and separate from each other. The guidelines state that in cases where there are second and/or successive offenses, the penalty should generally fall within the "Aggravated Penalty Range"

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column, and may often include removal. Both the recommended and aggravated penalty range under H. 6 include removal. The Deciding Official noted that he cannot continue to allow him to supervise in light of the string of corrective actions he has received over the past 3 years and his failure to maintain attention to his operation. The Board notes that H.6 was the appropriate Section of the Table to use.

The Board agrees with the Deciding Official's conclusions and finds that the Deciding Official correctly analyzed the penalty factors in making the determination to demote. In addition, the Deciding Official followed the guidance provided in the Table. The Table provides that a demotion may always be considered as an option when the applicable penalty range includes removal. It is noted that the appellant's corrective actions were all a result of his supervisory capabilities.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.02.26 13:48:08 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-014

February 22, 2018

Issue: *Unavailability for Duty*

OPINION AND DECISION

On January 12, 2018, 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: *Unavailability for Duty.* 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. In this matter, the Board must determine whether the Charge, *Unavailability for Duty,* is proven by a preponderance of the evidence.

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Unavailability for Duty,* on one specification which alleged that the appellant has been unavailable to perform the duties of her position as a TSO since on or about February 12, 2017, to present due to a work-related injury. The appellant has been in a Leave Without Pay (LWOP) status since February 12, 2017.

On or about May 30, 2013, the appellant filed an Office of Workers' Compensation Programs (OWCP) claim for an on-the-job injury. That claim was approved by the Department of Labor (DOL), OWCP, on August 5, 2013. On October 30, 2017, a Letter of Intent and Duty Status was delivered to the appellant, which notified the appellant that her continued unavailability may result in administrative action including removal. The letter advised the appellant of the

opportunity to submit medical documentation indicating that she was able to return to full duty. On November 28, 2017, the appellant submitted medical documentation from two physicians who both indicated that the appellant has a partial permanent disability which requires restrictions.

Management supported the Charge with: Request for Personnel Action forms (SF-52s), reflecting the appellant's Leave without Pay status.

The appellant received a Notice of Proposed Removal on December 11, 2017. The appellant did not respond to the proposal notice.

On appeal, the appellant requested that the charge be changed to a medical removal since the agency has no light duty assignments. She also argued that the agency did not look for jobs for OWCP employees before their removal from Federal service. In addition, the appellant stated that she received a letter from the Assistant Administrator from the Office of Human Capital who indicated that the appellant would continue as a Federal employee and remain in a LWOP status until the Vocational Rehabilitation (Voc Rehab) process is complete. The appellant argued that she should not be removed until either her Federal Employee Retirement System (FERS) disability is approved or until she completes the Voc Rehab program.

Management responded and argued that the Voc Rehab process is administered through the DOL, and as such is continued regardless of the appellant's employment status with TSA. In addition, management stated that the appellant's Voc Rehab and disability retirement options continue to be available to her but the processes are administered by the DOL and the Office of Personnel Management, respectively. Management stated that after the appellant's workplace injury in May 2013, she was placed on a limited duty assignment while she attempted to recover. Upon a finding that she has reached her maximum medical improvement and continues to have permanent lifting restrictions that prevent her from performing the full duties of a TSO, she was removed based on her unavailability to perform the full duties of a TSO.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence; it is clear from the SF52s that the appellant has been and remains unavailable for duty. The medical documentation provided by the appellant provides restrictions on her return to duty. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Unavailability for Duty.*

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.22 20:30:29 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER OAB—18-015

February 21, 2018

Issue: *Indefinite Suspension*

OPINION AND DECISION

On January 2, 2018, management indefinitely suspended the appellant from his position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on one Charge, *Employee has been indicted, or there is equivalent legal process (such as a criminal information or bench appearance), for a crime for which a sentence of imprisonment may be imposed.* The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

> (b) Employee has been indicted, or there is equivalent legal process (such as a criminal information or bench appearance), for a crime for which a sentence of imprisonment may be imposed.

Management based the Charge on one specification which alleged that on December 22, 2017, the appellant was arrested and charged with Domestic Violence Assault, Impede Breathing, a felony in the State in which he resides, currently pending in Municipal Court.

The issue before the Board is whether the appellant's placement on indefinite suspension on January 2, 2018, was appropriate under TSA policy.

The appellant was arrested on December 22, 2017, on Domestic Assault Impede Breath/Circulation with previous conviction. The appellant appeared before a Magistrate on December 23, 2017, and was released on bond on December 24, 2017.

The Board considered the evidence and arguments submitted by both parties. Management supported the charge with: pre-decision discussion, dated December 29, 2017; Appellant's response to the pre-decision discussion, dated December 29, 2017; and bench appearance before a Municipal Judge, dated December 23, 2017.

In his appeal, the appellant argued that he was acting in self-defense and provided photographs which allegedly showed where he was attacked. The appellant argued that the penalty was too harsh because he tried to prevent this from happening by contacting the Employee Assistance Program (EAP) and seeking counseling. The appellant requested to be returned to duty in a non-screening status pending the results of the outcome.

Management replied and argued that the appellant's misconduct is supported by a preponderance of evidence and that there is a nexus between his misconduct and legitimate government interests. Management argued that regardless of the appellant's claim that it was self-defense, the fact remains that he was arrested and charged with a second degree felony for domestic violence assault and impeding breath/circulation; a crime for which a sentence of imprisonment may be imposed. In addition, management argued that the appellant's indefinite suspension was in accordance with TSA policy.

The Board determined that the appellant's arrest on December 22, 2017, and appearance before a Magistrate on December 23, 2017, is substantial evidence to support that the appellant had a bench appearance for a crime for which a sentence of imprisonment may be imposed. Therefore, the Charge, *Employee has been indicted, or there is equivalent legal process (such as a criminal information or bench appearance), for a crime for which a sentence of imprisonment may be imposed*, is SUSTAINED.

The Board finds that management's decision to place the appellant on indefinite suspension was appropriate and consistent with TSA policy.

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.02.21 10:47:43 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-018

February 28, 2018

Issue: *Positive Alcohol Test*

OPINION AND DECISION

On December 29, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Positive Alcohol Test*. The appellant filed a timely appeal with TSA's Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The issue before the Board is whether the appellant was properly removed from her TSO position for testing positive for alcohol. Management based the Charge, *Positive Alcohol Test*, on one specification alleging that on December 11, 2017, the appellant was administered a random alcohol test pursuant to the TSA Drug and Alcohol Free Workplace Program. At 1308 hours the appellant was administered a breathalyzer test with a reading of 0.050. At 1332 hours the appellant was administered a second breathalyzer test with a reading of 0.041. Both readings were above the .02 threshold established to be considered fit for duty as a TSO.

A pre-decisional meeting was held with the appellant on December 29, 2017. The appellant responded in writing. She stated that it had been a full 12 hours after her last drink the evening prior and that she was not impaired in any way other than nerves and confusion.

Management submitted as evidence: Summary of Pre-Decision Discussion, dated December 29, 2017; Appellant's response to Pre-Decision Discussion, dated December 29, 2017; Drug and Alcohol Testing – Employee Instructions, dated December 11, 2017; US Department of Transportation (DOT) Transportation Security Administration Federal Employee Testing Breath Alcohol Testing Form, dated December 11, 2017; Intoximeters ASV XL Test Results, dated December 11, 2017; and TSA Broadcast 1100.9.1 – Alcohol Awareness Message, dated May 22, 2017.

On appeal, the appellant stated that she was randomly selected for drug and alcohol testing on December 11, 2017, and that the screening test performed at 1308 hours resulted in a blood alcohol content (BAC) of 0.050. She stated that another screening test was conducted at 1332 hours and that following the second test, the Breath Alcohol Technician (BAT) informed her that there was an error with the testing machine and that another test would have to be conducted. The appellant stated that at 1333 hours, the BAT prepared a final test and that he waited 15 minutes to allow the testing machine to fully reset. She stated that the BAT began the confirmation test by ensuring that the "air blank" resulted in a BAC of 0.000. The appellant stated that when the testing machine failed the air blank at 1349 hours, the BAT notified her that the testing machine was faulty and left to report the malfunction to his manager. The appellant argued that the decision must be rescinded because the breath alcohol test was conducted on a faulty machine that produced an invalid confirmation test.

The appellant argued that the Health and Human Services and Department of Transportation drug and alcohol testing regulations require a confirmation test to be performed in the event a screening test results in a BAC of 0.020 or greater. She argued that disciplinary action may be based only on the results of a valid confirmation test. The appellant argued that the regulations state that a breath alcohol test will be cancelled, and thus rendered invalid, when there is not a 0.000 result on the air blank conduced before the screening or confirmation test. The appellant argued that the test done at 1332 hours that followed the initial screening test was accidentally aborted by the BAT. She argued that this is evident by the BAT's notation in Section 3 of the Breath Alcohol Testing Form and from the fact that a third test was conducted. The appellant argued that the required confirmation test began at 1333 hours but was cancelled at 1349 hours when the air blank resulted in a number other than 0.000. The appellant argued that because the confirmation test was rendered invalid and because TSA may only take disciplinary action based on the results of a valid confirmation test, the Decision must be rescinded.

Management responded and argued that the appellant's initial breath alcohol test (test number 1141) began at 1307 hours when in the presence of the appellant, the BAT conducted an air blank test to verify that there was no alcohol residue present inside the alcohol sensor and that the air blank result was 0.000. Management stated that the BAT showed the air blank result to the appellant and then at 1308 proceeded with the breath alcohol test which resulted in a blood alcohol content result of 0.050. Management noted that the test type on the print-out is noted as "screening."

Management stated that by the machine's design, due to the positive blood alcohol sample, the machine locked and entered into the confirmation stage (test number 1142). Management stated

that at that time, the BAT advised the appellant that a confirmation test would be conducted and instructed her not to eat, drink, or put anything in her mouth while waiting to take the confirmation test once 15 minutes had passed. Management stated that at 1312 hours, the BAT accidentally pushed a button on the machine; aborting the next step; the confirmation stage. Management stated that the print-out would have denoted the test type as "confirmation." Management noted that the BAT made note of his error on in Step 3 of the Breath Alcohol Testing Form. Management stated that at 1329 hours, the BAT ran an accuracy check on the machine, which read 0.000 (test number 1143) and then informed the appellant that he was ready to administer a second test. Management stated that because the BAT had cleared the confirmation stage of the machine and performed the accuracy check, any subsequent test would denote "screening" on the print-out – as if the sample was the initial test.

Management stated that at 1332 hours, with the appellant present, the BAT conducted an air blank test to verify that there was no alcohol residue present inside the alcohol sensor and that the air blank result was 0.000. Management stated that the BAT then proceeded by instructing the appellant to blow through the mouth piece until she heard a click. Management stated that the results of that test indicated a blood alcohol content of 0.041 (test number 1144) and that the machine then locked and went into the confirmation stage. Management noted that the print-out for that test (test number 1144) denoted "screening" as the test type.

Management stated that because the machine reflected the confirmation stage, at 1349 hours, the BAT conducted another test (test number 1145). Management stated that the BAT instructed the appellant to blow into the alcohol sensor but that when she blew the meter on the machine did not move and the BAT made note of this in a written statement, stating that it appeared as though the appellant was allowing air to escape the mouth piece. Management stated that the BAT told the appellant that he needed her to blow into the mouth piece, as she had done twice previously, but to no avail the appellant continued to allow air to escape outside of the mouth piece which ended up giving a "high blank" result. Management stated that the BAT then called the DOT Quality Control Manager (QCM) and explained the situation and the QCM concurred with the BAT to print out the test result. The BAT then ran an accuracy check and the results were 0.000 (test number 1146). Management stated that the high blank reading was the result of the appellant not blowing enough air into the Alco-sensor. Management stated that the BAT then proceeded to conduct the breath alcohol test on the next employee and the result was 0.000 (test number 1147).

Management argued that because test number 1141 resulted in a blood alcohol content of 0.050, and test number 1144 resulted in a blood alcohol content of 0.041, test number 1145 was not required. With regard to the appellant's claim that the breath alcohol machine was faulty or malfunctioning, management argued that the report provided by the TSA Drug and Alcohol Free Workplace Program reflects normal results for breath alcohol screening conducted prior to and after the appellant, to include the appellant's testing results.

Management argued that the appellant's test was administered in accordance with the DOT Drug and Alcohol Testing Guide. Management argued that the appellant had a random alcohol test that resulted in a positive blood alcohol content greater than 0.020, a confirmation test that resulted in a positive blood alcohol content greater than 0.020, and that the machine was working properly.

The appellant responded to management's reply and argued that test number 1144 was not a confirmation test and that the results are insufficient. The appellant alleged that the BAT

accidentally voided test number 1142; misidentified "basic yet crucial information" when he labeled test number 1146 as a confirmation test at the top of his Collector Statement; and blamed a high air blank, which would be taken without any input from a donor, on the appellant. The appellant argued that there is no valid confirmation test.

The Board considered all of the evidence and arguments submitted by the appellant. The record shows that on December 11, 2017, the appellant was selected for a random alcohol test. The first breath alcohol test administered to the appellant registered a positive influence with a reading of 0.050. An additional breath alcohol test administered to the appellant, approximately 24 minutes later, registered a positive influence with a reading of 0.041. The Board gave no merit to the appellant's argument that there was no valid confirmation test. The test conducted at approximately 13:31:52 (test number 1144) was a confirmation test; the second test serves as confirmation of the first result. The BAT's notation on the Breath Alcohol Testing Form sufficiently accounts for the reason that test number 1144 is labeled at "screening" and test number 1145 is labeled as "confirmation" and why there were three tests. The Board found no evidence that the machine was faulty.

TSA MD 1100.33-1, *TSO Daily Fitness for Duty*, states, "Impairment due to the presence of alcohol occurs when a TSO has a blood alcohol concentration level of 0.020 or higher." The evidence in the record is substantial evidence that the appellant tested positive for alcohol on December 11, 2017. The Board finds that the evidence supports that the appellant tested positive for alcohol while on duty on December 11, 2017, and that the breath alcohol test was conducted in accordance with policy. Therefore, the Board SUSTAINS the Charge, *Positive Alcohol Test.*

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

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.02.28 13:17:56 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—18-021

February 2, 2018

Issue: *Jurisdiction (Termination in Trial Period)*

OPINION AND DECISION

On January 16, 2018, TSA management terminated the appellant's employment as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DISMISSES the appeal.

The appellant filed an appeal on February 2, 2018. Based on TSA Management Directive 1100.31, *Trial Periods*, management terminated the appellant during his trial period. The appellant commenced employment as a TSO on March 5, 2017. The applicable Section is 6.A (2) (a) of the MD, 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. The preponderance of evidence indicates that the appellant was subject to a one-year trial period and was still serving in his one-year trial period at the time of 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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Date: 2018.02.02 14:46:06 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—18-025

February 26, 2018

Issue: *Jurisdiction (Untimely)*

OPINION AND DECISION

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

BACKGROUND

On January 10, 2018, management terminated the appellant based on the Charge, *Failure to Follow Standard Operating Procedures*. On February 13, 2018, the appellant appealed his termination to the TSA Office of Professional Responsibility Appellate Board (Board).

ANALYSIS AND FINDINGS

The Handbook to TSA Management Directive 1100.77-1, *OPR Appellate Board*, states that appeals must be filed no later than 30 days after the action is effected. It goes on to state that the first calendar day after the effective date of the action is the first day of the 30-day filing period. The first day of the 30-day filing period would have been January 11, 2018, requiring the appellant to submit an appeal by February 9, 2018. The appellant did not submit his appeal to the Board until February 13, 2017.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2018.02.26 14:59:22 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-133

February 8, 2018

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

DECISION ON RECONSIDERATION

On December 6, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal and ordering the appellant reinstated to his position of Transportation Security Officer (TSO) with the Transportation Security Administration. On December 19, 2017, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* On January 4, 2018, 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

Denise D. Stark
Acting Director
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-136

February 12, 2018

***Issue**: Inappropriate Conduct*

DECISION ON RECONSIDERATION

On December 14, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On December 29, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On January 5, 2018, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

ROBERT L MILLER Digitally signed by ROBERT L MILLER Date: 2018.02.12 11:05:13 -05'00'

Robert Miller
Acting Director
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-141

February 12, 2018

***Issue**: Disorderly Conduct*

DECISION ON RECONSIDERATION

On January 4, 2018, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On January 11, 2018, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On January 16, 2018, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

ROBERT L MILLER

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Date: 2018.02.12 13:04:21 -05'00'

Robert Miller
Acting Director
Office of Professional Responsibility

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—17-144

February 13, 2018

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

DECISION ON RECONSIDERATION

On January 17, 2018, the Office of Professional Responsibility Appellate Board (Board) issued a decision granting the appellant's appeal and ordering the appellant reinstated to her position of Lead Transportation Security Officer (LTSO) with the Transportation Security Administration. On January 29, 2018, management filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On February 2, 2018, 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. As part of its request, management cited sections of the SOP it had not cited in the Proposal. Although management's arguments included in its request for reconsideration, relying on different sections of the SOP, may support the conclusion that appellant violated the SOP, I cannot consider those arguments or alternative SOP sections because management failed to include them in the Proposal. The Board was correct that the policy cited by management in the

Proposal does not alone support the specification. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

ROBERT L MILLER

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Date: 2018.02.13 13:12:48 -05'00'

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Robert Miller
Acting Director
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-003

February 9, 2018

Issue: *Inappropriate Conduct*

OPINION AND DECISION

On December 4, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge, *Inappropriate Conduct*. The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Inappropriate Conduct*, on one specification alleging that on September 5, 2017, at approximately 0900 hours, the appellant came up by the side of a female passenger and whispered into her ear, "Hey gorgeous, you are looking hot up in here," or words to that effect, and pressed his body against her enough that she stated she could feel the appellant's belt.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (3) states that employees are responsible for exercising courtesy and tact 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. Section 5. D. (7) states that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative polices and guidance. Section 6. B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities. Employees must perform their duties in a professional and business-like manner throughout the workday. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness.

Management also alleged that the appellant's conduct violated the Handbook to MD 1100.73-3, *Anti-Harassment Program*, Section B. 1., which states that all TSA employees have the responsibility for creating and maintaining an environment free of harassment. TSA policy prohibits harassment by or of any employee, supervisor, manager, contractor, vendor, applicant, or other individual with whom TSA employees come into contact by virtue of their work for TSA.

On September 5, 2017, a passenger approached a Lead Transportation Security Officer (LTSO) and told her that she had been assaulted by a male TSO. The LTSO then walked to the checkpoint with the passenger and the passenger identified the appellant. The LTSO notified a Supervisory Transportation Security Officer (STSO) who then informed a Transportation Security Manager (TSM). The TSM asked the passenger which officer had assaulted her and the passenger identified the appellant. The TSM contacted the local Department of Public Safety and the passenger provided a written statement to the Department of Public Safety in which she stated that a male TSA agent assaulted her. She stated, "I thought he was just going to go around me. Instead he pushed his body into mine pressing me into the end of the belt. He leaned in and whispered in my ear, "Hey gorgeous. You are looking hot up in here." I could feel him pressed against me, enough that I could feel his belt at his midsection."

The appellant was issued a Notice of Proposed Removal (NOPR) on October 18, 2017. The NOPR advised the appellant of his right to make an oral and/or written reply. The appellant requested and was granted a 14-day extension and provided an oral and written reply on November 8, 2017.

Management provided the following evidence to support the Charge: CCTV footage for September 5, 2017; statement from the passenger, dated September 5, 2017; Airport Department of Public Safety Report; statement from an LTSO, dated September 5, 2017; statement from a TSM, dated September 5, 2017; and statement from an STSO, dated October 30, 2017.

On appeal, the appellant stated that on September 5, 2017, he was performing his screening duties on a busy lane and that the CCTV footage shows him having to "repeatedly squeeze past passengers while working." The appellant stated that at least a couple of times, the footage shows him extending his hand toward a passenger, or lightly touching the back or the side of a passenger as he navigated around them. The appellant stated that both are "generally-accepted ways of indicating to a person that you are behind them or are about to move past them." The appellant argued that management failed to prove the charge by preponderant evidence. He argued that the only allegation came from the passenger herself and that her statement is

inconsistent with, and at times contradicted by, the CCTV footage. The appellant noted that the passenger described the "assault" by claiming that he "pushed her body into" his and "press[ed] [her] into the end of the belt." The appellant argued that the CCTV footage disproves the passenger's account. He argued that he did not push his body into the passenger, that instead he used his hand to get her attention as he squeezed behind her. The appellant argued that he did not do anything – push, tap, or otherwise – with so much force that it caused the passenger to get thrown into the end of the belt. He also argued that while the passenger stated that he "leaned in" and whispered to her, no lean in is visible on the footage. The appellant argued that there is no indication that he said anything more than "excuse me" or "behind you." He argued that the CCTV footage shows that he would not have had enough time to lean into the passenger and whisper "hey gorgeous, you are looking hot up in here" while moving past her. He argued that his stride was never broken and that he passed her quickly. The appellant stated that a couple of passengers and another TSO were both within feet of him when he passed the passenger and argued that they would have been able to hear any comment he made. He argued that no other people are seen reacting to the incident.

The appellant also argued that the CCTV footage provides a clear reason to doubt the passenger's credibility because the physical actions she described are inconsistent with what is apparent when viewing the CCTV footage. The appellant argued that since the comment came from only one passenger and because the CCTV does not provide sound, management relied on inference surrounding the incident to help substantiate the passenger's account of what took place. He argued that the evidence is lacking. The appellant noted that management found it incriminating that he "chose to pass between two female passengers rather than take a route that would not bring [him] into close bodily contact with a passenger" but argued that the fact is irrelevant. He argued that moving between the two passengers was the fastest route for him and that there is no rule against walking near passengers, noting that others had done the same thing in the CCTV footage.

The appellant further argued that neither the Proposing Official nor the Deciding Official is trained in interpreting body language and therefore, management's inference regarding the passenger's reaction is pure speculation and argued that it is not his burden to prove or explain why the passenger chose to place her arm on her neck while waiting for her personal property to be returned.

Management responded and argued that although the appellant does not admit to engaging in inappropriate conduct, the passenger's statement and a review of the video footage supports that her allegation is more likely true than untrue. Management argued that this conclusion is further supported by the appellant's acknowledgment in his response to the NOPR that he "might have bumped into her" which management argued indicates his recognition that there was physical contact. Management also noted that the Police Officer who responded to the incident noted in his incident report that "video footage was reviewed and could see [the appellant] brush up against the victim and appear to say something to the passenger." Management argued that the fact that the appellant made physical contact with the passenger is not in doubt. With regard to the appropriateness of the physical contact the appellant made with the passenger, management argued that the passenger did not claim that she was "thrown into the end of the belt" as alleged by the appellant. Management stated that the passenger stated that the appellant pushed his body into hers, pressing her into the end of the roller belt. Management stated that a review of the footage indicates that what the passenger likely felt pressing into her was the extended handle of

her own suitcase, which she may have mistaken for the roller belt and that the Deciding Official determined that the passenger mistaking a suitcase handle for a roller belt did not detract from her overall credibility and did not discredit her statement.

With regard to the appellant's argument that at least one other passenger and another TSO were in earshot and therefore would have overheard any comments he made, management argued that it is not plausible because the video footage reflects that the other passengers closest to the belt were an estimated two to four feet away from the passenger and the appellant, and were facing in the opposite direction. Management also noted that the other TSO nearby was speaking to a passenger in a wheelchair and was completing screening functions; walking away from the appellant and the passenger and focusing on her task. Management argued that it is unlikely that in a busy checkpoint environment any of the individuals would hear a whispered or softly spoken comment and that therefore, the appellant's claim that no other people were seen reacting to the incident is irrelevant.

Management argued that there was no need for the appellant to "repeatedly squeeze past passengers while working" and that his actions in the case were clearly a cognitive choice that he made, electing a route that would place him in close bodily contact with the passenger.

The appellant responded to management's reply and argued that management's speculation that the passenger may have been pressed into the handle of her suitcase and that she confused it with the x-ray belt does not negate the fact that the passenger's own version or recollection of events is seriously flawed. The appellant argued that since the passenger alleged that he whispered in her ear, an allegation he stated cannot be clearly corroborated or disproven based on the CCTV footage, her credibility is of the utmost importance. The appellant argued that the parts of the allegation that can be corroborated or disproven based on the CCTV footage indicate that the passenger's version of events is not reliable.

The appellant also argued that management also failed to cite a policy to support the contention that lightly touching a passenger to communicate one's presence is unacceptable.

The appellant alleged that the Deciding Official did not have the authority to remove him because the Deciding Official was a Deputy Assistant Federal Security Director (DAFSD). Human Capital Advisory Memo, dated August 2, 2017, delegated authority to DAFSDs to be the Deciding Official for removal actions.

With regard to the Charge, the Board carefully reviewed the CCTV footage and found that while it does not show that the passenger was pressed into the end of the belt, it does show that the appellant chose to squeeze between the passenger and another passenger in a wheelchair when he could have easily walked around them as there was ample free space within the immediate vicinity. The Board found the passenger's statement to be more credible than the appellant's version of the facts. The CCTV footage shows that the appellant got unnecessarily close to the passenger and made physical contact with her with his mid-section. The passenger's body moves forward as the appellant makes physical contact with her. The CCTV footage shows the appellant pause briefly with his face toward the passenger's ear which gives credence to the appellant's allegation that he whispered in her ear. Additionally, there is no merit to the appellant's argument that another passenger and a TSA employee would have heard him make a comment. The appellant whispered in the passenger's ear and as management noted, the TSO

was conducting other screening functions and the other passenger was two to four feet away. The CCTV footage shows that after the appellant passed the passenger, she immediately put her hand to her mouth and looked toward the appellant twice as he walked away and is then seen holding or rubbing her neck and looking around which is further evidence that the appellant said something to her to prompt her reaction. The passenger was clearly uncomfortable. The Board found the passenger's statement to be credible and determined that it follows the interaction seen on the CCTV video. The Board found no merit to the appellant's argument concerning failure to cite a policy. Management cited MD 1100.73-5, which encompasses the appellant's misconduct. The appellant was not charged with placing his hand on the passenger's back; he was charged with whispering into her ear and pressing up against her. The Board found that the passenger's statement and the CCTV footage are preponderant evidence to prove that the appellant's conduct with the passenger was inappropriate. The CCTV footage shows that the appellant's interaction with the passenger was both unnecessary and deliberate; there was no reason for the appellant to be as close to the passenger as he was. Therefore, the Charge, *Inappropriate Conduct*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to prove that the penalty of removal is reasonable. He argued that some of the penalty factors are not relevant noting that he is neither a lead nor a supervisor and that therefore, for the purposes of penalty determination, he is not held to the heightened standard of such positions. He also argued that management relied heavily on his two prior suspensions as justification for using the aggravated penalty range of the Table. The appellant conceded that the two suspensions were based on similar allegations, but argued that the fact that they were six and ten years ago proves that his conduct had improved and that he has rehabilitation potential. The appellant further argued that even his most recent corrective action, a Letter of Guidance and Direction from 2014, shows his potential for rehabilitation stating that had management believed a problem was escalating they would not have addressed it with the least severe non-disciplinary measure available. He argued that management overlooked significant improvement that has occurred over the last seven years.

The appellant noted that he has 15 years of service with TSA and that his performance has always been above average. He also referred to a statement from an STSO he included with his appeal and argued that he retains the support and confidence of his direct supervisors.

Management responded and argued that given the circumstances surrounding the appellant's repetitive inappropriate behavior, removal was the least severe form of action necessary to address the behavior. Management stated that employees' conduct directly affects the proper and effective accomplishment of their official duties and responsibilities. Management stated that employees are expected to behave professionally, in accordance with TSA directives and other applicable guidance, and in a manner that does not adversely reflect on TSA. Management stated that the appellant's conduct caused embarrassment to the agency and caused TSA to seriously question his reliability, judgment and trustworthiness.

Management argued that there is no provision of TSA policy that prevents management officials from removing an employee when the employee's misconduct is serious, especially when their behavior could pose a threat or danger to TSA employees or to the traveling public. Management argued that the appellant's behavior was so serious that alternative sanctions would not have been adequate because he participated in inappropriate conduct against a member of the traveling public, the population he is charged with protecting and securing. Management argued that as an experienced TSO who had previously been placed on clear notice about similar verbal and physical conduct, the appellant knew or should have known the impact of his actions.

Management stated that the appellant's tenure and status was considered as a mitigating factor but that the appellant was on clear notice of the agency's expectations and requirements regarding appropriate conduct, as well as TSA's commitment to a model work environment. Management stated that the length of time since the appellant's last suspension was also considered but that they found that while the appellant had rehabilitative potential as recently as six years ago, the fact that he engaged in this type of behavior yet again serves as clear and convincing proof that any lesser penalty now would not prevent a future recurrence of the behavior. Management argued that given the egregiousness and repetitiveness of the appellant's conduct during his tenure, which cannot and must not be ignored, any lesser penalty than removal was determined to be insufficient.

Management disputed the appellant's claim that he retains the support and confidence of his direct supervisors noting that the appellant provided only one written statement by a single supervisor who was not in possession of the full facts of the case. Management argued that the STSO's view cannot be considered as reflective of management's confidence in the appellant's ability to perform his assigned duties.

Management argued that the appellant's actions and his attempt to downplay his actions by attempting to discredit the passenger demonstrate his lack of judgment and the critical thinking skills necessary for the position. Management also argued that the appellant's obfuscation about his conduct demonstrates that he still fully fails to grasp the gravity of the situation and that he does not seem to understand how inappropriate his behavior truly was. Management argued that the appellant's attitude demonstrates his poor rehabilitative potential.

The appellant replied and argued that management repeatedly faults him for refusing to accept responsibility for his alleged misconduct. He argued that one's refusal to accept responsibility for alleged misconduct can follow two paths; first, where the employee committed the misconduct and refuses to take responsibility or accept the consequences and second, where an employee who did not commit the misconduct. The appellant argued that the second is relevant to his case and that a refusal to accept responsibility does not mean the employee fails to recognize the severity of the allegation, it means that the alleged conduct never took place. The appellant argued that an employee cannot and should not be expected to take responsibility for something he or she did not do.

The Deciding Official considered both mitigating and aggravating factors. As aggravating factors, the Deciding Official considered the nature and seriousness of the appellant's offense and its relationship to his position. She considered that the appellant's conduct was wholly inappropriate noting that it is incumbent upon him in his position to act in a manner that is professional and does not bring forth questions about his behavior. The Deciding Official

considered that the appellant is held to a high standard of public trust and that he failed egregiously to uphold that trust. She considered that the very nature of the appellant's job is to protect the traveling public and that instead he chose to behave in a manner that caused a passenger to feel endangered by him. The Deciding Official considered that the traveling public must have trust in TSA officers who hold a position of influence over them as they travel. She considered that the passenger filed a police report alleging assault, and that this directly negatively impacts the reputation of the agency which undermines the ability to provide effective and efficient security. The Deciding Official considered the Charge to be serious and clearly related to the appellant's position and employment.

The Deciding Official considered the impact the appellant's actions had upon the confidence of management in his ability to do his job and found that his actions completely obliterated whatever trust existed. The Deciding Official considered that she has zero confidence that the appellant can be trusted to interact with passengers or with fellow employees in a professional, courteous and appropriate manner. She considered that TSA is committed to a workplace free of harassment and that the appellant has demonstrated by his actions that he cannot support that commitment. The Deciding Official considered that despite repeated chances the appellant has been given, he continued to exhibit a pattern of inappropriate behavior. She also considered that the appellant refused to take any responsibility for his poor decisions in this instance and instead attempted to discredit the passenger.

The Deciding Official also considered the appellant's disciplinary history. She considered that the appellant was issued a 7-day suspension on January 10, 2011, for an action that included a charge for the appellant's inappropriate comments and intentionally brushing up against a co-worker's frontal torso with his body and blowing her kisses. She considered that he was also issued a 3-day suspension on June 29, 2007, for inappropriate behavior which included blowing kisses, winking, and making comments such as "You're hot, maybe you'll find a boyfriend here" to a co-worker. The Deciding Official found the appellant's disciplinary history to be significantly aggravating as his past misconduct is similar in nature to the present charge.

The Deciding Official also considered that the appellant was on notice through various corrective actions that his behavior has been inappropriate and that further misconduct could result in disciplinary action up to and including removal. She noted that he received a Letter of Guidance and Direction on December 4, 2014, and a Letter of Counseling on August 6, 2009, for similarly inappropriate behavior. She also noted that the appellant received a Letter of Reprimand (LOR) on June 21, 2006, for inappropriate comments toward a female passenger. The Deciding Official stated that while the LOR has expired for purposes of progressive discipline, it does demonstrate that the appellant was placed on clear notice regarding this type of conduct. Additionally, the Deciding Official considered that the appellant completed annual training on MD 1100.73-5 which states the expectation that employees treat others with courtesy and tact, noting that the appellant read the MD approximately 12 times with the most recent acknowledgement on December 7, 2016.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA since September 8, 2002, and that his technical job performance was above average. The Deciding Official found however, that the nature and seriousness of the misconduct, along with the aggravating factors, far outweigh the mitigating factors such that no other action besides removal from Federal service would serve to prevent a future occurrence.

Under Section B. 5 of the Table, the recommended penalty range for inappropriate conduct is a Letter of Reprimand to 5-day suspension and the aggravated penalty range is a 6-day suspension to removal. The guidelines of the Table states that for second and successive offense, the penalty should generally fall within the aggravated penalty range, and may often include removal.

The Board found that the Deciding Official properly assessed and weighed the penalty factors. The appellant's actions toward the passenger were egregious and even though the appellant's prior disciplinary actions were older, they were for similar misconduct. Management followed the tenants of progressive discipline and has repeatedly given the appellant the opportunity to correct his behavior. The Board found that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.09 13:11:52 -05'00'

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Supervisory Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER OAB—18-004

February 13, 2018

***Issue**: Lack of Candor*

OPINION AND DECISION

On December 6, 2017, management removed the appellant from his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA) based on the Charge, *Lack of Candor*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is GRANTED.

ANALYSIS AND FINDINGS

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

Management supported the Charge, *Lack of Candor*, with one specification alleging that between August 16, 2017 and August 29, 2017, the appellant submitted a resume in support of his application for a Training Manager position with TSA, a resume that he knew or should have known included information that was less than candid, accurate, or truthful.

Management found that 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: Section 5. D. (7) states that TSA employees are responsible for 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. Management also found that the appellant's conduct violated the Handbook to MD 1100.73.5, Section F. (1), which states that employees must cooperate fully with all TSA and DHS investigations and inquiries, including but not limited to inquiries initiated by supervisors and management officials. This includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so. Employees must follow established TSA and DHS procedures when responding to such requests for information and testimony.

The appellant responded to a job vacancy announcement and applied for the position of Training Manager (TM). In support of his application, the appellant submitted a resume which listed several job experiences that supported his qualification for the position. An Assistant Federal Security Director- Mission Support (AFSD-MS) reviewed the applications of qualified applicants for the position. During the review process, the AFSD-MS noticed discrepancies in the appellant's resume that required further inquiry. One of the discrepancies was that he represented that he had concurrent full-time jobs with both TSA and a company that was located in a different state from December 2006 to December 2009, and that he worked 40 hours per week at both of these jobs although they were located in different states.

The AFSD-MS called the appellant's supervisor at the other job who happened to be his brother. The AFSD-MS reported that the appellant's brother said that the appellant worked for him as "Safety Manager" from approximately 2006-2010. He described the appellant's job duties as including classroom training and monitoring of On-the-Job Training (OJT) for employees, and that due to the nature of his job responsibilities he was required to be physically present onsite in case of unannounced OSHA inspections. The AFSD-MS stated that he specifically asked the appellant's brother whether he worked onsite and he replied "yes."

The appellant met with the AFSD-MS on September 26, 2017. The AFSD-MS asked the appellant to explain how he could work both jobs at the same time. The appellant stated that he telecommuted for the company. The appellant also stated that he may not have worked 40 hours a week. The AFSD-MS asked the appellant how he could have worked 40 hours per week for each job to which the appellant replied that he worked 3 to 4 hours each night and 12 to 13 hours a day on his days off with TSA. The appellant stated that his brother was wrong and/or possibly misunderstood as he was not working at the airport and in another state at the same time. The appellant told the AFSD-MS that he worked the graveyard shift and when he was off, he worked for the other company. The AFSD wrote that the appellant said that he exaggerated on the duties that he was performing as he would have had to be present on site. The AFSD-MS stated that there were at least 7 of the duties listed that had to be accomplished while on site. He also questioned the appellant as to why a previous resume did not list this job.

Management supported the charge with: statement of the appellant, dated September 26, 2017; meeting notes from AFSD-MS, dated September 26, 2017; statement of AFSD-MS, dated September 26, 2017; resume of appellant for TM position; resume of appellant for a Transportation Security Manager position; and WebTA timecards from 2006 to 2009.

On appeal, the appellant argued that there are large questionable variances between what happened during the meeting and what was stated in the proposal. The appellant alleged that phrases had been taken out of context, additional information was added that was never

discussed and information that was covered was included inaccurately. The appellant stated that included in the information were words and phrases that he has never said and vital information was omitted. The appellant alleged that he was misled by the AFSD-MS and that his rights were violated.

As to the Lack of Candor charge, the appellant argued that he was not advised that information provided was subject to verification through reference checks. The appellant stated that the phone call with his brother only lasted five minutes and that his brother told the AFSD-MS that the inspections occurred on-site but the appellant was not required to be there. The appellant argued that the AFSD-MS misconstrued what his brother told him and that his brother explained that part of his responsibility was to assist the company in being prepared. The appellant argued that the AFSD-MS did not describe the position applied for nor give the description of the duties to his brother. He also alleged that it was the AFSD-MS's opinion that it was impossible to work two full-time jobs located in separate states. The appellant vehemently disagreed and reiterated that he telecommuted. The appellant stated that he told the AFSD-MS that it was a physical impossibility to be on-site for two full-time jobs but that he made numerous trips during the 3-year period that he worked for the company. The appellant alleged that the AFSD-MS explained that everyone he knew that had worked two full-time jobs was either divorced or had a poor family life and then inquired of his marital status. The appellant argued that the AFSD-MS discussed prohibited topics with him during the meeting. In addition, the appellant alleged that the AFSD-MS told him that there was an integrity issue with his resume and suspected that he was lying. The appellant admitted that he told the AFSD-MS that he was working the graveyard shift but that he misspoke but had worked the graveyard shift in 2006.

The appellant argued that he never stated that he worked an eight-hour day but stated that he worked ten hour shifts and never stated that he worked "12 to 13 hours telecommuting." The appellant also argued that he never said that he "may not have worked 40 hours per week for [the company]." The appellant argued that in USAJOBs.gov there is not an option to annotate both hours and statuses of either full-time or part-time and asked the AFSD-MS how he should have annotated this and was given no response. The appellant also pointed out that the proposal only includes seven of the fourteen bullet points that he included on his resume and the AFSD-MS only asked him to highlight these bullet points. The appellant also denied stating that he "exaggerated on the duties" and also did not state "Did not perform all the duties identified." The appellant argued that he never claimed to be on-site for inspections. In addition, the appellant admitted that he did tailor his resume to fit the job description but that this is not unusual or improper. The appellant argued that there was a reason why he did not have this job listed on previous resumes as he had no problem making the certified list for the Transportation Security Manager.

Management replied and argued that the appellant was removed from federal service because of his Lack of Candor which was apparent in a resume he presented to the agency and his subsequent attempts to deny the charge. Management argued that the appellant was put on clear notice of TSA's policy on Employee Roles, Responsibilities and Code of Conduct but failed to draw from such training and resorted to providing statements and representations which were a misrepresentation of his prior job experience. Management alleged that there was a concerted effort on part of the appellant, possibly in coordination with his brother, to make misrepresentation of facts to the agency by falsely claiming a work experience he did not have, or that he performed at a far lower level than he claimed in his resume. Management argued that

the charge was supported by the appellant's resume and subsequent statements, statements from his prior employer and the inquiry officer who questioned the appellant and took copious notes of his interactions with the appellant and the former employer. Management claimed that despite the appellant's responses, he presented a resume which had information indicating that he was physically present at the work site and that his previous employer confirmed this.

Management asserted that when the appellant was asked to explain the discrepancies in his resume, he changed his representation of the number of hours from full-time to part-time and asserted that he telecommuted during the day and worked graveyard shifts for TSA. However, this statement was inconsistent with the timecards which showed that he did not work graveyard shifts during the 3-year period that he worked for the other company.

The Board found that there were no procedural errors. Management had the right and was simply performing their due diligence by contacting the appellant's previous employer. The appellant agreed on his resume that his employer could be contacted. Although it appears that the gist of management's assertion deals with the fact that the appellant had concurrent full-time jobs, that is not stated in the specification. Management has alleged that the appellant was not candid on seven points listed in his resume. However, the appellant has provided plausible explanations for the points listed by management. The Board also notes that all of the points listed below in the appellant's resume could have been accomplished through telecommuting:

- Coordinate and Schedule the training of the OJT monitors to ensure correct application and use of machinery/products
- Sets and maintains training goals and objectives, through planning, scheduling and evaluating the progress of the employees
- Analyzed and Designed Instructional systems to meet training needs and continued to develop and impellent the education through evaluations and observations-
- Held instructional classes in a real-time setting for increased knowledge retention and to ensure correct application of skills
- Mentored and coached individual's OJT mentors and associates to ensure knowledge retention and to ensure correct applicable of skills
- Provided performance appraisal and award nominations based on competencies and metrics earned
- Offer solutions to individual and organizational problems through analyzation and through developing corrective and training programs to aid in remediation and at times termination of contracts

In addition, management claimed that the appellant was less than candid, accurate or truthful by stating on his resume that he worked 40 hours for the other job. The appellant stated he was unable to reflect the correct hours to the program provided. Management was unable to show that appellant was less than candid in regards to the hours provided on the resume. Although management may have been able to prove that he did not work the graveyard shifts for TSA, he was not charged with being candid in regards to his specific work hours; he was charged with being less than candid on his resume. Management also argued that the fact that the appellant failed to list this job on a previous resume provides further evidence of his untruthfulness. The appellant indicated that he in fact, had made the best qualified list for Training Manager and saw no reason to add this job to the resume used for that job announcement. With respect to the Charge, the AFSD stated that the appellant said that he "exaggerated on the duties." Exaggeration of his job does not rise to the level of Lack of Candor. Management was unable to

prove that the other job held by the appellant could not have been accomplished through telework. If the appellant had not in fact worked for the company and placed the information on his resume, that would have been Lack of Candor. Although the appellant's brother may have been untruthful in his statement to management, management was unable to show that the appellant was untruthful in his resume. After receiving the information from the appellant's brother, management failed to conduct further fact-finding to in fact determine whether the appellant could have held two full-time concurrent jobs in different states. Contrary to management's assertion in the reply, there were no statements from his previous employer. Therefore, the Charge, *Lack of Candor,* is NOT SUSTAINED.

Decision. The appeal is GRANTED. The removal is overturned, and the appellant will receive back pay from the date of his removal to his return to duty in accordance with 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:

Transportation Security Administration

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.13 14:50:16 -05'00'

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—18-005

February 7, 2018

Issue: *Possession of Illegal Drugs; Arrest for Felony Involving Illegal Possession of a Controlled Substance*

OPINION AND DECISION

On December 4, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two Charges: *Possession of Illegal Drugs* and *Arrest for Felony Involving Illegal Possession of a Controlled Substance.* The appellant filed a timely appeal with TSA's Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Possession of Illegal Drugs*, on one specification alleging that on or about October 26, 2017, the appellant was arrested by a Sheriff's Office deputy and charged with Possession of Marijuana less than 2 ounces, a Class B Misdemeanor in the State in which he was charged. Charge 2, *Arrest for Felony Involving Illegal Possession of a Controlled Substance*, was based on one specification which alleged that on or about October 26, 2017, the appellant was arrested by a Sheriff's Office deputy and charged with Possession of a Controlled Substance- Penalty Group 2, a State Jail Felony in the State in which he was arrested.

Management alleged that the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (7) states that TSA employees are responsible for 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. Section 6. D. states that employees in direct contact with the pubic bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA.

Management also alleged that the appellant violated the Handbook to MD 1100.73-5, Section O. (1), which states that TSA prohibits the use of illegal substances. Illegal substances include, but are not limited to, cocaine, marijuana, opiates, amphetamines, and phencyclidine.

On October 26, 2017, a Sheriff's deputy conducted a traffic stop. The deputy approached the driver side and detected the odor of marijuana emitting from inside the vehicle. The appellant was seated in the front right passenger seat and there was another passenger in the back seat. All three occupants denied knowledge of any marijuana in the vehicle. In the front right passenger side door compartment, the deputy located a clear plastic tube with pills inside. Once the tube was opened, the deputy was able to see a white rolled joint which appeared to be marijuana. There were a total of five pills later identified as Alprazolam, Dextroamphetamine, and a non-controlled substance. The driver of the vehicle indicated that the drugs belonged to the appellant. The other passenger said that he did not know who the drugs belonged to but that the appellant made a phone call from the back seat of the patrol car and told someone that he got "hemmed up." The driver of the vehicle mentioned that the appellant needed to get something for the girls at the strip club and he interpreted that as "party favors." The appellant denied any drug possession and said he needed to get money for the girls. The appellant was then arrested for possession of marijuana < 2 ounces, a class B misdemeanor, possession of a controlled substance- penalty Group 2 (amphetamine < one gram), a State Jail felony, and Possession of a Controlled Substance- Penalty Group 3 (Alprazolam < 28 grams), a Class A Misdemeanor.

Management met with the appellant for a pre-decisional discussion on November 8, 2017. The appellant was given the opportunity to respond and claimed that he was a passenger in the vehicle and that he was not in possession of the drugs that the police found.

Management provided as evidence: Affidavits for Warrant of Arrest and Detention for Possession of Marijuana <2 ounces, a Class B Misdemeanor, Possession of a Controlled Substance- Penalty Group 2 (amphetamine <1 gram), a State Jail Felony, and Possession of a Controlled Substance- Penalty Group 3 (Alprazolam < 28 grams), a Class A Misdemeanor.

On appeal, the appellant argued that he was arrested because of his proximity to where the drugs were found and the fact that he identified himself as a federal officer to the deputy. The appellant argued that the owner of the vehicle informed him that he did not indicate that the drugs belonged to the appellant but only indicated that the drugs were not his. The appellant provided a statement from the driver of the vehicle who stated that the drugs did not belong to him nor was he aware of how they got there. He stated that there was a possibility that what was found may have belonged to someone other than the appellant. The appellant argued that he immediately had a drug test on

October 27, 2017, which showed negative results for all drugs tested. The appellant supplied a copy of said report. The appellant argued that he does not take drugs and provided management a list of all of his prescription medications. The appellant also argued that management's concerns over his fitness for duty were directly disputed by the negative drug test. In addition, the appellant argued that he is innocent until proven guilty and notified the Board that all charges against him were dismissed. As part of the appeal, the appellant also submitted character references and a copy of a voluntary substance abuse education program that he participated in.

Management replied and noted that the deputy indicated that in searching the vehicle, he located a clear plastic tube with pills inside which was located next to where the appellant was sitting. Additionally, the driver/owner of the vehicle told the deputy that the drugs found in the vehicle belonged to the appellant. The deputy found the driver more credible than the appellant and arrested the appellant. Management argued that TSA policy not only permits management to remove the appellant but requires management to do so.

Management complied with policy by holding a pre-decisional discussion with the appellant on November 8, 2017, and the appellant responded orally.

The Board found that the details included in the Affidavits for Arrest and Detention provide substantial evidence to support the Charge. The Police Officer smelled marijuana from the vehicle in which the appellant was a passenger which gave the Officer probable cause to search the car where he found marijuana and pills in the front right passenger side door compartment. The marijuana and pills were found in a location closest to which the appellant was seated. In addition, the driver/owner of the vehicle told the deputy that the drugs belonged to the appellant. The statement provided by the appellant from the driver/owner does not state that he did not tell the deputy that the drugs belonged to the appellant. Rather, the driver/owner said that the drugs did not belong to him nor was he aware of how they got there. He did state that he has never seen the appellant use any kind of drugs. Management has met the burden of substantial evidence that the appellant possessed the illegal drugs. Therefore, the Charges, *Illegal Drug Possession* and *Arrest for Felony Involving Illegal Possession of a Controlled Substance*, are SUSTAINED.

The Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Appendix A, (1) (e) and Section C.8 of the TSA *Table of Offenses and Penalties*, requires removal for a possession of illegal drugs and permits removal for TSO offenses involving an arrest for a felony involving illegal possession of a controlled substance. The Board has sustained the Charges of *Possession of Illegal Drugs* and *Arrest for Felony Involving Illegal Possession of a Controlled Substance*. Removal for *Possession of Illegal Drugs* 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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Date: 2018.02.07 11:07:36 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

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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—18-006

February 9, 2018

Issue: *Sleeping While on Duty; Tardiness*

OPINION AND DECISION

On December 18, 2018, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two disciplinary charges, *Sleeping on Duty* and *Tardiness*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence in the record. Management based Charge 1, *Sleeping on Duty*, on one specification alleging that on October 4, 2017, at approximately 1235 hours, the Supervisory Human Resources Specialist (SHRS) observed the appellant asleep while he was supposed to be watching a training video on Security Identification Display Area (SIDA) policy and procedures. The SHRS observed the appellant with his eyes closed for thirty (30) seconds and said his name out loud three (3) times, each in a louder tone than previously, before he woke up and responded to her.

Management based Charge 2, *Tardiness*, on eleven specifications alleging that between September 18, 2017 and October 24, 2017, the appellant was tardy. The tardies ranged from reporting late one (1) minute to thirty-four (34) minutes.

Management found that the appellant violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, and Handbook. Section 5.D.(1) requires employees to report to work on time and ready, willing, and able to perform the duties of their position. Section 5.D.(7) requires employees to observe and abide by all laws, rules, regulations and other authoritative policies and guidance. Section 6.B. states that employees' conduct at work directly affects the proper and effective accomplishment of their official duties and responsibilities, and that employees must perform their duties in a professional and business-like manner throughout the workday. Section BB (2) of the Handbook states that tardiness includes delay in reporting to work at the employee's scheduled starting time.

On October 4, 2017, an SHRS walked past an open cubicle and observed the appellant in full uniform with his head dropped forward. The SHRS stood next to the cubicle and observed him with his eyes closed for approximately thirty (30) seconds. The SHRS stated his name out loud three (3) times and each time with a louder tone. After the third time, he lifted his head and looked at the SHRS in a daze. The appellant stated that he was just resting his eyes. On eleven occasions between September 18, 2017 through October 3, 2017, the appellant was tardy.

The appellant was issued a Notice of Proposed Removal on November 16, 2017. The Notice advised the appellant of his right to make an oral and/or written reply. The appellant gave an oral reply, and also submitted a written reply. Management removed the appellant on December 18, 2017.

Management provided as evidence: Pre-decisional discussion, dated October 11, 2017; statement of the SHRS, dated October 4, 2017; and Punch Origin card with dates September 10, 2017 through October 26, 2017.

On appeal, the appellant alleged that management violated TSA's pre-decisional process. In particular, the appellant alleged that management failed to obtain a witness statement from him regarding the alleged sleeping on duty allegation. The appellant also argued that the Sleeping on Duty charge was not proven by a preponderance of evidence. The appellant argued that the case is nothing more than the SHRS making an allegation against him which he categorically denies. The appellant did not challenge the tardiness charge.

Management responded and stated the TSM met with the appellant on October 11, 2017, to discuss the charges. At that time, the TSM reviewed the evidence and discussed the evidence with the appellant. However, the appellant chose not to respond. Management also stated that the charge was proven by the statement of the SHRS.

The appellant responded to management's reply and stated that management failed to respond to their allegation of failing to obtain an incident report in regards to the sleeping on duty charge. The appellant asserted that management's arguments are conclusory and "red-herring" in nature and should be rejected. In addition, the appellant argued that he categorically denied that he was sleeping and that the SHRS is not more credible than he is. The appellant alleged that the SHRS's version of the events were suspect and that the case only amounts to her allegations that he was sleeping on duty.

With regard to Charge 1, management afforded the appellant the opportunity to respond to the charges not only during the pre-decisional discussion but also as part of the reply to the Notice of Proposed Removal. Therefore, management did follow TSA policy and the Board gives no merit to the appellant's argument. The statement provided by the SHRS was detailed in nature and the Board found the statement to be credible. The statement of the SHRS is preponderant evidence that the appellant was sleeping on duty. Therefore, the Charge, *Sleeping on Duty*, is SUSTAINED.

With regard to Charge 2, the appellant does not deny the charges. The Punch Origin sheet is preponderant evidence that on eleven occasions between September 18, 2017 and October 24, 2017, the appellant was tardy. All specifications are sustained. Therefore, the Charge, *Tardiness*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to follow TSA's policy of progressive discipline. In addition, the appellant argued that his removal from federal service was not reasonable. The Board notes that appellant's discussion in regards to the penalty is premised on only Charge 2 being sustained. As to the tardiness charge, the appellant argued that there are four (4) mitigating factors that warrant a penalty in the mitigated range. He argued that he has acknowledged his wrongdoing; has made efforts to remedy his wrongdoing; that he has contributed to the mission of TSA; and removal would be catastrophic for him and his son.

Management responded to the appeal and argued that given the severity of the offenses, as well as recent prior disciplinary and corrective actions, removal was appropriate. Management also argued that either charge- independent of the other- would support the penalty of removal.

The appellant responded to management's reply and argued the removal for tardiness is overly harsh and unreasonable.

In determining the appropriate penalty, the Deciding Official considered both mitigating and aggravating factors. The Deciding Official determined that the appellant sleeping while watching a video related to security procedures raises questions about his lack of judgment and willingness to abide by rules and regulations. He also determined that this act seriously undermined his faith in the appellant to perform his duties and raised questions regarding his attentiveness while performing security screening. The Deciding Official determined that the appellant's repeated tardiness raised serious questions regarding his reliability. The Deciding Official stated that he must be able to rely upon the appellant to report for duty as scheduled to ensure that the security process operates in an efficient and continuous manner. The Deciding Official also considered the appellant's potential for rehabilitation.

As aggravating. the Deciding Official considered the appellant's prior disciplinary history. On August 15, 2017, the appellant was suspended for fifteen (15) days for display and use of a personal electronic device, failure to follow procedures, and tardiness. On January 3, 2017, the appellant

was issued a Letter of Reprimand (LOR) for repeated tardiness. On February 4, 2016, the appellant was issued a three (3) calendar day suspension for inappropriate comments.

The appellant also had numerous corrective actions to include: a Letter of Counseling (LOC) for tardiness, dated October 25, 2016; an LOR for failure to follow proper screening procedures, dated August 28, 2015; an LOR for tardiness, dated February 13, 2015; an LOC for tardiness, dated December 19, 2014; an LOC for failure to follow directions, dated October 21, 2014; an LOC for unprofessional demeanor, dated March 8, 2014; and an LOR for failure to follow directions, dated November 29, 2012.

As mitigating factors, the Deciding Official considered that the appellant has been with TSA since 2011 and has satisfactory performance ratings. The Deciding Official determined that the mitigating factors are far outweighed by the aggravating factors; he did not believe that the appellant's length of service or satisfactory performance outweighed the seriousness of his offenses.

Under H.5 of the Table, for sleeping on duty, the recommended penalty is an LOR to a ten (10) day suspension. The aggravated penalty range is an eleven (11) day suspension to removal. Under Section A.1, for tardiness, the recommended penalty is a LOR and the aggravated penalty range is a one (1) day suspension to a five (5) day suspension. The Guidelines on using the Table provide that "[i]n cases where an employee commits more than one offense, the appropriate penalty should generally be in the 'Aggravated Penalty Range' column corresponding to the most serious offense being charged."

The Deciding Official correctly weighed both the mitigating and aggravating factors; finding that the mitigating factors were far outweighed by the aggravating factors. The Board found that management's decision to remove the appellant was supported and was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.09 14:58:21 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-007

February 9, 2018

Issue: *Failure to comply with the Terms of the Last Chance Agreement*

OPINION AND DECISION

On December 13, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) for Violation of his Last Chance Agreement (LCA). An LCA was entered into on October 12, 2017, and signed by the appellant and management. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

Management charged the appellant with a violation of his LCA that was signed by the parties on October 12, 2017. A copy of the signed agreement was included with the record and showed that the appellant signed said agreement. The appellant was proposed for removal on August 31, 2017, for *Inappropriate Conduct; Failure to Follow Leave Procedures;* and *Absence without Leave,* and notified of the decision to remove on October 5, 2017. It is the removal of October 5, 2017, that was held in abeyance.

The LCA provides that the appellant's removal would be held in abeyance for a period of one (1) year from the effective date of the agreement. The agreement goes on to provide that in exchange for TSA's agreement to place the removal action in abeyance, the appellant agreed to adhere to all the terms of the Agreement for a period of one (1) year from the date of the Agreement (October 12, 2017). As part of the agreement, the appellant agreed that he would not engage in any misconduct that could result in a proposal for disciplinary or adverse action under TSA Management Directive No. 1100.73-5, *Employee Responsibilities and Code of Conduct.*

The key section of the Agreement, Section 1.f., states that if the appellant breaches any terms of the LCA, the Agency will implement the October 5, 2017, Notice of Decision and issue an SF-50 documenting his removal. The issue before the Board is not to assess the merits of the charges that led to the LCA, but rather to determine whether the appellant is in violation of his LCA, thus giving management the right to reinstate his removal and remove him from Federal service.

On December 13, 2017, the appellant was notified of his failure to adhere to the terms of the LCA. Management alleged that the appellant violated the LCA by calling an employee at Dunkin Donuts a "bitch." Management alleged that this incident was witnessed by several other airport employees as well as another TSA employee.

On appeal, the appellant argued that after almost ten (10) years of service to TSA, he was wrongfully terminated without justification; without due process; and under humiliating circumstances. The appellant argued that the incident in question was minor and did not warrant dismissal. He stated that he had a dispute with a Dunkin Donuts employees who provided atrocious customer service and nearly caused him to be late for his shift. He argued that he has suffered far greater verbal abuse from passengers. The appellant argued that his actions did not constitute an offense that should result in termination, as he only stood up for himself and was only being a little more verbally forceful in response to repeated abuse.

Management replied and argued that the appellant committed in the LCA to not engage in on-duty or off-duty misconduct of the type identified in the Proposed Removal from Federal service. Management alleged that the appellant was not able to adhere to the provisions of the LCA when he interacted inappropriately with a Dunkin Donuts employee calling her a "bitch" in front of a TSA officer and members of the public. Management stated that the incident is a clear continuation of the behavior that precipitated the previous discipline given to the appellant that accounted for the decision to remove him from Federal service and for which the LCA was constructed and issued to him in an attempt to allow him a last opportunity to refrain from disruptive behavior at the airport. Management also noted that the incident at Dunkin Donuts occurred only one month after he signed the LCA.

The record shows that the appellant engaged in misconduct on November 16, 2017, when he called an employee at Dunkin Donuts a "bitch" in front of a TSA employee and other airport employees. The Board finds that the appellant voluntarily signed the LCA and that he thereafter, violated its terms.

The Board is here to determine whether the appellant is in violation of the LCA and has found that management has met their burden of proving that the appellant is in violation of the LCA and thus, has the right to reinstate the removal from Federal service.

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.09 16:52:29 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—18-008

February 23, 2018

Issue: *Off-Duty Misconduct; Lack of Candor*

OPINION AND DECISION

On December 18, 2017, management removed the appellant from his position of Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA) based on two Charges: *Off-Duty Misconduct* and *Lack of Candor*. 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, *Off-Duty Misconduct*, on one specification alleging that during a polygraph examination dated August 25, 2016, the appellant admitted, "[He] turned and pushed [his] girlfriend harder than [he] knew [he] should, causing her to raise up into the air, hitting her head on the hallway wall, and falling to the floor." This is unacceptable conduct (which resulted in the appellant being arrested) for a TSA Officer and a violation of TSA MD 1100.73-5.

Management based Charge 2, *Lack of Candor*, on three specifications. Specification 1 alleged that in the appellant's sworn statement dated October 24, 2012, concerning his encounter with [appellant's girlfriend] on October 12, 2012, to [a Transportation Security Manager (TSM)] he

wrote, "I asked her to give me the phone which I bought and payed [sic] the monthly bill for. After she gave me the phone I told her I was leaving the apartment." However, in the appellant's polygraph examination dated August 25, 2016, he told the polygraph examiner about the encounter with [appellant's girlfriend] on October 12, 2012, that he, "Demanded that she return the phone that [he] had purchased for her, but she refused to give [him] the phone. [The appellant] grabbed his girlfriend and threw her onto the bed, physically restraining her by holding onto her one wrist with [his] hand, while [he] wrestled the phone from her other hand." The appellant's sworn statement dated October 24, 2012, was less than truthful and a violation of TSA MD 1100.73-5.

Specification 2 alleged that in the appellant's sworn statement dated October 24, 2012, to [the TSM] concerning his encounter with [appellant's girlfriend] on October 12, 2012, he wrote, "At that point I gave her the phone and she dropped it on the floor. She got upset and picked it up and slammed it on the ground and began yelling." However, in the appellant's polygraph examination dated August 25, 2016, he admitted that "[he] threw the cell phone to her. [His] girlfriend did not catch the cell phone and it broke when it hit the ground." This statement referred to the October 12, 2012, encounter with [the appellant's girlfriend]. The appellant's sworn statement dated October 24, 2012, was less than truthful and a violation of TSA MD 1100.73-5.

Specification 3 alleged that in the appellant's sworn statement dated April 4, 2013, to Office of Inspection (OOI) Special Agents (SA) concerning his encounter with [the appellant's girlfriend] on October 12, 2012, he wrote, "I would also like to state that I didn't choke or put my hands on my ex-girlfriend [the appellant's girlfriend]." However, in the appellant's polygraph examination dated August 25, 2016, referring to the October 12, 2012, encounter with [the appellant's girlfriend] he admitted that, "[he] turned and pushed [his] girlfriend harder than [he] knew [he] should, causing her to raise up into the air, hitting her head on the hallway wall, and falling to the floor." The appellant's sworn statement dated April 4, 2013, was less than truthful and a violation of TSA MD 1100.73-5.

Management alleged that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing the following basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. 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 employees' reliability, judgement, or trustworthiness.

Management also alleged that the appellant's misconduct violated the Handbook to MD 1100.73-5, Section F. (1) which states that employees must cooperate fully with all TSA and DHS investigations and inquiries, including but not limited to inquiries initiated by supervisors

and management officials. This includes providing truthful, accurate, and complete information in response to matters of official interest, and providing a written statement, if requested to do so. Employees must follow established TSA and DHS procedures when responding to such requests for information or testimony.

On October 15, 2012, the appellant was arrested and charged with Criminal Mischief, Strangulation 2nd Degree, and Aggravated Harassment regarding an incident involving his girlfriend that occurred on October 12, 2012. The appellant gave a sworn statement to a TSM on October 24, 2012, detailing the circumstances of his arrest. In his statement, the appellant gave details about an argument with his girlfriend regarding a phone. The appellant stated, "I ended up leaving the apartment but she ran after me and as I was trying to walk away she keep [sic] pulling at my pocket and yelling in the streets, she was telling me to give her the phone and kept repeating it louder and louder. At that point I gave her the phone and she dropped it on the floor, she got upset and picked it up and slamed [sic] it on the ground and began yelling call the cops call the cops . . ."

On March 28, 2013, the charges against the appellant were dismissed. On April 4, 2013, Special Agents from OOI interviewed the appellant. In his sworn statement to the Special Agents, with regard to his October 15, 2012, arrest, the appellant stated, "I would also like to state that I didn't choke or put my hands on my ex-girlfriend."

On August 25, 2016, the appellant voluntarily submitted to a polygraph examination as part of the application process for a position with Customs and Border Patrol (CBP). During the polygraph examination the appellant provided details of the circumstances of his October 15, 2012, arrest. In the Polygraph Report, the examiner stated that the appellant provided an additional admission regarding his October 2012 arrest for Domestic Violence. The examiner stated, "[The appellant's] girlfriend returned to their shared apartment after being out drinking and using drugs. [The appellant] demanded that she return the phone that he had purchased for her, but she refused to give him the phone. [The appellant] grabbed his girlfriend and threw her onto the bed, physically restraining her by holding onto her one wrist with his hand, while he wrestled the phone from her hand. After he obtained the phone, he arose from the bed in an effort to leave the apartment. As he approached the door to the apartment, the girlfriend approached him from behind in an effort to prevent him from leaving. He turned and pushed his girlfriend harder than he knew he should have, causing her to raise up into the air, hitting her head on the hallway wall, falling to the floor. He then exited the apartment. After a short walk his girlfriend caught up with him, and he threw the cell phone at her. His girlfriend did not catch the cell phone and it broke when it hit the ground. At that point the police arrived and arrested [the appellant] for Strangulation, Robbery, and Harassment, all of which were subsequently dismissed due to the fact that his girlfriend recanted her story."

Management learned about the appellant's August 25, 2016, polygraph examination with CBP from a PERSEC report received by management on June 8, 2017. The report included the details and results of the appellant's polygraph examination.

On June 9, 2017, the appellant was placed on Indefinite Suspension as a result of a Notice of Determination to Revoke Access to Classified Information issued by PERSEC on June 2, 2017. The determination to revoke access to classified information was based on potentially disqualifying information concerning the appellant's personal conduct, alcohol consumption, and

criminal conduct. The appellant appealed his Indefinite Suspension to the Board and the appeal was denied on September 8, 2017. On October 1, 2017, the appellant transitioned from a Behavior Detection Officer (BDO) position that required a Secret clearance to an LTSO position, a non-critical sensitive position. The appellant appealed the continuation of his Indefinite Suspension to the Board on November 1, 2017. The appeal was granted and the appellant was returned to duty as of October 1, 2017, because his position as of October 1, 2017, no longer required a security clearance.

The appellant was issued a Notice of Proposed Removal (NOPR) on November 20, 2017. The appellant gave an oral reply on December 13, 2017.

Management provided the following evidence to support the Charges: Polygraph Report, dated August 25, 2016; appellant's sworn statement to OOI, dated April 4, 2013; appellant's statement to the TSM, dated October 24, 2012; Notice of Determination to Revoke Access to Classified Information, dated June 2, 2017; Certificate of Disposition regarding October 15, 2012 arrest, dated March 28, 2013; Report of Investigation covering February 15, 2012 through April 18, 2012; Indefinite Suspension – Arrest for Off-Duty Misconduct, dated October 25, 2012; Removal of Indefinite Suspension, dated April 8, 2013; 3-day Suspension – Failure to Report Arrest, dated June 5, 2013; Notice of Indefinite Suspension – Arrest for Off-Duty Misconduct, dated June 5, 2015; Removal of Indefinite Suspension, dated February 23, 2016; Notice of Indefinite Suspension – Revocation of Security Clearance, dated June 9, 2017.

On appeal, the appellant stated that following his arrest in October 2012, he wrote a statement regarding his arrest to his manager in which he stated that he gave an iPhone to his girlfriend and that she dropped it on the ground. He stated that he was asked on April 4, 2013, about the written statement that he made in October 2012 and that he clarified with OOI that he slammed the iPhone on the ground, not his girlfriend, and that he used a poor choice of words in his prior written statement. The appellant also stated that he admitted during the OOI interview that he did push and shove his girlfriend but denied choking or hitting her. The appellant stated that TSA did not issue him any discipline regarding his conduct or interview and that he continued his employment with TSA.

The appellant stated that the Office of Personnel Security (PERSEC) suspended his security clearance on July 24, 2015, because of a May 29, 2015, arrest for allegedly choking his girlfriend and three arrests for violating a restraining order by contacting his girlfriend. He stated that he was placed on an indefinite suspension but when the charges against him were dropped; management lifted the indefinite suspension on February 22, 2016, and assigned him to administrative duties. The appellant stated that for the next 15 months he worked a full-time schedule contributing to various administrative tasks throughout the airport. He stated that on August 25, 2016, he took a polygraph test as part of his application for a CBP positon. The appellant stated that he was questioned about the October 15, 2012, arrest and discussed the incident preceding the arrest with the individual conducting the polygraph exam. He stated that he described an argument about an iPhone during which he demanded his girlfriend return the phone and she refused to return it. The appellant argued that what he said is consistent with his statement to TSA in April 2013.

The appellant argued that after his August 25, 2016, polygraph report from CBP, TSA continued to employ him and did not initiate any discipline for his conduct or any discrepancies with the

report and prior statement until 15 months after the CBP examination when the Agency removed him.

The appellant argued that his removal is retaliation for his November 1, 2017, appeal to the Board of the continuation of his indefinite suspension. He argued that management's reply acknowledged that his new LTSO position no longer required a security clearance but also announced an intention to discipline him upon his return. The appellant stated that he was reinstated on November 17, 2017, and that three days later he was removed for the current charges of *Off-Duty Misconduct* and *Lack of Candor*. He argued that management had the information they used to support the charges for removal for well over a year and that the only event triggering his removal was his decision to file an appeal that forced the Agency to end his indefinite suspension and reinstate him.

With regard to the *Off-duty Misconduct* charge, the appellant argued that it is not legally sufficient because it has no nexus to his employment. He argued that he was not in uniform at the time nor in public and therefore, there is no nexus between the argument that he stated he regrets became physical, and his employment.

With regard to his statements and explaining the discrepancy of the statements, he stated that he was concerned about criminal charges. He argued that all citizens possess a constitutional right not to incriminate themselves and that he exercised that right to avoid any formal statements being used against him in criminal proceedings. The appellant stated that he recounted the 2012 incident to TSA OOI investigators in 2013 and the CBP examiners in 2016 as best as he could remember and that he was upfront and apologetic about his conduct from five years ago.

Management responded and argued that the appellant's allegations of retaliation are without merit. Management stated that a report received on June 8, 2017, detailing the reasons for the three areas of concern PERSEC had led to a determination to rescind the appellant's security clearance. Management stated that the report alerted management for the first time to the appellant's interactions with CBP in 2016, specifically his polygraph statement and results. Management stated that the June 9, 2017, Indefinite Suspension letter given to the appellant clearly stated that management would not be taking any disciplinary action against him while he was initially requesting a reconsideration of the PERSEC decision and if needed and requested, a final appeal to the DHS Security Appeals Board, but that once the timeframe for those processes had run its course, appropriate final action would be taken.

Management stated that the appellant began his review process and that while the review process was proceeding, Management, on October 1, 2017, transitioned the appellant's BDO position to an LTSO position which did not require a secret clearance. Management stated that the appellant appealed his indefinite suspension to the Board a second time citing his position status change and that management replied that it was lifting the indefinite suspension since a secret clearance was no longer a requirement for the LTSO position. Management stated that since the appellant no longer pursued a review of PERSEC's June 2, 2017, determination, the subsequent action to propose removal of the appellant was the appropriate action based on the facts contained in the full PERSEC report of June 8, 2017. Management argued that the appellant's claim that it was a form of retaliation against his second appeal to the Board to have his indefinite suspension rescinded is false. Management argued that based on finally receiving a full PERSEC report on June 8, 2017, management was ready to pursue disciplinary action against the appellant but

decided to give him the opportunity to try to reverse PERSEC's determination before starting proceedings to remove him from TSA. Management argued that the overriding consideration for the appellant's removal had to do with the revelations contained in the CBP polygraph report.

Management argued that there is a nexus to the appellant's employment because his LTSO position requires him to be able to lead a staff of TSOs and to guide, coach and develop them in necessary skills. Management argued that an LTSO must be able to exercise sound judgment while performing behavior detection tasks and that core competencies for the position encompass taking steps to prevent counter-productive confrontations, being conscientious, treating others with respect, courtesy and sensitivity and demonstrating integrity and honesty by behaving in an honest, fair and ethical manner showing consistency in words and actions. Management argued that the appellant's admitted off-duty misconduct leads management to conclude that he cannot be trusted to exhibit sound judgment.

The appellant responded to management's response and argued that he never abandoned his review request for PERSEC's revocation of his security clearance and that the appeal process has not run its course. He argued that neither he nor his representative has received any notification that his appeal has been closed, resolved, or dismissed. The appellant also argued that appeals typically take over a year and that he is well within that time period having filed the original appeal on September 28, 2017. He stated that he received correspondence on October 2, 2017, stating that the appeal had been received and that he would receive a written notice of decision to uphold or reverse the determination. The appellant argued that since he has continued to pursue the review and it has not run its course, management's purported reason for removing him is false.

The appellant also argued that management admitted in their reply that they knew about his 2012 arrests and continued to employ him. He argued that management also knew that he admitted to pushing his girlfriend and breaking the cellphone to OOI investigators in 2013, that they knew about his 2015 arrests and that once the charges were dismissed, they had no issue returning him from an indefinite suspension and continuing to employ him. He also argued that management knew that his security clearance was suspended in 2015 for the same reasons it was later revoked and they continued to employ him in an administrative capacity. The appellant further argued that management admitted that they did not place him on an indefinite suspension or remove him for the underlying conduct contained within the final PERSEC report in June 2017.

The Board is not authorized to review and decide allegations of discrimination and harassment based on retaliation. Therefore, the Board gave no merit to the appellant's allegations that his removal was in retaliation for his appeal for his indefinite suspension. Management had the right to charge the appellant based on the new information provided to them by the PERSEC report received June 8, 2017, and the action is separate from the indefinite suspension actions taken in regard to the suspensions of the appellant's security clearance. Although cited as the basis for the action, the current charges have no bearing on the indefinite suspension which was for suspension of his security clearance. In addition, there is no merit to appellant's argument that there is no nexus. The appellant was arrested for domestic violence. His off-duty conduct clearly has bearing on his job and the responsibilities that he holds in his position representing TSA before the public on a daily basis.

With regard to Charge 1, although management was aware of the appellant's arrest when it occurred in October 2012, the statement of the polygraph examiner received by management in June 2017, provided new information and therefore, the action is not untimely. The appellant provided a copy of the ROI dated April 2013, arguing that he admitted to pushing and shoving his girlfriend to get her off of him. This is in neither of his statements and does not exonerate him from the true events of that evening. The statement provided to the polygraph examiner admitted to shoving her in the apartment causing her to hit her head and fall. The polygraph examiner's statement is preponderant evidence that the appellant's actions which resulted in his October 15, 2012, arrest were unacceptable and improper. Therefore, the Charge, *Off-Duty Misconduct*, is SUSTAINED.

With regard to Charge 2, the Board found that the details of the incident resulting in his arrest on October 12, 2012, provided in statements the appellant gave on October 24, 2012, and April 4, 2013, were different than what the appellant revealed during his polygraph examination on August 25, 2016. The appellant stated to the SAs that he did not choke or put his hands on his ex-girlfriend but admitted during the polygraph exam to pushing her harder than he knew he should have causing her to raise up into the air, hitting her head on the hallway wall, and falling to the ground. The appellant provided a copy of the ROI dated April 2013, arguing that he admitted to pushing and shoving his girlfriend to get her off of him. This is in neither of his statements and does not exonerate him from the true events of that evening. In addition, the statement provided by the appellant to the TSM told a far different story than that presented to the polygraph examiner. The appellant's statements and the polygraph examiner's report are preponderant evidence that the appellant was less than candid in his October 24, 2012, and April 4, 2013, statements. Therefore, specifications 1, 2, and 3 are SUSTAINED. Having sustained all three specifications, the Charge, *Lack of Candor*, 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 the penalty should be mitigated because management failed to prove that removal is a reasonable penalty. He argued that management failed to consider any mitigating circumstances and that the Deciding Official only considered factors he believed to be aggravating. The appellant noted that management cited two indefinite suspensions for prior arrests that management later removed because the charges were dismissed and argued that they cannot rely on them as aggravating factors. He also noted that management considered the June 9, 2017, indefinite suspension and argued that the indefinite suspension was not based on misconduct and was subsequently ended when his position no longer required a security clearance. He also argued that management cannot aggravate the penalty by using past arrests and past alleged off-duty misconduct for actions they never disciplined him for, specifically the alcohol related incident from February 11, 2008. The appellant argued that the only past misconduct discipline management should have relied upon was a 3-day suspension received in 2013.

The Board agrees that management cannot rely on the indefinite suspensions which were based on arrests for which charges were dismissed or for the revocation of his security clearance as

aggravating factors as they are not disciplinary actions. Similarly, it is inappropriate for management to rely on the past arrests or past alleged off-duty misconduct for which the appellant was not disciplined as an aggravating factor related to the appellant's disciplinary history.

The appellant argued that he took responsibility for his actions and recognized the past mistakes he made. He stated that he served TSA and its mission for over 13 years in both elevated positions of BDO and LTSO and that he gets along with coworkers. He stated that he has been a dependable employee without any past attendance discipline and that he received favorable performance ratings throughout his career. The appellant provided character reference letters with his appeal.

The appellant also argued that management cannot claim that the seriousness of the offenses is an aggravating factor because they permitted him to work for months after they obtained the CBP report which he stated mirrors much of the April 2013 TSA OOI report. The appellant argued that similarly, management cannot now claim that he has no rehabilitation potential as TSA continued to employ him after April 2013 and again after August 2016. He argued that management also saw rehabilitation potential in their initial decision to offer him a demotion in June 2017 and that there have been no additional misconduct allegations from June 2017 until the date of his removal.

Management responded and argued that the nature of the off-duty misconduct justifies using the high end of the aggravated penalty range. Management further argued that either charge on its own merits removal in this case. Management stated that the nature of the charges against the appellant are extremely serious and argued that his 13-year record of service is overshadowed by the charges. Management also argued that the character references garnered by the appellant from his co-workers in the former BDO program came from individuals who did not know about the appellant's damning admissions made to CBP.

Management argued that the appellant has repeatedly demonstrated a cavalier attitude toward the core values of integrity, respect and the commitment to the mission. Management argued that the appellant bears the responsibility for the disciplinary action levied as a result of his actions. Management stated that the disciplinary action is consistent with discipline taken against other employees at the airport and is consistent with TSA's guidelines on using the Table. Management stated that the appellant's actions as listed in the charges show a self-serving sophistication to change his story to get or keep his job and are a direct assault on the core value of integrity. Management stated that the appellant's total history, his lack of trustworthiness exhibited throughout the evidence, and his inability to realize that his behavior is unacceptable make him a security risk. Management argued that the penalty of removal is appropriate, reasonable and necessary to promote the efficiency of TSA at the airport.

The appellant responded to management's reply and continued to argue that the removal was in retaliation for submitting an appeal, that management attempted to add additional information on which they did not rely on for either charge purely to prejudice him to the Board and that the removal was not legally sufficient.

The Deciding Official considered the nature, extent and seriousness of the appellant's conduct noting that he freely admitted under oath during his August 25, 2016, polygraph examination to

grabbing his girlfriend, throwing her onto a bed, physically restraining her, pushing her harder than he knew he should, causing her to raise up into the air, and causing her to hit her head on the hallway wall before she fell to the floor. The Deciding Official stated that he considered the circumstances surrounding the appellant's conduct, to include knowledgeable participation. He considered that when the appellant submitted his sworn statements to his TSM and the OOI Special Agents, he deliberately made attempts to mislead them in their investigations, contradicting his August 25, 2016, statement to CBP. The Deciding Official stated that the appellant's admitted assaultive conduct cannot be tolerated.

The Deciding Official also considered the appellant's frequency of poor conduct. He noted that during the appellant's tenure with TSA he had been arrested for an alcohol related incident resulting in his conviction on February 11, 2008. He also considered that at the time of the appellant's October 15, 2012, arrest, the appellant was nearly 28 years old and sufficiently mature to understand that emotionally and physically abusing his girlfriend could not be condoned in any manner whatsoever. The Deciding Official considered that although the appellant's girlfriend recanted on the case and caused it to be dismissed, the appellant admitted to his assaultive conduct in his statement to the CBP polygraph examiner. The Deciding Official noted that the appellant persisted in his relationship which he now describes as "toxic" demonstrating poor judgment on his part. He noted that on May 29, 2015, the appellant was arrested for choking his girlfriend and was subsequently arrested three more times for violating restraining orders of protection by contacting his girlfriend when he was ordered by the courts not to do so. The Deciding Official found that the appellants ongoing involvement with the criminal justice system creates doubt about his judgment, reliability, and trustworthiness. He found that it calls into question the appellant's ability and willingness to comply with laws, rules and regulations as well as his ability to change his conduct.

The Deciding Official considered that the appellant demonstrated a total disregard for TSA rules governing conduct which violates TSA values of honesty and integrity. He found that the appellant's repeated pattern of disrespect toward TSA's rules and regulations negatively reflects upon TSA's image. The Deciding Official considered that the appellant's actions adversely affect TSA's mission to provide the required level of security at the airport by trained and trusted professionals.

The Deciding Official considered that the appellant's lack of candor, his abusive physical actions against his girlfriend, his history of alcohol abuse and his unwillingness to comply with rules and regulations caused management to lose all faith and confidence in the appellant's ability to perform in a sensitive screening position which depends on judgment, the need to conduct sensitive pat downs of passengers and the need to act as a leader of new hires and other TSA officers who depend on the appellant's ability to make clear and decisive judgment decisions. The Deciding Official stated that the appellant's overall pattern of conduct dating back to 2008 and culminating in his lack of candor relating to assaultive conduct against his girlfriend goes against the core values of TSA and is not acceptable to anyone holding a sensitive security position.

Under Section B. 5 of the Table, for Off-Duty Misconduct, the recommended penalty range is a Letter of Reprimand (LOR) to 5-day suspension and the aggravated range is a 6-day suspension to removal. Under Section E. 2 for Lack of Candor, the recommended penalty is removal. The Guidelines of the Table 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 Guidelines also list examples of aggravating factors to include prior disciplinary action.

The Board found that the Deciding Official did fail to address the mitigating factors, and has noted that the appellant has been with TSA for almost 14 years and has a satisfactory performance record. However, these mitigating factors do not outweigh the aggravating factors in this case. The Charges are the result of the appellant's misconduct on October 12, 2012, and the subsequent inconsistent statements the appellant made about the October 12, 2012, incident in 2012, 2013 and 2016. The appellant's conduct on October 12, 2012, was egregious and he was less than truthful about the details of the incident when he provided sworn statements on October 24, 2012, and April 4, 2013. There is a nexus to the appellant's employment due to his criminal conduct and his public safety position. Management had the right to consider a penalty in the aggravated range given the appellant's prior 3-day suspension in 2013, and the fact that the appellant committed more than one offense. Management did not need to consider the aggravated range since the recommended penalty for Lack of Candor is removal.

The Board finds that management's decision to remove the appellant from his position as an LTSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL Digitally signed by DEBRA S ENGEL Date: 2018.02.23 22:10:36 -05'00'

Debra S. Engel
Chair
OPR Appellate Board

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Arlington, VA 20598