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—17-105

August 30, 2017

***Issue**: Jurisdiction*

OPINION AND DECISION

On August 16, 2017, the appellant, a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA), filed an appeal to the TSA Office of Professional Responsibility Appellate Board (Board).

The appellant did not submit evidence showing that she was removed from Federal service. The evidence shows that the appellant resigned from Federal service on June 29, 2017. The Board has jurisdiction to review certain disciplinary actions involving TSOs.[1] Actions covered include suspensions of more than fourteen (14) days, indefinite suspensions, involuntary demotions for performance/conduct, furloughs of any length, and removals. Accordingly, the Board lacks authority to decide the appellant's appeal because the appellant was not removed from Federal service. Because the Board lacks jurisdiction to decide this appeal, it is DISMISSED.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

SupervisoryTransportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-101

August 25, 2017

Issue: *Jurisdiction (12-day suspension)*

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to issue him a twelve (12) day suspension relative to his position as a Supervisory Transportation Security Officer (STSO) with the Transportation Security Administration (TSA). For the reasons stated below, the appeal is DISMISSED.

BACKGROUND

On August 15, 2017, TSA management issued the appellant, a TSO, a twelve-day suspension. On August 17, 2017, the appellant appealed his twelve-day suspension to the TSA Office of Professional Responsibility Appellate Board (Board).

ANALYSIS AND FINDINGS

The Board has jurisdiction to review certain disciplinary actions involving TSOs.[1] Actions covered include suspensions of more than fourteen (14) days, indefinite suspensions, involuntary demotions for performance/conduct, furloughs of any length, and removals. Suspensions of fourteen (14) days or less, to include Letters of Reprimand, are not covered, and are not within the Board's jurisdiction to review.

Conclusion. The Board lacks authority to decide the appellant's appeal because he received a twelve-day suspension. The proper avenue to contest his suspension was through the grievance procedures set forth in Human Capital Management Policy 771-4, *National Resolution Center*.

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

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

FOR THE BOARD:

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)
Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-100

August 17, 2017

Issue: *Jurisdiction (14-day suspension)*

OPINION AND DECISION

The appellant petitions for review of the respondent's decision to issue her a fourteen (14) day suspension relative to her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). For the reasons stated below, the appeal is DISMISSED.

BACKGROUND

On July 6, 2017, TSA management issued the appellant, a TSO, a fourteen-day suspension. On August 15, 2017, the appellant appealed her fourteen-day suspension to the TSA Office of Professional Responsibility Appellate Board (Board).

ANALYSIS AND FINDINGS

The Board has jurisdiction to review certain disciplinary actions involving TSOs.[1] Actions covered include suspensions of more than fourteen (14) days, indefinite suspensions, involuntary demotions for performance/conduct, furloughs of any length, and removals. Suspensions of fourteen (14) days or less, to include Letters of Reprimand, are not covered, and are not within the Board's jurisdiction to review.

Conclusion. The Board lacks authority to decide the appellant's appeal because she received a fourteen-day suspension. The proper avenue to contest her suspension was through the

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

grievance procedures set forth in Human Capital Management Policy 771-4, *National Resolution Center*.

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

FOR THE BOARD:

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-098

August 4, 2017

Issue: *Jurisdiction (Untimely)*

OPINION AND DECISION

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

BACKGROUND

On June 22, 2017, management terminated the appellant based on the Charge, *Unavailable for Duty*. On August 1, 2017, the appellant appealed her 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 failure to file within 30 days, without a demonstration of good cause, will result in dismissal of the appeal as untimely. The appellant was notified of management's actions on June 26, 2017, and did not file an appeal with the Board until August 1, 2017. The appellant's appeal was due on July 26, 2017. However, the appellant's representative requested an extension until July 31, 2017, and said extension was granted. The appellant did not submit her appeal to the Board until August 1, 2017.

Conclusion. The appellant failed to file her appeal within 30 days and failed to file the appeal within the time frame granted for an extension. 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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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-098

August 28, 2017

***Issue**: Unavailable for Duty*

DECISION ON RECONSIDERATION

On June 22, 2017, the appellant was removed from Federal Service for the Charge, *Unavailable for Duty*. On July 24, 2017, the appellant's representative requested an extension to file an appeal before the Office of Professional Responsibility Appellate Board (Board). The request for an appeal was granted and the appellant was given to July 31, 2017, to file said appeal. The Board dismissed the appeal due to untimeliness as the appeal was received on August 1, 2017. On August 18, 2017, the appellant's representative filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.*

The Handbook to TSA Management Directive 1100.77-1, *OPR Appellate Board*, Section C. (7), states "If delivery is by facsimile or e-mail, the date the appeal was sent by facsimile or e-mail, shall be considered the date the appeal is filed." Although the appeal was received by the OAB on August 1, 2017 at 2:55 a.m., it is clear that it was sent on July 31, 2017, at 11:55 p.m. Therefore, the appeal was timely. Accordingly, the request for reconsideration is GRANTED and the appellant's appeal before the Board will be accepted.

FOR THE BOARD:

Deborah Kearse

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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—17-094

August 22, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

On or about June 23, 2017, the appellant was removed from her position as a Lead Transportation Security Officer (LTSO) with the Transportation Security Administration (TSA). On or about July 18, 2017, the appellant appealed her removal to the TSA Office of Professional Responsibility Appellate Board (Board). On August 22, 2017, management rescinded the removal action.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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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—17-093

August 29, 2017

Issue: *Inappropriate Conduct; Lack of Candor*

OPINION AND DECISION

On June 19, 2017, management removed the appellant from her position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on two Charges: *Inappropriate Conduct* and *Lack of Candor*. The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Inappropriate Conduct*, on one specification alleging that between December 18, 2015 to March 18, 2016, the appellant associated with an individual known or believed to be connected to criminal activity. The individual the appellant was in contact with was arrested on December 16, 2015, for felony possession of narcotics and third degree murder for distributing a controlled substance. Following this arrest, the individual placed approximately 157 calls to the appellant's cellular telephone, 66 calls connected, for a total of approximately 751 minutes of talk time. There were approximately 42 calls which lasted 15 minutes in duration, for a total of 630 minutes.

Management based Charge 2, *Lack of Candor*, on one specification alleging that on or about December 28, 2015, the appellant informed officers from a Narcotics and Violent Crimes Task Force that she used her own money to purchase a vehicle. In the appellant's signed statement dated April 6, 2016, the appellant admitted that she "lied about where [she] got the money for the car because [she] didn't want it to be taken." The appellant acknowledged her statement to the Narcotics and Violent Crime Task Force was less than truthful.

Management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic on-the-job rules. Section 5. D. (2) states that TSA employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials. Section 5. D. (7) states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. Section 6. D. states that employees in direct contact with the public bear a heavy responsibility, as their conduct and appearance have a significant impact on the public's attitude toward the Federal Government and TSA. Section 6. E. states that while on or off-duty, employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, or negatively impact its ability to discharge its mission, cause embarrassment to the agency, or cause the public and/or TSA to question the employee's reliability, judgment or trustworthiness. This applies regardless of whether the conduct is legal or tolerated within the jurisdiction it occurred.

Management also alleged that the appellant's conduct violated the Handbook to MD 1100.73-5. Section F (1) states that employees must cooperate fully with all TSA and DHS investigations and inquiries . . . this includes providing truthful, accurate, and complete information in response to matters of official interest. Section P. (2) states that membership or participation in organizations that condone violence against others or engage in criminal or other notorious activity – whether or not the employee himself or herself engages in such activity – is inconsistent with TSA's and DHS's mission to ensure the safety of our nation's transportation systems and security of our country. Therefore, employees who associate with such organizations run the risk that their membership, participation, or association could reasonably be taken as approval of the organization's notorious activities. Under certain circumstances, employees may be required to terminate their relationship with such organizations and/or may be subject to administrative action. Section P. (3) states that employees will not, except as may be necessary in connection with official assignments or duties, associate with individuals or groups who are believed or known to be connected with criminal activities. This limitation on association covers any social, sexual, financial, or business relationship with a source of information, a suspected or known criminal, or an illegal alien, subject to being removed from the United States of America.

On December 28, 2015, the appellant was interviewed by officers of the local Narcotics and Violent Crimes Task Force (Task Force) regarding her association with a known narcotics trafficker (hereinafter referred to as the appellant's boyfriend) who had recently been arrested for felony possession and sale of heroin, cocaine, and methamphetamine, along with third degree murder in connection with an overdose death. A Special Agent (SA) with the TSA Office of Inspection (OOI) summarized the details of the appellant's interview with the Task Force as part of OOI's Report of Investigation (ROI) that was used as evidence for the case. In the summary,

the SA stated that the appellant told the officers that the individual was her boyfriend and that she had been dating him since May of 2015, but she had no knowledge that he was a drug trafficker. The appellant told officers that she only became aware that he was involved in drug trafficking when she saw on the news that he had been arrested. At the time of the arrest, he was driving a car registered to the appellant. The appellant was also questioned about this car and the financial transactions she made in conjunction with the purchase of the car. The appellant told the Task Force that she did not purchase the car on behalf of her boyfriend but rather purchased the vehicle for herself and loaned it to him for an unspecified period of time. The appellant initially told the officers that she saved up all of the money for the car but later in the interview stated that she borrowed some of the money and also had some saved. She stated that she borrowed money from a loan company around 2012 and that she also borrowed money from her ex-boyfriend. When questioned further, the appellant told the officers that her boyfriend helped her pay for the car and that he gave her the majority of the money for the car. The appellant stated that her boyfriend gave her $16,000 and indicated that it was a gift. The appellant obtained two cashier's checks from two separate locations on the same date to pay for the car but said that this was not to intentionally structure bank deposits but rather as a convenient way for her to do it.

TSA OOI also reviewed telephone records from December 21, 2015, through March 13, 2016, from the jail where her boyfriend was held after his arrest and confirmed 751 minutes of telephone calls between the appellant and her boyfriend during this period.

The appellant was interviewed by OOI on April 6, 2016, regarding her association with the person she had previously indicated was her boyfriend. In the SA's summary of the interview, the SA stated that the appellant said she lied about the source of the funds and about the way the bank transactions went because she did not want to lose her car and she thought if she admitted her boyfriend gave her the money, she would lose it. The SA stated that the appellant said that she believed the car was hers and that her boyfriend bought it for her. The SA stated that the appellant said she was not aware of her boyfriend's drug trafficking and that she had no relationship with him at the present time, but that she had talked to him on the telephone on a regular basis since December 2015. In addition, the appellant recalled speaking to the Deputy Federal Security Director (DFSD) after speaking to the Task Force on December 28, 2015, and him cautioning her about being mindful of what she did in her private life because it could have an impact on her job. The appellant stated that she now understands what he meant about being aware of the company that you keep. The appellant admitted to speaking to her boyfriend after being informed that he was a criminal but that she has not spoken to him since April 5th, 2017.

The appellant was issued a Notice of Proposed Removal (NOPR) on April 4, 2017. The NOPR advised the appellant of her right to reply orally and/or in writing within seven days of receipt of the NOPR. The appellant submitted a written response on April 11, 2017.

Management included as evidence: OOI Report of Investigation, dated September 8, 2016; Phone Call Detail Report; and appellant's OLC history showing completion of MD 1100.73-5 in February 2016.

On appeal, the appellant stated that she knew her boyfriend by a different name other than his given name and that he told her that he owned a cleaning business. She stated that she never saw him engage in any suspicious activity or flaunt substantial amounts of money. The appellant

stated that she learned about his arrest when her friend sent her a news article about it. The appellant stated she was completely shocked by the allegations and overcome with emotion. The appellant stated that she had been dating him for seven months and had not seen him engage in criminal activity. She stated that she felt betrayed and hurt but decided to accept a call from him in order to gain some clarity on the matter. The appellant stated that he told her that the entire situation was a misunderstanding and that he was not the man portrayed in the media. The appellant stated that because they were in a meaningful relationship and she was truly in love with him, she believed that the accusations were possibly false. The appellant argued that despite the publicity her boyfriend received for his arrest, she was not affiliated with him in the press or in any other public manner.

The appellant argued that after the interview, the Task Force officers cleared her of having any involvement with the criminal undertakings of her boyfriend. The appellant also stated that on the same day, the DFSD made a general statement that she should exercise discretion regarding the people she associates with, but argued that the DFSD never told her to specifically stop all contact with her boyfriend. The appellant stated that she maintained contact with him in an attempt to uncover the truth about him and their relationship, and to figure out what to do about the vehicle they purchased together. The appellant argued that with regard to her interview with OOI on April 6, 2016, the Decision letter referenced that she was "completely forthright" in the meeting with the TSA investigator. The appellant argued that she answered every question truthfully and fully cooperated with the investigation. The appellant stated that during the meeting, the investigator told her that her telephone conversations were in violation of the Employees Responsibilities and Code of Conduct and that after the meeting she ceased all communication with her boyfriend. The appellant pointed out that the call log revealed that between April 1, 2016, and April 17, 2016, her boyfriend called her 22 times and that she did not answer any of his phone calls.

The appellant argued that management has not presented preponderant evidence that receiving phone calls from an inmate amounts to inappropriate conduct. The appellant noted that the specification asserts that between December 18, 2015 and March 18, 2016, she associated with an individual known or believed to be connected to criminal activity and that by "associated" management is referring to the 157 calls, of which only 66 were connected, that her boyfriend made to her. The appellant argued that there is no record of her calling or visiting him, or placing money into his jail money account. She argued that management has not submitted any evidence to explain how receiving phone calls, with nothing more, qualifies as "associating." She argued that speaking with someone over the phone does not amount to an association with the person.

The appellant argued that Charge 2 is not supported by preponderant evidence because she told the officers the truth during the interview, and she has not lacked candor in any regard when speaking with TSA. She stated that in the beginning of the interview with the Task Force, she initially was not upfront regarding where she received the money for the down payment on her car because she was afraid the officers may take her car. The appellant argued that during the same interview, she admitted that her boyfriend gave her the money for the down payment. She argued that she is an honest person who had a brief lapse in judgment due to a combination of fear, stress, and the unraveling of a romantic relationship that had been built upon lies. The appellant argued that she ultimately corrected her misstatement and told the officers the truth during the same interview. She argued that management has not proven why a lack of candor

charge is warranted when she ultimately told the officers the truth and then was completely forthright with the TSA investigator.

Management replied and noted that the appellant stated that she became aware of her boyfriend's criminal activity when he was arrested on December 18, 2015. Management also pointed out that her boyfriend's extensive criminal history included his arrest or being charged 38 times for various offenses, to include: assault and battery, assault with dangerous weapon-firearm, firearm violations, kidnapping and terroristic threats, possession of narcotics (cocaine/heroin/methamphetamine), false information to police officer, criminal damage to property, criminal trespass and other lesser alcohol/reckless driving charges. Management argued that the appellant's responses to the Task Force were dishonest and misleading during her interview on December 28, 2015. Management argued that the DFSD cautioned the appellant about associating with criminals following her December 28, 2015, interview and reiterated that after her boyfriend's arrest, she engaged in 66 telephone conversations with him, for a total of 751 minutes of connected time while he was incarcerated. Management argued that the appellant's mischaracterization of her continued contact with her boyfriend as not displaying inappropriate conduct is unpersuasive noting that she continued to accept his calls and spoke to him for the length of time allowed by the incarceration facility and that she did not hang up or abruptly end the calls.

In their reply, management also discussed an incident that was included in the ROI involving an undercover drug purchase that took place while the appellant allegedly stood by. The appellant responded and argued that the full details of the incident have not been verified by her representative and are not relevant to the case. She argued that management did not base either charge on the alleged event and that therefore, she did not have the opportunity to properly dispute the allegation in her appeal. The appellant argued that management cannot bring up a serious allegation against her for the first time in its response to her appeal. The appellant further argued that the Task Force cleared her of any criminal involvement after the investigation which further proves that the alleged incident is not relevant. She argued that management's introduction of a new allegation in its response is improper and should be disregarded. The Board agrees and the newly introduced incident was not considered.

In the appellant's reply to management's response, she also argued that the DFSD never made the statement to her that management alleged; cautioning her about associating with criminals. She argued that the DFSD made a general statement to her about exercising discretion regarding the people with whom she associates. She argued that management is incorrectly portraying the statement as if the DFSD gave her explicit instructions to end all communications with her boyfriend. The appellant argued that if the DFSD had given her the explicit instructions that management alleged, then the matter could have been resolved through an appropriate non-disciplinary corrective action. She argued that the DFSD instead chose to make a vague statement that lacked the severity and urgency that management alleges.

With respect to Charge 1, the Handbook to TSA MD 1100.73-5, Section P. (3) states, "Employees will not, except as may be necessary in connection with official assignments or duties, associate with individuals or groups who are believed or known to be connected with criminal activities. This limitation on association covers any social, sexual, financial or business relationships . . ." The MD is clear that association includes social interaction. Telephone conversations totaling 751 minutes over a period of three months is social interaction. The

appellant admitted that she became aware of her boyfriend's arrest for criminal activity in December 2015, and that she continued to engage in telephone conversations with him for months after his arrest. The appellant's argument that the DFSD did not specifically tell her to stop associating with her boyfriend is irrelevant. It is the appellant's responsibility to abide by the requirements of MD 1100.73-5. The Board determined that the appellant's statement and the call log are preponderant evidence that the appellant associated socially with a person known to be connected with criminal activities through telephone conversations in violation of MD 1100.73-5. The appellant was aware of her boyfriend's arrest and incarceration for criminal activities and she was aware of her responsibilities under the MD. Her conduct was inappropriate. Therefore, the Charge, *Inappropriate Conduct*, is SUSTAINED.

With respect to Charge 2, the Board determined that even though the appellant did eventually tell the truth; she initially lied to law enforcement officers about the circumstances surrounding the purchase of her vehicle. Despite the appellant's claim that she was afraid and stressed and had a brief lapse of judgement, she had an obligation and responsibility to be truthful when questioned by law enforcement. The SA's summary of the appellant's interview with the task force officers is preponderant evidence to support the charge. Therefore, 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 management failed to prove there is a nexus between a legitimate government interest and the charges against her because the Task Force determined that she had no connection or involvement with the criminal investigation of her boyfriend and because Charge 2 resulted from a statement she made and recanted during an interview with the Task Force, which is not a DHS entity. The appellant also argued that management failed to prove that removal is reasonable. She argued that one of the most significant indicators that the alleged offenses were not serious in nature is the amount of time that passed before management initiated an adverse action against her. The appellant argued that management allowed her to remain in her active position as a TSO for a year and a half after they became aware of her alleged association with her boyfriend and eight months after the investigation concluded. She argued that if the alleged offenses were serious in nature, management should have initiated an adverse action immediately after finding out about the alleged offenses and/or placed her on administrative leave. The appellant also argued that the alleged offenses were not committed maliciously and do not relate to her duties or position as a TSO and that removal for accepting phone calls seems particularly harsh. The appellant argued that mitigating factors such as her excellent work record, active participation in TSA initiatives, 10 years of service with TSA without any prior discipline, and her time with the Army together should be considered a significant mitigating factor. She also argued that management did not properly consider her potential for rehabilitation.

Management replied and argued that the nexus to a legitimate government interest was satisfied when the appellant failed to be completely honest with law enforcement when questioned as part of a criminal investigation. Management also argued that it cannot trust the appellant to have

another "brief lapse of judgement" if someone were to solicit her involvement to defeat the security systems. Management argued that while it is arguable that one might be empathetic to the appellant having been caught up in a bad situation that she allegedly knew nothing about, her continued contact with her boyfriend after being fully informed of his extensive criminal background, and then lying to the authorities about her actions, caused management to completely question her reliability, trustworthiness, and judgment. Management argued that the appellant's actions demonstrate at best, that she was a victim of social engineering, which cannot be tolerated, and at worst, demonstrate she was motivated by the financial gain she was receiving.

Management acknowledged and apologized for the lack of timeliness of the action, but argued that the lack of timeliness does not overcome the severity of the lack of candor charge or her continued association with a known criminal. Management argued that the penalty for either charge is removal and that the decision is supported by a preponderance of evidence. Management further argued that there is a demonstrated nexus to the appellant's TSA employment, and that removal is reasonable. Management argued that even when considering the mitigating factors, the fact that management has lost all confidence in the appellant's reliability, trustworthiness and judgment far outweighs any mitigation of the penalty. Additionally, management argued that the Table, under E.2 omits any mitigated option for a lack of candor charge.

The appellant responded and argued that management's statement that there is no mitigated option for a lack of candor charge is incorrect citing that the Table clearly states that the mitigated penalty range for lack of candor is a 14-day to 30-day suspension. She also argued that there is a mitigated range under G.10 for inappropriate conduct of a Letter of Reprimand (LOR) to a 13-day suspension.

The appellant also argued that management took her statement that she had a "brief lapse in judgement" completely out of context in order to imply that she is not capable of fulfilling her duties as a TSO. The appellant stated that she became very flustered during the interview with the Task Force officers as they revealed her boyfriend's criminal undertakings and asked her a series of questions. She stated that as a result, she was under a severe amount of stress resulting in a brief lapse of judgement but argued that it does not correspond to performing her TSO duties at the airport. She argued that the fear and stress was an immediate reaction to the police questioning her and not a permanent emotional state that affected her ability to fulfill her duties as a TSO. The appellant argued that this was exhibited by the fact that she received the highest possible rating on her performance appraisals each year since the allegations in 2015. The appellant argued that she is not susceptible to social engineering or dangerous schemes, as management alleges. She argued that she was never solicited by her boyfriend to assist him with any criminal activity and that he never even told her the truth about his criminal involvement. The appellant argued that management is completely unjustified in stating that she may become involved in criminal activities as if she has a pattern of doing so. She argued that she is a dedicated employee who takes her responsibilities as a TSO very seriously and that her spotless disciplinary record during her 10-year tenure at TSA demonstrates her serious commitment to her job and TSA's mission.

The Deciding Official considered the nature and seriousness of the appellant's misconduct and the relationship to her duties. The Deciding Official considered as an aggravating factor that the

appellant was provided information regarding her boyfriend and was advised that she was in violation of the policies in December. He considered that the appellant lied, for personal gain, to law enforcement, and that she made a decision to continue a relationship with her boyfriend. The Deciding Official considered that integrity is the core of TSA's mission and that management cannot have employees make a choice to continue to violate policies when specifically told of the violations. The Deciding Official also considered the clarity with which the appellant was on notice of the rules violated as an aggravating factor, noting that local training records show that that appellant acknowledged reading and understanding TSA MD 1100.73-5 on February 16, 2016.

As mitigating factors, the Deciding Official considered the appellant's service with TSA since 2007, the fact that she has no prior discipline and that her work record is good.

The Deciding Official considered the effect of the appellant's offense upon her ability to perform at a satisfactory level and confidence in her ability to perform assigned duties. The Deciding Official concluded that the appellant's conduct undermines management's confidence in her ability to follow policy stating that the actions and choices the appellant made while off-duty, when she thought no-one was watching, and when she had to made a choice were unacceptable.

The Deciding Official also considered the appellant's potential for rehabilitation again citing that she knowingly associated with a convicted criminal after being cautioned not to maintain contact and that she was less than honest with the police when questioned about her activities. The Deciding Official found her actions unacceptable and inconsistent with the appellant's duties as a TSO to uphold the trust of management and the traveling public. The Deciding Official stated that he found no reason to consider alternate actions to address the appellant's conduct because he has lost all trust in her. The Deciding Official found that removal is necessary to impress upon the appellant the importance of striving toward and maintaining an acceptable, professional reaction to any event which she is presented.

Under Section G.10 of the Table, pertaining to knowingly and inappropriately associating with individuals or groups known to be connected with criminal activity, the recommended penalty range is a 14-day suspension to removal. The mitigated penalty is an LOR to 13-day suspension and the aggravated range is removal. Under Section E.2 of the Table, pertaining to lack of candor, the recommended penalty is removal. The mitigated penalty is a 14-day suspension to 30-day suspension and the aggravated penalty is removal.

The Board determined that while the action was untimely, the untimeliness of the action does not outweigh the seriousness of the appellant's misconduct. The appellant continued to frequently talk to a known criminal for several months after learning about his criminal activity and her first instinct when questioned by law enforcement was to lie. The appellant's actions were unacceptable and she showed no appropriate remorse for her actions. The Guidelines of the Table state that when 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. Both Charges were upheld and removal is within the recommended and aggravated penalty ranges for each Charge. Therefore, the Board finds that management's decision to remove the appellant from her position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-092

August 22, 2017

Issue: *OFF DUTY MISCONDUCT (Second Alcohol Related Offense)*

OPINION AND DECISION

On June 13, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge, *Off-Duty Misconduct (Second Alcohol Related Offense).* The appellant filed a timely appeal of his removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based the Charge, *Off-Duty Misconduct (Second Alcohol Related Offense),* on one specification which alleged that on April 22, 2017, at approximately 2100 hours, following the appellant's involvement in a car accident with another vehicle, the appellant was arrested and charged with Driving Under the Influence (DUI), an Alcohol Related Offense. The appellant submitted to testing of his breath alcohol content and provided two (2) breath samples. The first breath sample was conducted at 22:41:03, which resulted in a breath alcohol content of 0.130 with a breath volume of 1.67 liters. The second breath sample was conducted 22:45:54, which resulted in a breath alcohol content of 0.131 with a breath volume of 1.74 liters. The legal limit for DUI in the State is .08.

Management alleged that the appellant's conduct was in violation of TSA MD 1100.75-4, *Addressing DUI and DWI Offenses*, Paragraph B. (4), which requires that if an employee is arrested for a second time for an Alcohol Related Offense while employed with TSA, management will take action to remove the employee from employment consistent with the provisions of TSA MD 11100.75-3, *Addressing Unacceptable Performance and Conduct*. The MD also states under Section 6.A that TSA employees who engage in the reckless, illegal, and dangerous behavior of DUI/DWI offenses demonstrate a disregard for TSA's mission of protecting the nation's transportation systems to ensure freedom of movement for people and commerce. The MD goes on to state that employees who misuse and/or abuse alcohol or drugs raise a serious issue about their potential ability to appropriately deal with security threats. The Handbook to MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, Paragraph O.(2)(g), states that employees are prohibited from endangering themselves and the public by driving while under the influence of alcohol. MD 1100.73-5, Section 6.E.[1], also states that 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. Section 5.D.(7)[2] of MD 1100.73-5 requires all employees to observe and abide by all laws, rules, regulations and other authoritative policies and guidance.

On April 22, 2017, the appellant was arrested and charged with DUI. Management reviewed the appellant's records and discovered that he was also arrested on January 16, 2005, for DUI. The appellant was found not guilty of the January 2005 charge. The appellant acknowledged and received the Notice of Proposed Removal on May 30, 2017. The appellant did not respond to the Notice of Proposed Removal.

Management included as evidence: TSA Alert and Warning System, dated April 25, 2017; employee statements, undated; Police Incident report, dated 4/23/17; Motor Vehicle Accident Report, dated April 22, 2017; Intoxilyzer report, dated April 22, 2017; Cash bond for appellant, dated April 23, 2017; Impound report, dated April 22, 2017; arrest report, dated January 17, 2005; alcohol analyzer report, dated January 16, 2005; Disposition report, dated November 1, 2006; Motion to dead docket, dated November 1, 2006; Verdict, dated November 1, 2006; Accusation by the State for DUI, dated December 21, 2005; summary of appellant's arrests, undated; and DUI risk reduction certificate of completion, dated April 30, 2017.

On appeal, the appellant disputed the facts surrounding the DUI charge of January 17, 2005. The appellant argued that through the court process, he was acquitted. Additionally, the appellant argued that he was also innocent on the DUI dated April 22, 2017.

Management responded and argued that the preponderance of the evidence supports the Charge.

The Board finds that the TSA Alert and Warning system, indicating that the appellant reported his arrest to management, and the Police Department Incident report are preponderant evidence to support the specification. Accordingly, the Charge, *Off-Duty Misconduct (Second Alcohol Related Offense)*, is SUSTAINED.

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[1] Management incorrectly stated that this language was from MD 1100.75-4, Section 5.B. (1).
[2] Management incorrectly stated that this language was from MD. 1100.75-4, Section 5.B.(2).

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

On appeal, the appellant argued that his removal was extremely harsh due to the facts of his acquittal being used against him some 12 years later. The appellant asserted that his performance on the job has been at "Achieve" or "Exceeded Expectation" and that neither this pending charge nor the previous charge has affected TSA in a negative way. The appellant stated that he has and will be able to discharge TSA's mission without his reliability, judgment or trustworthiness being questioned. Additionally, the appellant stated that he has reached out to the Employee Assistance Program to see if he has a substance abuse problem.

Management responded to the appeal and argued that the Deciding Official conducted an analysis of the penalty factors and penalty determination and that his determination was documented in the decision. Management argued that the appellant does not dispute that he was arrested twice for DUI. Management asserted that the fact that the appellant was acquitted of the first DUI is irrelevant since MD. No. 1100.75-4 provides that if any employee is arrested for a second time for an Alcohol Related Offense, management shall take action to remove the employee from employment. Therefore, appellant's removal was required under TSA policy.

The Deciding Official considered the penalty factors. As mitigating, she considered that the appellant has no disciplinary history and has been with TSA since 2002 with performance evaluations in 2015 and 2016 as "Exceeded Expectations" and "Achieved Excellence." The Deciding Official found as aggravating the nature and seriousness of the offense and its relation to the employee's duties. She also found that the appellant's conduct raises questions about whether he will use sound judgement and demonstrate professionalism in all matters, on or off-duty. The Deciding Official determined that the incident has called into question the confidence of his supervisors and managers in his ability to exercise good judgment. The Deciding Official did not believe that the appellant had potential for rehabilitation.

Section 7.B (4) of TSA MD 1100.75-4, states that if an employee is arrested a second time for an Alcohol Related Offense while employed with TSA, the Management Official shall take action to remove the employee from employment consistent with the provisions of TSA MD 1100.75-3. Section C.9 of the Table states that a second arrest for an Alcohol Related Offense will result in removal.

The Board finds that the evidence shows that the appellant, while employed with TSA, was arrested for a DUI on January 16, 2005. The evidence also shows that the appellant submitted to a breathalyzer test on January 16, 2005, and blew above the legal limit on this test. Management properly followed policy set forth in TSA MD 1100.75-4. The policy requires removal for a second alcohol related arrest. Therefore, the Board finds that the appellant's removal is within the bounds of reasonableness and SUSTAINS the penalty decision.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-091

August 21, 2017

Issue: *Sleeping on Duty While Assigned to a Security Activity*

OPINION AND DECISION

On June 21, 2016, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the Charge: *Sleeping on Duty While Assigned to a Security Activity*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the Board DENIES the appeal.

ANALYSIS AND FINDINGS

In proceedings before the Board, management bears the burden of proving the charge(s) by a preponderance of the evidence or substantial evidence, as applicable. In the present case, the applicable standard is 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 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.

Management based the Charge, *Sleeping on Duty While Assigned to a Security Activity,* on one specification alleging that on June 12, 2017, at approximately 0740 hours, the appellant slept on duty while assigned as an exit lane monitor.

Management alleged that the appellant's actions violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (7) states that employees must observe and abide by all laws, rules, and regulations and other authoritative policies and guidance. Paragraph 6.B requires employees to perform their duties in a professional and business-like manner throughout the day. Paragraph 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.

A Deputy Assistant Federal Security Director (DAFSD) observed the appellant with his head down and his body not moving. The DAFSD stated that as he walked closer, he could see that the appellant had his eyes closed and appeared to be asleep. The DAFSD stated that approximately 10 feet away from the exit lane was a full queue of passengers and that he could see the passengers looking at the appellant as if they were in disbelief that he was asleep. The DAFSD stated that he stood directly in front of the appellant and that the appellant was asleep and did not notice him standing in front of him until he called his name. When the DAFSD called his name, the appellant became startled or surprised to see him right in front of him. The DAFSD asked the appellant if he was asleep. The appellant responded that he simply had closed his eyes.

The DAFSD called the Lead Transportation Security Manager (LTSM) to come to the exit lane. The LTSM provided a statement and indicated that the DAFSD told him that the appellant was asleep and that numerous passengers waiting in the queue were looking in disbelief of what was going on. The LTSM asked the appellant what happened and the appellant replied that he had shut his eyes for a minute. The appellant also told the LTSM that he had taken pain medicine before coming to work and that he knew that he should have called off sick because the medication makes him drowsy. The LTSM also questioned the other TSO assigned to the exit lane. The TSO stated that the appellant appeared to be sleeping and that when the DAFSD walked up and stood in front of him, he woke up looking confused and startled. The TSO provided a statement which said that the appellant appeared to be asleep and when approached, the officer woke up with confusion and a startled look on his face.

The appellant submitted a written statement on June 12, 2017. He stated that he reported to work after taking some pain medication and that the pain medication has a habit of making him drowsy. The appellant stated that he closed his eyes for a second and one of the TSMs saw him. He also stated that in all likelihood, he should not have come to work.

A pre-decisional discussion was held with the appellant on June 12, 2017. The appellant told management that he had taken pain medicine before coming to work and it made him drowsy. He also stated that he should have stayed home and admitted to closing his eyes for a second.

Management provided as evidence: statement from the appellant, dated June 12, 2017; Memorandum from the DAFSD, dated June 12, 2017; Memo from the LTSM, dated June 12, 2017; statement from a TSO, dated June 12, 2017; and Closed Circuit Television (CCTV) footage and timeline.

On appeal, the appellant argued that management failed to prove by substantial evidence that he was sleeping on duty. The appellant argued that his face is angled away from the camera and it is not possible to see whether or for how long his eyes are closed. The appellant conceded that his eyes were closed when the DAFSD began to speak to him but asserted verbally and in his written statement that he was fully conscious while he rested his eyes. The appellant argued that the video supported this assertion since it shows him immediately and alertly responding when the DAFSD speaks to him.

Management responded to the appeal and argued that the appellant did not assert verbally or in his written statement that he was fully conscious while he rested his eyes. Management argued that the

body of evidence is adequate to conclude that the appellant was sleeping and that they have met the substantial evidence standard.

The Board found that the statement of the DAFSD and the TSO are substantial evidence to support the Charge. Although the CCTV does not show the appellant's face, the appellant has admitted that his eyes were in fact closed when the DAFSD called his name. Neither the appellant's written statement or verbal statements made mention of being fully conscious while he rested his eyes. The Board gave no merit to this argument. Therefore, the Charge, *Sleeping on Duty while Assigned to a Screening Activity,* is SUSTAINED.

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

The Deciding Official noted that the Handbook to TSA MD 11100.75-3, *Addressing Unacceptable Performance and Conduct,* Appendix A (1)(f), requires removal for the offense of sleeping on duty while assigned to a security activity. In addition, MD No. 1100.75-3, Section G (Note) states that penalty factors do not apply to mandatory removals.

Under Section M.5 of the Table, the recommended penalty for sleeping on duty while engaged in security duties is removal. Moreover, Appendix A.(1)(f) of the Handbook to TSA MD 1100.75-3, *Addressing Unacceptable Performance and Conduct,* states that sleeping on duty is an offense for which removal is required.

MD 1100.75-3 requires removal for the offense of sleeping on duty. The substantial evidence showed that the appellant was sleeping on duty. The Deciding Official correctly determined that the appellant's removal was required under the MD.

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

FOR THE BOARD:

DEBRA S ENGEL

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-090

August 17, 2017

Issue: *Failure to Maintain a Regular Work Schedule*

OPINION AND DECISION

On June 13, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Failure 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, *Failure 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, *Failure to Maintain a Regular Work Schedule,* on one specification which alleged that a review of the appellant's leave record shows that between May 29, 2016 through May 15, 2017, the appellant used a total of 118 hours of Annual Leave (AL), 78 hours of Sick Leave (SL), and 222 hours of Leave without Pay (LWOP). Additionally, the appellant has been charged 144 hours of Absence without Leave (AWOL). The appellant has also called out on unscheduled leave 52 times since May 29, 2016. The appellant has used leave in 25 of the last 27 pay periods and has been cumulatively away from work approximately 14 weeks or 27% of the time.

On February 10, 2016, the appellant was placed on a Sick Leave Restriction, which was subsequently reviewed on July 6, 2016, and December 6, 2016. In the Sick Leave Restriction letter and follow-up discussions, the appellant was put on notice that her unscheduled leave usage was excessive. Although management has put forth efforts to address her excessive leave usage, she has continued to call out of work.

Management supported the Charge with: Interest Based Discussions, dated April 3, 2014, October 28, 2015, and February 2, 2016; Follow-up Discussions, dated July 6, 2016, and December 12, 2016; Sick Leave Restriction Letter, dated February 10, 2016; Kronos Report; WebTA Leave Audit; and AIM Call-Out Log;

The appellant received a Notice of Proposed Removal on May 18, 2017. The appellant provided an oral response on June 9, 2017. The appellant explained that her high frequency of absences was due to the care of her mother who passed away in January 2017. Management responded to the appellant that there had been 14 instances of unscheduled leave after January 2017. The appellant responded that she had two uncles pass away and had doctor's appointments for her own medical condition, as well as being sick in May.

On appeal, the appellant argued that management failed to establish that removal is a reasonable penalty and that her removal does not promote the efficiency of the service. The appellant argued that for about two years she has dealt with familial obligations relating to the death of her mother. She indicated that her situation has stabilized and she is now able to perform her full duties as a TSO. The appellant argued that management failed to follow progressive discipline and that management did not take progressively more severe action until the unacceptable performance or conduct was corrected. The appellant acknowledged receiving a Reprimand in Lieu of a 1-day suspension on August 15, 2016, for failure to follow the instructions of the Sick Leave Restriction and on May 2, 2016, a Letter of Reprimand (LOR) for failure to follow the Sick Leave Restriction instructions. She argued that she was never disciplined in 2017; received no interest based discussions following her mother's death; and was never suspended. She argued that she has been with TSA for over ten years and arbitrarily removing a long-time employee without prior suspension is unreasonable. The appellant also argued that management did not consider the penalty factors. The appellant argued that if management had correctly factored the mitigating factors, they would have chosen a suspension to properly put her on notice of the severity of her offense. She argued that she was not on clear notice regarding the seriousness of her absences and the requirements of her leave restriction. The appellant also argued that no legitimate government interest would be furthered by removing her from Federal service.

Management responded by arguing that the appellant's non-disciplinary removal was for failing to maintain a regular work schedule and not for being charged AWOL or failing to adhere to the directions in the Sick Leave Restriction letter. Management argued that the appellant was warned multiple times that her absences were excessive and could potentially result in administrative action. In addition, management argued that the letter of Sick Leave Restriction and the reviews on July 6, 2016, and December 16, 2016, were clear notices that her absences were unacceptable. Management also pointed to the documented Interest Based Discussions held on April 14, 2014, October 28, 2015, and February 2, 2016, as further evidence that she was put on notice that her failure to report to work on a regular and recurring basis may result in being proposed for removal from Federal service. Management argued that they did not consider

the penalty factors because this was a non-disciplinary removal. Management also argued that the appellant's removal does promote the efficiency of the Federal service as the record is clear that her absences were beyond a reasonable amount of the time; she had been placed on proper notice that her absences were impacting operations; and that her position needed to be filled by an employee available for duty on a regular full-time basis.

Management has deemed the Charge, *Failure to Maintain a Regular Work Schedule*, to be non-disciplinary. The Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section G., Penalty Determinations, states that the penalty factors do not apply to non-disciplinary removals. Therefore, once deemed non-disciplinary, management was not required to discuss penalty factors. Even if the penalty factors had been considered by the Board, the appellant's continual absence from work would have weighed heavily as aggravating. Management must be able to have employees that show up to do the work. The appellant had been warned on several occasions that her attendance was unacceptable.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence. The Board finds that there is a clear nexus between a legitimate government interest and appellant's unavailability for duty. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Failure 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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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

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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—17-089

August 11, 2017

Issue: *Indefinite Suspension*

OPINION AND DECISION

On April 21, 2017, 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. The Charge alleged that the appellant made an appearance before a judge for a crime for which a sentence of imprisonment may be imposed. On June 6, 2017, management notified the appellant that his indefinite suspension was continued based on an investigation by the TSA Office of Investigation (OOI) for serious allegations of criminal conduct, inappropriate off-duty conduct and falsification. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons stated below, the appeal is GRANTED, in part.

ANALYSIS AND FINDINGS

Section I of the Handbook to TSA Management Directive 1100.75-3, *Addressing Unacceptable Performance and Conduct*, provides that an indefinite suspension is appropriate "when evidence (i.e., more than a mere suspicion or allegation) exists to demonstrate misconduct." There are several conditions under which an indefinite suspension may be imposed. The condition relevant to the Indefinite Suspension, dated April 21, 2017, is set forth in Section I. (1) (a):

> (a) 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. The specification alleged that on April 19, 2017, at 1635, the appellant was arrested for the charges of felony aggravated stalking of a minor and misdemeanor voyeurism. On April 20, 2017, the appellant made a first appearance/bond hearing before a judge. The judge scheduled the appellant's

arraignment hearing for May 19, 2017, and a $15,000 bond was set, for which the appellant posted and was released.

The condition relevant to the Indefinite Suspension, dated June 6, 2017, is set forth in Section I. (1) (c). Management incorrectly identified the appropriate section as I. (1) (b). Section I. (1) (c) states:

> (c) An investigation being conducted on serious allegations against an employee that represents a threat, which is so serious that if it proves to be true, the employee's continued presence at the worksite would represent a threat to life, property, safety or the effective operation of the workplace. This could include investigation into or allegations of theft, fraud or falsification, for example, where there is substantial evidence for which removal would be the likely outcome.

Management failed to state the specification and simply listed the Charge.

The issue before the Board is whether the appellant's placement on indefinite suspension on April, 21, 2017, and June 6, 2017, was appropriate under TSA policy.

The Board considered the evidence and arguments presented by both parties.

In the appellant's appeal, he argued that he did not engage in criminal conduct, inappropriate off-duty conduct or falsification. The appellant also argued that penalty of indefinite suspension is too harsh. The appellant provided documentation that the charges were dropped. The appellant stated that there is nothing in his history that would indicate that he is a threat.

In management's reply to the appeal, they contend that the first indefinite suspension was issued based on the appellant making an appearance before a judge for crime for which a sentence of imprisonment may have been imposed. Subsequently, management became aware that the appellant's criminal charges were "no actioned" on or about May 25, 2017. Management indicated that they were also notified that the appellant was under investigation by the TSA Office of Investigation (OOI) for off-duty misconduct related to off-duty stalking and falsification and on June 6, 2017, issued the appellant a notice of Indefinite Suspension extension based on the pending investigation by OOI. Management argued that the June 6, 2017, action was not based on the criminal charges but rather on OOI's pending investigation of the appellant. Management asserted that they met the requirements set out in MD 1100.75-3 for issuance of an Indefinite Suspension. Additionally, management argued that the appeal was untimely.

The Handbook to Management Directive 1100.77-1, *OPR Appellate Board,* Section C. (2) states that the basis for continuing an indefinite suspension may be appealed to the Board at any time during the action. Additionally, the appellant filed his appeal within 30 days of issuance of the Indefinite Suspension, dated June 6, 2017. Therefore, the appellants' appeal is not untimely.

As to the Indefinite Suspension, dated April 21, 2017, management supported the Indefinite Suspension with preponderant evidence. Management provided evidence in the record of the appellant's arrest and bond hearing based on 24 counts of Stalking/Aggravated/Minor, a felony. Therefore, the Indefinite Suspension, dated April 21, 2017, was consistent with TSA policy. As to the Indefinite Suspension, dated June 6, 2017, management failed to support the charge with

preponderant evidence. There was no evidence in the record indicating that the appellant is under investigation by OOI. The Deciding Official stated OOI is continuing its investigation into the appellant's off-duty misconduct. The Board notes that the attachments to the Indefinite Suspension indicate that there is an e-mail from OOI indicating that the investigation is continuing. This email was not part of the record. Additionally, management has the burden to show that the appellant's presence at the worksite would represent a threat to life, property, safety, or the effective operation of the workplace. Although an ongoing investigation is a key element in the conditions required under subsection (c), listed above, it is not the only key element. Management has failed to provide evidence that the appellant was under investigation by OOI and failed to show that his continued presence at the worksite would present a threat to life, property, safety or the effective operation of the workplace. Therefore, the Board determined that management's decision to place the appellant on indefinite suspension on June 6, 2017, was not consistent with TSA policy.

The appellant's Indefinite Suspension, dated April 21, 2017, is SUSTAINED. The appellant's Indefinite Suspension, dated June 6, 2017, is NOT SUSTAINED. Accordingly, the appeal is GRANTED, in part, and the appellant shall receive back pay from the date of his June 6, 2017, Indefinite Suspension, to the date of his resignation from TSA on July 24, 2017.

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-088

August 16, 2017

Issue: *Failure to Maintain a Regular Work Schedule*

OPINION AND DECISION

On June 6, 2017, management removed the appellant from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on the non-disciplinary Charge: *Failure 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, *Failure 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, *Failure to Maintain a Regular Work Schedule,* on one specification which alleged that a review of the appellant's leave record shows that between January 10, 2016 through April 26, 2017, the appellant used a total of 44.5 hours of Annual leave (AL), 31 hours of Sick leave (SL), and 255.75 hours of Leave Without Pay (LWOP). Additionally, the appellant was charged 32 hours of Absence without Leave (AWOL). This does not include the 240 hours that the appellant was approved through the Family Medical Leave Act (FMLA). The appellant also called out on unscheduled leave 37 times since January 10, 2016. The appellant used leave in 30 of the last 34 pay periods and has been cumulatively away from work approximately 18 weeks or 26 % of the time.

The appellant received a Leave Usage and Request for Medical Documentation letter on August 28, 2015, after a review of her leave record showed that between August 10, 2014 through August 22, 2015, she had used a total of 59.75 hours of AL, 32 hours of SL, and 633.23 hours of LWOP. The appellant was also charged 76.75 hours of AWOL. The appellant had been cumulatively away from work approximately 20 weeks or 38% of time. On January 9, 2016, the appellant had a meeting with the Human Resources Specialist to again discuss her excessive absences. During the meeting, she requested and was approved to convert from a full-time to part-time position effective January 10, 2016. Additionally, on April 20, 2017, the appellant had a phone discussion with the Human Resources Specialist to again address her excessive absenteeism. Another meeting was held with the appellant on April 24, 2017, to discuss her excessive absenteeism.

Management supported the Charge with: Kronos Report; WebTA Leave Audit; AIM Call-Out Log; Leave Usage and Request for Medical Documentation with response from physician, dated August 26, 2015; email from Human Resources Specialist, dated January 8, 2016, and memos from Human Resources Specialist regarding phone discussion on April 20, 2017, and meeting on April 24, 2017.

The appellant received a Notice of Proposed Removal on April 28, 2017. The appellant provided an oral response on May 10, 2017. As part of the meeting, the appellant provided documentation from her treating physician stating that she was scheduled for surgery on May 25, 2017, and would be out of work for six (6) weeks

On appeal, the appellant argued that management failed to prove the charge by a preponderance of the evidence; the removal does not promote the efficiency of the service; and the Agency improperly classified the removal as "non-disciplinary" and failed to properly consider mitigating factors. The appellant argued that the charge was not proven because management approved her personal leave and LWOP, and thus, approved her work schedule. She also argued that when management approves LWOP; it has determined that the serious needs of the employee are sufficient to offset the costs and administrative inconveniences that result from the employee's absence. The appellant stated that her most recent medical procedure should allow her to return to work at full capacity. Additionally, the appellant argued that her removal was incorrectly classified as "non-disciplinary," as the Table considers this charge to be a disciplinary action. The appellant argued that management did not consider the mitigating factors and failed to follow progressive discipline.

Management responded by arguing that the charge was proven by preponderance after sufficient notice was given to the appellant and multiple attempts were made to address her attendance issues. Management argued that the charge was "non-disciplinary" and that there is no indication in the Table that states that word "inability" must be in the charge. Management argued that both the proposing and deciding letters indicate that this is a non-disciplinary charge. Additionally, management argued that if an employee follows all leave requesting procedures then management cannot disapprove the leave request and the approval of her absences are immaterial to their occurring. Management stated that the appellant does not argue that she was on notice about her attendance and that management had warned her multiple times that her absences were excessive and could potentially result in administrative action.

The appellant responded to management's response and argued that management's mere repetition of "non-disciplinary" does not supersede the Agency's Table of Penalties. The appellant argued that "failure" and inability" to maintain a regular work schedule are clearly intended to be distinct charges, with the only difference provided by the bracketed note describing the inability to maintain a regular work schedule to be a non-disciplinary removal. The appellant argued again that mitigating circumstances were erroneously ignored. In addition, the appellant argued that contrary to management's assertions, the appellant was never warned that missing 25% or more of her work meant that she was failing to maintain a regular work schedule.

In regards to the appellant's argument that the Charge is disciplinary, not non-disciplinary, the Board finds that management has chosen to liberally interpret the Table and thus, deem the charge non-disciplinary. The Table is intended to give guidance. In light of the language in the Table, there is no prohibition against doing so. The Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, Section G., Penalty Determinations, states that the penalty factors do not apply to non-disciplinary removals. Therefore, once deemed non-disciplinary, management was not required to discuss penalty factors. Even if the penalty factors had been considered by the Board, the appellant's continual absence from work would have weighed heavily as aggravating. Management must be able to have employees that show up to do the work. The appellant had been warned on several occasions that her attendance was unacceptable. Management even allowed the appellant to go to a part-time schedule to try to improve her attendance. In addition, the fact that that management approved the appellant's leave does not prohibit management from taking an action against the appellant. The appellant's absences appear to be for reasons beyond her control, so management was correct in stating that they followed the rules set out for approving and disapproving leave. The amount of time taken by the appellant exceeded a reasonable amount of time.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence. The Board finds that there is a clear nexus between a legitimate government interest and appellant's unavailability for duty. Thus, the Board SUSTAINS management's decision to remove the appellant based on the non-disciplinary Charge*: Failure 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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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)
Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-087

August 14, 2017

Issue: *Misconduct of a Sexual Nature*

OPINION AND DECISION

On June 5, 2017, management removed the appellant from his position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on one Charge: *Misconduct of a Sexual Nature*. 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, *Misconduct of a Sexual Nature*, on one specification alleging that on May 18, 2017, at approximately 1410 hours, while assigned to the Advanced Imaging Technology (AIT) position, the appellant deliberately reached out and touched another TSO, who was operating the AIT controls, on her waistline/buttocks area. The appellant's conduct towards the TSO was unwelcomed and she immediately informed the appellant not to touch her and to keep his hands to himself. When questioned on why he touched the TSO in an inappropriate manner, the appellant stated, "I don't know why I did that. I'm sorry." The TSO reported the incident to management and further indicated that she felt violated by the appellant's unwelcome touching

of her buttocks. The appellant admitted that the TSO was "quite offended" by his actions and warned him to "never touch her."

Management alleged that the appellant's conduct violated TSA Management Directive 1100.73-5, *Employee Responsibilities and Code of Conduct*. Section 5. D. (3); 5. D. (7); and 6. A. 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. Section 5. D. (3) states employees are responsible for exercising courtesy and tact (whether on or off-duty) in dealing with fellow workers, supervisors, contract personnel, and the traveling public, even in the face of provocation. Supporting and assisting in creating a productive and hospitable model work environment. 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. A. states that TSA employees must comply with all standards, responsibilities, and code of conduct established by the directive and shall report any violation(s) of the directive to appropriate management officials.

Management also alleged that the appellant's conduct violated the Handbook to MD 1100.73-5, Section K, Sexual Harassment and Misconduct of a Sexual Nature. Section K.3 states that all employees have a responsibility to behave in a proper manner and to take appropriate action to eliminate sexual harassment or other misconduct of a sexual nature in the workplace.

Additionally, management alleged that the appellant's conduct violated TSA MD 1100.73-3, *Prevention and Elimination of Sexual Harassment in the Workplace*, Section H, where TSA employees are responsible for: (1) maintaining a work environment free from sexual harassment, where employees maintain the public trust and are held to high standards of honesty, integrity, impartiality, and conduct; and (2) ensuring that his or her conduct is not sexually offensive to other employees, contractors, job applicants, or the public. The accompanying Handbook, specifically under Section C. 2. (d), provides the following examples of misconduct of a sexual nature: unwelcome and deliberate touching such as patting, stroking, rubbing, biting, pinching, grabbing, bumping, back/neck rubs, and unsolicited clothing adjustments.

On May 18, 2017, the appellant and another TSO were assigned to an AIT lane. In a statement dated May 18, 2017, the TSO stated, "May 18th 2017 between 1410 – 1412 I felt movement on my butt. I turned around to find [the appellant's] hand tangled in the cord of my radio that was resting on my butt. I asked him why his hand was there & he said he didn't have an answer & said he was sorry." The TSO submitted a second statement, dated May 21, 2017. In that statement, she reiterated what she stated in her initial written statement, stating that on May 18, 2017, she turned around to find [the appellant's] hand tangled up in the radio cord that was resting on her "behind." The TSO also stated that she asked the appellant what he was doing and that he had no response. The TSO stated that she told the appellant that there was no reason for his hands to be below her waist and that the appellant replied that he was sorry. The TSO stated that she said something along the lines of "do not touch me you need to keep your hands to yourself." The appellant stated, "I think I processed one or two or more passengers before I called [an LTSO] over. She stated that the Lead Transportation Security Officer (LTSO) asked her what was going on and that she told the LTSO "the whole situation." The TSO stated that she felt very concerned and disturbed by the appellant's actions because he could not articulate why he did what he did. The TSO stated that the fact that she does not know what the appellant

was thinking disturbed her. She stated, "I was violated & I have been feeling sick since the incident."

The LTSO the appellant notified after the incident submitted a statement dated May 19, 2017. In her statement, the LTSO stated that on May 18, 2017, she was working at the checkpoint at around 1410 when the TSO called her over to the AIT. The LTSO stated that the TSO asked her if she saw what the appellant had done. The LTSO stated that she replied, "no" and that the TSO then informed her that the appellant "had touched her in an inappropriate way." The LTSO stated that she asked the TSO what happened and that the TSO told her that the appellant had touched her on her butt and that she was upset and uncomfortable with being at the AIT with the appellant. The LTSO stated that she asked the appellant if he touched the TSO on her butt and that the appellant admitted that he touched her on her butt and did not know why he had done so and that it was stupid of him. The LTSO stated that the appellant then apologized to the TSO. The LTSO stated that she and the TSO switched places and that she went to inform the supervisor on duty of the incident. The LTSO stated that the appellant stated again, "I don't know why I did that."

Another officer present at the checkpoint at the time of the incident submitted a statement on March 10, 2017. In his statement, the officer stated that he was working as the Dynamic Officer (DO) and the appellant and the TSO were working on the AIT. The officer stated that he heard the TSO "say very sternly and firm 'don't touch me, don't ever touch my lower back.'" The officer also stated that the TSO "seemed very irritated."

The appellant submitted a statement on May 18, 2017. In his statement he stated that at about 2:10 pm, he was working the AIT with the TSO. He stated, "I for some reason lost my balance and reached out to steady myself and touched [the TSO's] waistline. She was quite offended and warned me to never touch her without allowing me to explain. I promptly apologized."

The appellant was issued a Notice of Proposed Removal (NOPR) on May 25, 2017. The NOPR advised the appellant of his right to reply orally and/or in writing within seven days of receipt of the NOPR. The appellant requested an extension to respond which was granted. The appellant provided a written response on May 28, 2017.

Management included as evidence: statement from the appellant, dated May 18, 2017; statements from the TSO, dated May 18 and May 21, 2017; statement from an LTSO, dated May 19, 2017; statement from a TSO, dated May 18, 2017; and CCTV video from May 18, 2017.

On appeal, the appellant argued that the Charge of *Misconduct of a Sexual Nature* cannot be sustained based on the evidence submitted. He argued that management's allegation that he deliberately reached out and touched the TSO on her waistline/buttocks area is a "completely erroneous description of the incident." The appellant argued that he did not deliberately touch the TSO; he stated that he suddenly lost his balance and that as he reached out to steady himself, his hand became tangled in the cord of the TSO's radio. The appellant argued that he did not purposefully lose his balance; he stated that it was an unexpected occurrence that required him to lurch to steady himself and that it was purely accidental. The appellant also argued that he did not touch the TSO on her waistline/buttocks area; he stated that his hand grazed her waist while it was tangled in the cord, but that his hand never came into contact with her buttocks. The appellant argued that management did not present any evidence to support the allegation that he

deliberately touched the TSO or that he touched her buttocks. The appellant argued that it is particularly significant that another TSO who was standing nearby, indicated in his statement that he heard the TSO state "Don't ever touch my lower back" and argued that it is further evidence that he did not touch the TSO on her buttocks.

The appellant also argued that it is important to note that there were at least four other TSOs in the immediate area at the time of the alleged incident and that it would make no logical sense for him to choose that moment, with four coworkers right there, to make inappropriate and deliberate contact with the TSO. The appellant also argued that if he was bothering the TSO or being inappropriate with her, then it is likely that at least one of her coworkers would have seen the encounter and come forward with a statement. The appellant argued that management did not put forth a single corroborating witness who observed him deliberately touch the TSO and that with no corroborating witnesses, management relied solely on the CCTV footage to support the Charge.

The appellant argued that reliance on the CCTV footage is insufficient because it does not prove that he deliberately reached out and touched the TSO. He argued that that the only thing that can be determined with certainty is that he made a sudden movement forward. He argued that the forward movement is consistent with the fact that he lost his balance and attempted to steady himself. The appellant also argued that it is misleading and inaccurate that management consistently used the term "waistline/buttocks" to describe the location of the contact as there is a distinct separation between the waistline and the buttocks. He argued that management blurred the distinction in order to insinuate that the charge was sexual in nature.

Management replied and argued that the appellant and management have two very different versions of the facts. Management argued that the appellant made deliberate steps to reach out and to touch the TSO on her buttocks/waistline area and that they relied on the CCTV and witness statements to make that conclusion. Management argued that its version of the facts is consistent with the documentary and video evidence. Management stated that its version is reasonable and that the facts support the Charge by a preponderance of the evidence.

Management also argued that while the appellant contends that there is a "distinct separation between the waistline and the buttocks," assuming for the sake of argument, that there is a distinction, unwelcomed and deliberate touching of either the waist or the buttocks is sexual misconduct, as cited in Section C. 2. (d), Examples of Misconduct of a Sexual Nature, MD 1100.73-3, Prevention and Elimination of Sexual Harassment in the Workplace, Handbook.

With respect to the Charge, the Board determined that the CCTV video supports the statements of the affected TSO and the LTSO. The CCTV video footage shows that the appellant reached out and touched the appellant; it does not show that the appellant lost his balance as he alleges. The statements of the TSO and LTSO are consistent and the statement of the appellant does not discredit the statements of the TSO and LTSO. The Board agrees with management that whether the appellant touched the TSO on the buttocks or the waistline is irrelevant because the fact that the appellant's physical contact with the TSO was deliberate and unwelcome is in violation of TSA MD 1100.73-3. The appellant's actions clearly fit the definition under Section C. 2. (d) of the Handbook to the MD which states that misconduct of a sexual nature may be verbal or non-verbal in nature and that that non-verbal conduct includes unwelcome and deliberate touching. Therefore, the Charge, *Misconduct of a Sexual Nature*, 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 removal is reasonable because management failed to adequately consider the mitigating factors and surrounding circumstances that compel a mitigated penalty and failed to abide by its own policy of progressive discipline.

The appellant argued that management did not adequately consider the nature of the alleged offense, but rather inaccurately portrayed the occurrence as a deliberate action. He argued that his unintentional act was not committed maliciously. The appellant argued that this was a single, nonrecurring incident and that for the aforementioned reasons, this should serve as a mitigating factor. The appellant also argued that the fact that he is not a supervisor or a law enforcement officer and the fact that he has been an exemplary TSA employee for over 14 years and received an exceeded expectations rating on his last performance appraisal should be mitigating factors. The appellant also noted his work on the Safety Action Team and various awards and commendations he has received. The appellant argued that the current allegations are not related to his assigned duties and that he is still fully capable of carrying out his TSO duties with integrity and competence. The appellant also argued that no one witnessed the alleged misconduct and that the incident was never made public and thus, it had no impact on the reputation of the agency. He argued that he did not do anything to jeopardize the image of TSA or the safety of the traveling public.

The appellant argued that the Deciding Official treated a few "minor infractions" in his disciplinary history as an aggravating factor. He argued that the few occurrences that are reflected in his record are not even remotely related to the charge that is the basis for his removal. The appellant acknowledged that management is permitted to consider previous discipline when performing a *Douglas* factors analysis, he argued that his discipline is both minor and for conduct unrelated to the current charge and should therefore, be given minimal weight.

The appellant also argued that management incorrectly disregarded his potential for rehabilitation. He argued that he has acknowledged the severity of the allegations and expressed sincere remorse several times. The appellant argued that if management gave him the opportunity to explain the incident from his point of view, they would have realized that he was trying to regain his balance when his hand grazed the TSO's waist. He argued that he is an excellent candidate for rehabilitation because he sincerely believes in maintaining professionalism in the workplace and would never subject anyone to mistreatment. The appellant argued that the incident resulted from an unfortunate misunderstanding and it not evidence of a pattern of inappropriate conduct.

The appellant also argued that his removal does not promote the efficiency of the service. He argued that he has dedicated over 14 years of service to TSA and has proven his competency through his consistent satisfactory work performance throughout his tenure.

Management replied and disagreed with the appellant's argument that his disciplinary history was improperly treated as an aggravating factor. Management argued that in July 2016, the appellant was issued a 6-day suspension for his unprofessional conduct in two separate situations. Management stated that in one situation, the appellant yelled at a female TSO in front of a passenger and in the other situation the appellant yelled at a female passenger who was traveling with two small children. Management stated that the appellant also received a 3-day suspension in October 2014 for making inappropriate comments to a female passenger. Management argued that the appellant's actions in these situations exemplify his inability to control his impulsive behavior and treat fellow workers and members of the traveling public with courtesy and respect. Management found the prior actions as well as the 5-day suspension the appellant received for a Standard Operation Procedures violation aggravating. Management also noted that although not considered for progressive discipline, the appellant was reprimanded in April 2012 for inappropriate behavior towards coworkers. Management argued that the appellant has demonstrated repeatedly an inability to maintain professionalism with both the traveling public and fellow coworkers.

Management also argued that the Deciding Official did give consideration to the appellant's 14 years of service, his 2016 performance appraisal, his expression of remorse, his role on the Safety Action Team, and the observation by a TSM for having "great customer service and smile" on April 10, 2017. Management noted that for performance years 2013 and 2014, the appellant received an Achieved Expectations rating and in 2015 and 2016 he received a rating of Exceeded Expectations. Management argued that it failed to find that the appellant has been an exemplary TSA employee given his discipline, both for unprofessional conduct and SOP violations, and average to above average performance ratings. Management also noted that at the time of the misconduct, the appellant was on a Performance Improvement Plan (PIP) for his interpersonal skills. Management argued that the PIP along with his prior discipline undermines his contention that he has a great relationship with his coworkers and demonstrates excellent customer service skills.

With regard to the appellant's potential for rehabilitation, management argued that the appellant's history of misbehavior, despite discipline and corrective actions over the years, along with his unprofessional conduct and inability to get along with others as noted in his PIP, clearly indicates that he is not capable of being rehabilitated.

The appellant responded to management's response and argued that management improperly brought up specific allegations of unsuitable conduct that allegedly led to him being placed on a PIP. The appellant argued that the allegations of specific conduct were never mentioned in the Decision letter; he noted that the Decision letter stated that his performance has been satisfactory with the exception of being placed on a PIP on March 9, 2017, due to his interpersonal skills. The appellant argued that if the specific accusations were initially brought up in the Decision letter, he would have had an opportunity to dispute those allegations in his appeal. The appellant argued that management cannot bring up detailed accounts of serious accusations against him for the first time in the Response. The appellant argued that management's introduction of new allegations in its Response is improper and should be disregarded for the purposes of the Appeal.

The Deciding Official considered the nature and seriousness of the appellant's misconduct as related to his duties and responsibilities as a TSO. He considered that as a TSO, the appellant is

held to a high standard of conduct and that the appellant's conduct at work directly impacts the proper and effective accomplishment of his official duties and responsibilities. The Deciding Official considered that TSA employees are expected to behave in a professional manner at all times and to treat fellow coworkers with respect. The Deciding Official considered that all employees must be able to work in an environment that is free from sexual misconduct and/or unprofessional behavior. He considered that the appellant's action took place at an active TSA checkpoint where passengers were being screened and found it particularly troubling that the appellant thought it was acceptable to reach out and touch a coworker on her buttocks for no other reason than his personal interest. The Deciding Official considered that the appellant has a responsibility to not act in a manner that is sexually offensive to his coworkers and found that not only does the appellant's misconduct of a sexual nature demonstrate disrespect for his coworkers, but also a lack of professionalism in the workplace, especially in front of the traveling public. The Deciding Official considered that the appellant failed to uphold the public trust by his actions. He considered that he must be able to depend on the appellant to follow established procedures and avoid disrupting the workplace through unprofessional behavior. The Deciding Official stated that the appellant's misconduct undermines the trust management has in his ability to perform his duties in a professional manner and to adhere to TSA's policies and procedures.

The Deciding Official considered that the appellant acknowledged the policies and procedures contained in TSA MD 1100.73-5 and that he most recently completed the Online Learning Center (OLC) on MD 1100.73-5 on March 6, 2017. The Deciding Official also considered that the appellant completed the OLC course on the MD on Prevention and Elimination of Sexual Harassment on August 6, 2012. The Deciding Official found that the appellant was adequately notified of the relevant TSA MDs and the importance placed on TSA employees' conduct and appropriate behavior.

The Deciding Official also considered, as an aggravating factor, the appellant's disciplinary history and noted that he has a history of unprofessional conduct. He noted that on July 22, 2015, the appellant was issued a 6-day suspension for unprofessional conduct; on October 8, 2014, he was issued a 3-day suspension for inappropriate comments; and on September 5, 2014, the appellant was issued a 5-day suspension for failure to follow standard operating procedures (SOP). The Deciding Official also noted that while not disciplinary and not used for progressive discipline purposes, the appellant received a Letter of Counseling for failure to follow SOP on November 4, 2016, and a Letter of Reprimand for unprofessional conduct in 2013. The Deciding Official considered that those actions placed the appellant on clear notice of his responsibilities and how to conduct himself in the workplace. The Deciding Official considered that the appellant was advised that further misconduct may lead to a strong penalty, up to and including removal.

The Deciding Official considered the appellant's ability to get along with fellow workers and noted that due to concerns with the appellant's interpersonal skills with both the traveling public and his coworkers, the appellant was placed on a Performance Improvement Plan on March 9, 2017, and that while on the plan, he continued to have issues in getting along with his coworkers.

As mitigating factors, the Deciding Official considered that the appellant has been employed with TSA for over 14 years and that his performance has been satisfactory with the exception of being placed on a PIP on March 9, 2017, due to his interpersonal skills. The Deciding Official

also considered factors the appellant brought up during his response to the Notice of Proposed Removal including the appellant's expression of remorse, his role on the Safety Action Team, and his 2016 performance appraisal. The Deciding Official found however, that the aforementioned mitigating factors are not sufficient to outweigh the severity of the appellant's offense and the aggravating factors.

Under Section B. 3, pertaining to inappropriate and/or unwelcome verbal or physical conduct of a sexual nature, the recommended penalty range is 3-day to 14-day suspension and the aggravated penalty range is a 15-day suspension to removal.

The Board found that management sufficiently considered and weighed the penalty factors, including the mitigating factors. The Board agreed that management's introduction of new allegations in its Response was improper and the Board did not consider the new allegations in determining whether the removal was reasonable. The appellant was aware of the conduct expected of him in the workplace. There was no plausible reason for the appellant to touch the TSO the way he did; his conduct was inappropriate. The Board also determined that management followed progressive discipline. The appellant has prior discipline therefore; management has the right go with a penalty in the aggravated penalty range. The Board finds that management's decision to remove the appellant from his position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-086

August 15, 2017

Issue: Improper Display and Use of Personal Electronic Device; Inattention to Duty; Lack of Candor; Failure to Follow Procedures; Failure to Follow Directions; Tardiness

OPINION AND DECISION

On March 24, 2017, management removed the appellant from his position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on six Charges: 1) *Improper Display and Use of Personal Electronic Device*; 2) *Inattention to Duty*; 3) *Lack of Candor*; 4) *Failure to Follow Procedures*; 5) *Failure to Follow Directions;* and 6) *Tardiness*. The appellant filed a timely appeal with the Office of Professional Responsibility Appellate Board (Board). For the reasons noted below, the appeal is GRANTED, in part, and the appellant's removal is mitigated to a fifteen (15) day suspension.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Improper Display and Use of Personal Electronic Device*, on one specification alleging that on April 4, 2017, at approximately 2017 hours, the appellant was operating the x-ray and displayed and used his personal electronic device, a cell phone.

Management based Charge 2, *Inattention to Duty*, on one specifications alleging that on April 4, 2017, at approximately 2017 hours, while operating the x-ray, the appellant displayed and used

his personal electronic device, a cell phone, while the x-ray belt was running. As a result, several bags/bins were able to exit the x-ray chamber without being screened.

Management based Charge 3, *Lack of Candor*, on two specifications. Specification 1 alleged that on April 4, 2017, at approximately 2030 hours, a Lead Transportation Security Manager (LTSM) met with the appellant to discuss the issue of the appellant looking at his cell phone while operating the x-ray belt. The appellant told the LTSM that it was his brush he removed from his pocket, not his cell phone. Specification 2 alleged that on April 4, 2017, at approximately 2030 hours, the LTSM showed the appellant the Closed Circuit Television (CCTV) video of the incident and the appellant replied again that it was not his cell phone, it was his brush.

Management based Charge 4, *Failure to Follow Procedures*, on six specifications. Specification 1 alleged that on December 20, 2016, the appellant clocked in with his KRONOS card at Terminal 1, which was not his assigned duty station. Specification 2 alleged that on December 28, 2016, the appellant clocked in with his KRONOS card at Terminal 1, which was not assigned duty station. Specification 3 alleged that on January 15, 2017, the appellant clocked in with his KRONOS card at Terminal 3, which was not his assigned duty station. Specification 4 alleged that on January 24, 2017, the appellant clocked in with his KRONOS card at Terminal 2, which was not his assigned duty station. Specification 5 alleged that on February 13, 2017, the appellant clocked in with his KRONOS card at Terminal 2, which was not his assigned duty station. Specification 6 alleged that on February 21, 2017, the appellant clocked in with his KRONOS card at Terminal 3, which was not his assigned duty station.

Management based Charge 5, *Failure to Follow Directions*, on two specifications. Specification 1 alleged that on February 13, 2017, a Transportation Security Manager (TSM) observed the appellant clocking in at Terminal 2 and informed the appellant that he was required to clock in at his home terminal. Specification 2 alleged that on February 15, 2017, a Supervisory Transportation Security Officer (STSO) had an interest based conversation (IBC) with the appellant advising him not to clock in at locations that were not his assigned location to work.

Management based Charge 6, *Tardiness*, on four specifications. Specification 1 alleged that on January 18, 2017, the appellant reported for duty at 1303 hours, three minutes after the start of his assigned scheduled shift. Specification 2 alleged that on January 25, 2017, the appellant reported for duty at 1304 hours, four minutes after the start of his assigned scheduled shift. Specification 3 alleged that on February 1, 2017, the appellant reported for duty at 1305 hours, five minutes after the start of the appellant's assigned scheduled shift. Specification 4 alleged that on March 22, 2017, the appellant reported for duty at 1304 hours, four minutes after the start of his assigned scheduled shift.

With regard to Charge 1, management found that the appellant's conduct violated TSA Management Directive (MD) 1100.73-5, *Employee Responsibilities and Code of Conduct*, Section 5. D (2), (4) and (7). Section 5. D. (2) states that TSA employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials. Section 5. D. (4) states that TSA employees will comply with all policies relating to uniformed employees' appearance and responsibilities. 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. Management also found

that the appellant's conduct violated the Handbook to MD 1100.73-2, *TSO Dress and Appearance Responsibilities*, Section E, Accessories and Grooming, (9), Personal Electronic Equipment, which states that display and use of personal electronic devices (to include cell phones) is prohibited in identified TSA screening areas. Personal electronic devices may only be used during an employee's rest of meal break in a designated area that is not co-located with the TSA screening area.

With regard to Charge 2, management found that the appellant's conduct violated MD 1100.73-5, Sections 5. D. (2) and (7) along with Section 6. B. 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.

With regard to Charge 3, management found that the appellant's conduct violated the Handbook to MD 1100.73-5, Sections F and I. Management did not specify which subsections of Sections F and I the appellant allegedly violated.

With regard to Charge 4, management found that the appellant's conduct violated MD 1100.73-5, Section 5. D. (7), which states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance.

With regard to Charge 5, management found that the appellant's conduct violated MD 1100.73-5, Section 5. D. (2), which states that TSA employees are responsible for responding promptly to and fully complying with directions and instructions received from their supervisor or other management officials.

With regard to Charge 6, management found that the appellant's conduct violated MD 1100.73-5, Sections 5. D. (1) and (7) and Section BB (2) of the accompanying Handbook. Section 5. D. (1) states that employees are responsible for reporting to work on time and ready, willing and able to perform the duties of their position. Section BB (2) states that tardiness includes delay in reporting to work at the employee's scheduled starting time, returning late from lunch or scheduled break periods, or returning late to the employee's work site after leaving the workstation on official business or leave.

On April 4, 2017, while operating an x-ray machine, the appellant removed his cell phone from his pocket, placed it between his legs and looked at the device. Later that day, an LTSM met with the appellant to discuss the incident. Management alleged that the appellant told the LTSM that he removed his brush from his pocket, not his cell phone.

Management also alleged that the appellant failed to follow procedures on six separate occasions between December 20, 2016 and February 21, 2017, when the appellant clocked in with his KRONOS card at a terminal that was not his assigned duty station. Management noted that on February 13, 2017, a TSM observed the appellant clocking in and informed the appellant that he was required to clock in at his home terminal. Additionally, management noted that on February 15, 2017, an STSO had an IBC with the appellant advising the appellant that he was not to clock in at locations that were not his assigned location to work.

On four occasions between January 18 and March 22, 2017, the appellant reported between three and five minutes late for his assigned scheduled shift.

Management provided as evidence: Summaries of Pre-Decisional Discussions, dated February 22, March 1, and April 5, 2017; statements from the appellant, dated February 22, March 1, April 5 and April 9, 2017; Memo to File from an STSO, dated April 5, 2017; Memo to File from a TSM, dated March 1, 2017; Memo to File from a TSM, dated March 1, 2017; Memo to File from an STSO, dated April 28, 2017; KRONOS Time detail, December 20, 2016 through March 24, 2017; Airport Information Management (AIM) Employee Record, dated February 18, 2017; and CCTV video footage.

On appeal, the appellant stated that he arrived at work on April 5, 2017, knowing that his two-year old son, who was chronically ill, would likely have to be taken to the hospital. He stated that he also knew that his mother, who was watching the child, would send him a text message if his son's condition worsened and medical treatment was necessary. The appellant stated that he was unsure if he missed a message and that he pulled his cell phone out of his pocket at approximately 2017 hours and placed the phone between his legs to see if his mother had tried to contact him. The appellant argued that management contends that he displayed and used his phone, allowing several bags to pass unscreened, but that the CCTV footage shows that he only looked down at his phone briefly; he did not "display" his phone to passengers or other officers, and that he did not "use" his phone. He also argued that none of the bags completely passed from the beginning to the end of the x-ray belt without him looking at the x-ray screen. The appellant stated that nevertheless, the STSO decided to run all of the bags back through the x-ray machine.

The appellant argued that the Charge, *Improper Display and Use of Personal Electronic Device,* cannot be sustained based on the evidence submitted. The appellant reiterated that he did not display the phone as alleged, nor did he use the phone while operating the x-ray machine. The appellant argued that he did not make or receive calls, send text messages, or use any other function on his phone. The appellant stated that he briefly glanced down at his phone to see if there was a message from his mother regarding his son.

The appellant argued that management exaggerated the amount of time that passed when he glanced at his phone. He also argued that the short amount of time that elapsed in the CCTV footage makes the claim that he was using his phone implausible. The appellant argued that during his momentary glances, he did not even have time to enter the six-digit unlock code and begin using the phone. He argued that management has not submitted concrete evidence that proves the charge by a preponderance of the evidence.

The appellant also argued that management failed to support the Charge of Inattention to Duty. He argued that although he did glance down at his phone, at no point was he inattentive to his duties. The appellant stated that only a few bags came through the x-ray chamber during those disputed moments, and no bags passed the x-ray screen without him viewing them. The appellant argued that the amount of time that elapsed is equivalent to if a supervisor or co-worker called out to him to get his attention and he glanced over at the person. The appellant also argued that no passengers were able to pass through without screening during the brief moment and the safety of the traveling public was not jeopardized.

The appellant argued that on the same day, at 2030 hours, an LTSM and STSO met with him to ask questions and investigate the cell phone issue. The appellant stated that he reasonably believed that the discussion could result in discipline and therefore, immediately requested union representation at the beginning of the meeting. The appellant stated that the LTSM denied his request and required him to answer questions related to the cell phone incident. The appellant argued that what happened next is in dispute because the STSO alleges that he said he removed his brush from his pocket, not his cell phone. The appellant argued that what the STSO alleged is incorrect. He argued that he readily admitted that he removed both a brush and a phone. The appellant argued that his written statement, which he made shortly after the interview and on the same day, corroborates that fact.

The appellant argued that management takes the position that he flatly denied taking out his phone, denied it again after reviewing CCTV footage that clearly shows him taking out the phone, and then, without any intervention or time passing, wrote a statement admitting that he took his phone out of his pocket. The appellant argued that the Charge is based solely on a statement from an STSO even though the LTSM witnessed the entire event. The appellant argued that the LTSM provided no affidavit or memorandum detailing the meeting or corroborating the STSO's understanding of the events. The appellant argued that he, on the other hand, provided multiple statements and a rebuttal that consistently explained that he took out both a brush and a cell phone. The appellant argued that a single statement from the STSO, especially when weighted against the consistency of his written statements, is insufficient to prove this serious charge by preponderant evidence.

The appellant also argued that Charge 3 must be dismissed because management violated his right to union representation. The appellant argued that on April 5, 2017, at 2030 hours, management denied him his right to union representation during a meeting that he reasonably believed might result in disciplinary or adverse action against him. The appellant cited TSA MD 1100.63-4 which provides that a bargaining unit employee (BUE) has the right to a personal representative during interviews in connection with examinations or investigations. The appellant argued that the STSO and LTSM undoubtedly "interviewed" him during an investigation or examination as outlined in 1100.63-4. The appellant argued that all four conditions of Section 6. D. (1) of the MD were met in this case: 1) he – based on the cell phone incident that occurred just minutes before – reasonably believed that discipline might result from the interview; 2) he orally requested personal representation at the beginning of the interview, and his statement after the interview corroborates that fact; 3) the personal representative was not disallowed for any appropriate reason; and 4) there was no evidence that a personal representative would have unreasonably delayed the examination. The appellant also argued that the interview was not in relation "to a security incident or concern at a screening or location, the resolution of which [was] time sensitive and require[d] immediate action," pursuant to Section F. (1). The appellant argued that his oral request for representation at the beginning of the meeting was proper and there was no permissible reason for management's denial of his request.

In response to Charges 4 and 5, the appellant noted that the Failure to Follow Procedures Charge specifies each occasion that he clocked in at an incorrect terminal while the Failure to Follow Directions Charge specifies only the February 13 incident and the February 15 Interest Based Conversation. The appellant argued that the directions given on February 13 took place after the appellant clocked in, and that the IBC on February 15 does not actually specify any failure to follow directions.

Additionally, the appellant argued that with regard to Charge 4, management failed to identify what procedure was actually violated by the specified conduct. The appellant noted that the only alleged policy violation is Section 5. D. (7) of the Handbook to TSA MD 1100.73-5, and argued that the Section simply provides that employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. The appellant argued that there must necessarily be an independent TSA policy prohibiting clocking in at a different terminal in order for him to have violated Section 5. D. (7). The appellant argued that absent the inclusion of that policy in the proposed and decision on removal, the charge must fail.

With regard to Charge 5, the appellant argued that neither specification actually proves the Charge. He argued that the first specification alleged that a TSM spotted him clocking in at the wrong terminal, but does not allege that he failed to heed the TSM's directions. He argued that the second specification merely explains that the IBC took place on February 15 and, again, makes no specific claim to his failure to follow directions.

The appellant stated that he did not contest Charge 6, *Tardiness*.

Management responded and argued that the appellant admits that while on duty as the x-ray operator he pulled out his cell phone and looked down at the cellphone and noticed a text notification. Management argued that when an STSO questioned the appellant about what he was looking down at, the appellant stated that he removed his brush because his pants were too tight. Management stated that even when the STSO asked the appellant to stop with his retelling of the events and to think about integrity and lack of candor, the appellant remained firm that he did not pull out his cell phone. Management argued that the appellant's later written admission stating that he indeed pulled out his cell phone does not negate his lack of candor to his supervisor when he was initially questioned about the incident. Management argued that these facts standing alone more than satisfy the burden of proving by preponderant evidence that the appellant displayed and used his cellphone, lacked candor, and was inattentive to his duties. Management argued that for the three remaining charges relating to attendance, the evidence is clear and fully supportive of the fact that the misconduct occurred.

With regard to Charge 1, The Board found that the CCTV footage shows that the appellant pulled his phone out of his pocket, placed it between his legs and glanced down at it. The appellant did not deny looking at his phone. The Handbook to TSA MD 1100.73-2, Section E. (9) states that display and use of personal electronic devices (to include cell phones) is prohibited in identified TSA screening areas. The appellant violated TSA policy by removing his cell phone from his pocket and looking it while operating the x-ray; his actions constitute display and use of his cell phone. The CCTV footage along with the STSO's statement are preponderant evidence to support the Charge. Therefore, the Charge, *Improper Display and Use of Personal Electronic Device*, is SUSTAINED.

The specification to Charge 2 provided that the appellant displayed and used his cell phone while the x-ray belt was running and that as a result "several bags/bins were able to exit the x-ray chamber without being screened." The evidence provided by management to support the charge was a statement from an STSO and a statement from the appellant dated April 5, 2017, the day after the events occurred. In his appeal, the appellant argued that he requested union

representation prior to being interviewed and providing his statement following the April 4, 2017, incident, but his request was denied.

In its response to the appeal, management did not address in any way appellant's claim that he requested union representation. TSA MD 1100.63-3, *Employee Representation*, Section 6. B. provides that Bargaining Unit Employees (BUEs) "have the right to personal representation during interviews in connection with investigations or examinations that the employee reasonably believes may result in disciplinary or adverse action." Additionally, TSA MD 1100.63-4, *Personal Representation During Examination or Investigation*, Section 6. A. provides that a BUE has the right to a personal representative during interviews in connection with examinations or investigations, as set forth in the directive that the BUE reasonably believes may result in disciplinary or adverse action against him or her. MD 1100.63-4 defines an interview as questioning, verbal or written, conducted by TSA management officials, including supervisors, TSA's Office of Inspection, or any other TSA employee or agent authorized by TSA management to conduct an examination or investigation concerning TSA operations or activities or TSA employees' conduct.

The Board considered and evaluated the appellant's concerns regarding the lack of a personal representative at the time of his interview and first statement.[1] Absent any evidence to rebut appellant's claim that he appropriately requested union representation, the Board found that appellant's representation request was denied. The Board further found that the appellant had a reasonable belief that the interview regarding the April 4, 2017, incident might result in disciplinary or adverse action against him. The Board determined not to give weight to the appellant's April 5, 2017, statement regarding the bags. Because the only other evidence to support the Charge and specification was the STSO's statement, which was not supported by the CCTV footage provided by management, the Board found that management did not prove the charge by a preponderance of evidence. Therefore, the Charge, *Inattention to Duty,* is NOT SUSTAINED.

With regard to Charge 3, both specifications reference interaction between the appellant and an LTSM, however, the statement submitted as evidence to support the Charge was written by an STSO. Specification 1 states that the appellant told the LTSM it was his brush he removed from his pocket, not his cell phone and specification 2 states that the LTSM showed the appellant the CCTV video of the incident and that the appellant replied again that it was not his cell phone, it was his brush. The appellant disputes the Charge and there is no statement from the LTSM, the person directly referenced in the specifications as the person the appellant made the statements to. Management failed to prove the Charge by a preponderance of evidence. Therefore, Charge 3, *Lack of Candor*, is NOT SUSTAINED.

With regard to Charge 4, the Board found that management failed to cite the specific policy or procedure the appellant failed to follow in the Notice of Proposed Removal and Decision letters. Management stated that the appellant's conduct is in violation of MD 1100.73-5, Section 5. D. (7). Section 5. D. (7) merely states that TSA employees are responsible for observing and abiding by all laws, rules, regulations and other authoritative policies and guidance. There is a

[1] The Board notes that the appellant also raised the denial of his request for a union representative in his written reply to the proposed removal. That claim was not addressed by the deciding official in the Notice of Decision on Proposed Removal.

Memo to File in the record, dated March 1, 2017, from a TSM, which states that at approximately 1300 hours on February 13, 2017, the TSM observed the appellant clocking in at Terminal 2 and that he explained to the appellant that he is required to clock-in at his home terminal and that he is still considered late if he is not present at the start of his shift at Terminal 5. The specifications indicate that the appellant clocked in at a terminal other than that which he was assigned on December 20 and December 28, 2016, and January 15 and January 24, February 13, and February 21, 2017. There is no evidence in the record however, that the appellant was told that he was violating a policy until after the TSM witnessed him clock-in on February 13, 2017. There is no evidence that the appellant was put on notice of the policy he violated prior to February 13, 2017, therefore, specifications 1 through 5, referencing instances from February 13 or earlier, are NOT SUSTAINED. Specification 6, which references February 21, 2017, after the TSM spoke to the appellant, is SUSTAINED. Having sustained specification 6 of the Charge, the Charge, *Failure to Follow Procedures,* is SUSTAINED.

With regard to Charge 5, the Board noted that both specifications are merely statements. Specification 1 states that a TSM informed the appellant that he was required to clock in at his home terminal and specification 2 states that an STSO had an IBC with the appellant and advised him not to clock in at locations that are not assigned to his location of work. The specifications do not claim that the appellant failed to follow directions; there is no allegation or discussion as to how the appellant failed to follow directions. Therefore, Charge 5, *Failure to Follow Directions,* is NOT SUSTAINED.

With regard to Charge 6, the Board found that the Punch Origin document is preponderant evidence that the appellant was tardy on each of the dates listed in the specifications. Therefore, specifications 1 through 4 are SUSTAINED and the Charge, *Tardiness*, is SUSTAINED.

Having sustained Charges 1, 4 and 6, the remaining question is whether removal is consistent with the TSA *Table of Offenses and Penalties* (Table) and is reasonable. In determining the reasonableness of the penalty, the Board considered whether the penalty factors listed in the TSA Handbook to MD 1100.75-3, *Addressing Unacceptable Performance and Conduct*, have been considered properly by the Deciding Official.

The appellant argued that management failed to prove that removal is reasonable because the *Douglas* factors were not adequately considered. The appellant argued that management did not fairly consider the nature and seriousness of the offenses. He also argued that there is no evidence in the record to suggest that cell phone usage is a recurring issue for him, or that this incident was anything but an anomaly. The appellant also argued that during his interview with the STSO and the TSM, he did not intentionally or maliciously make an incorrect statement. He argued that the root of the conversation seems to be a misunderstanding which may have been avoided had he been afforded the union representative he was entitled to. The appellant argued that the only thing he denied was using his phone, not having his phone.

The appellant also argued that management improperly treated a few minor infractions in his past disciplinary history as an aggravating factor. He argued that his record reflects a few Letters of Reprimand and one 3-day suspension for an unrelated incident. The appellant stated that while management is permitted to consider previous discipline, his discipline is both minor, and, in the case of the suspension, for conduct unrelated to the current action and argued that it should therefore, be given minimal weight.

The appellant argued that management did not properly consider that he has worked for TSA for over five years and that his work has never fallen below a satisfactory level throughout his career. He noted that he has been commended for providing special assistance to the members of the Wounded Warriors Program as they travel through the airport, and that he has received a great amount of positive feedback from the travelling public due to his helpful nature. The appellant argued that his "excellent" work history should be treated as a significant mitigating factor.

Further, the appellant argued that the mitigating circumstances surrounding the cell phone allegations also deserve significant attention. He stated that he has a two-year-old son who is chronically ill and that on the day in question, his mother told him that she may have to take his son to the emergency room. The appellant stated that the last time his mother had to take his son to the hospital, he did not find out until his break hours later and that by that time, too much time had passed and he was unable to assist his son during a serious emergency. The appellant argued that he glanced down at his phone on April 5 because he was very concerned about his son's wellbeing, as any parent would be.

The appellant also argued that management disregards his potential for rehabilitation. The appellant argued that in the almost two months working after the cell phone incident, management did not take away any of his job duties, including x-ray screening. The appellant argued that during that time, management trusted him to perform his job duties without incident. The appellant argued that if his supervisors had truly lost faith in his ability to complete his job functions, they would have moved him to non-security duties until his removal was effected. The appellant argued that they did not which shows that management believes that he has at least some potential for rehabilitation.

Management responded and argued that the penalty of removal based on the findings is completely consistent with applying discipline in the aggravated penalty range. Management stated that the appellant's actions, especially his lack of candor and inattention to duty while operating the x-ray machine, resulted in a total lack of confidence in his potential for rehabilitation.

The Deciding Official considered the penalty factors. The Deciding Official considered the appellant's satisfactory job performance and his five years of service with TSA. The Deciding Official stated that he did not find the appellant's length of service or satisfactory performance to be sufficient enough to outweigh the severity of the appellant's offenses. The Deciding Official stated that he considered the seriousness of the appellant's conduct, the clarity with which the appellant was on notice of the policies he violated, the appellant's work and disciplinary history, any mitigating circumstances and the guidance outlined in the Table.

The Deciding Official considered the appellant's disciplinary history and noted that the appellant was issued a Letter of Reprimand (LOR) on February 13, 2017, for tardiness; an LOR on January 3, 2017, for tardiness; a 3-day suspension on February 4, 2016, for inappropriate comments; an LOR on August 25, 2015, for failure to follow proper screening procedures; and an LOR on November 29, 2012 for failure to follow instructions. The Deciding Official also considered that although not disciplinary, the appellant received a Letter of Counseling for excessive tardiness on October 25, 2016, and a Letter of Leave Restriction on March 16, 2016. The Deciding

Official considered that through these actions the appellant was placed on notice that any future misconduct could result in more severe disciplinary action, up to and including removal from Federal service. The Deciding Official considered that as a TSO, the appellant's unprofessional conduct has had an adverse effect on management's confidence in the appellant's ability to perform his duties and to carry out TSA's mission. The Deciding Official considered that as a TSA employee, the appellant is in a position of trust and held to a high standard of conduct and integrity and that the success of the operation depends upon every team member reporting for duty and arriving on time. The Deciding Official stated that the appellant's continued failure to follow proper procedures and failure to follow directions has negatively impacted screening operations. The Deciding Official stated that the appellant's actions undermined management's confidence in the appellant's ability to perform his duties in a reliable and consistent manner.

The Board sustained Charges 1, 4 and 6. Under Section D. 4 of the Table, for Failure to Follow Procedures, the recommended penalty is a Letter of Reprimand (LOR) to a 14-day suspension and the aggravated penalty range is a 15-day suspension to removal. Under Section A.1 of the Table, for Tardy, the recommended penalty is an LOR and the aggravated penalty range is a 1-day to 5-day suspension. While the Board determined that management had the right to consider the aggravated penalty range due to the fact that there are multiple charges and considering the appellant's record of prior discipline, removal is not reasonable for the Charges upheld. Charge 4 was sustained based on only one of six specifications upheld. Charge 6 was sustained based on the fact that the appellant was tardy for a total of 16 minutes over four days. In light of the appellant's previous disciplinary record, the Board determined that a penalty at the bottom of the aggravated penalty range, a fifteen (15) day suspension, is sufficient to correct the appellant's behavior.

Decision. Accordingly, the appeal is GRANTED, in part, and the appellant's removal is mitigated to a fifteen (15) day suspension. The appellant will be reinstated as a TSO and will receive back pay from the date of his removal, subject to TSA rules and regulations. This is a final decision issued pursuant to TSA policy as set forth in TSA Management Directive 1100.77-1.

FOR THE BOARD:

DEBRA S ENGEL

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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—17-085

August 9, 2017

Issue: *Unavailability for Duty*

OPINION AND DECISION

On June 1, 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: *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 his position since July 28, 2015, to present due to a work-related injury. The appellant has been in a Leave Without Pay (LWOP) status since July 28, 2015.

On March 26, 2014, the appellant filed a Worker's Compensation Claim which was accepted by the Department of Labor (DOL), Office of Worker's Compensation (OWCP) on April 2, 2014. The appellant has been in a LWOP status since July 28, 2015. On April 6, 2017, management sent the appellant a Letter of Intent and Duty Status Update. In that letter, they advised the appellant that his continued absence negatively impacts TSA's ability to protect the nation's

transportation systems and that his continued unavailability may result in administrative action, such as removal from his position. Management requested that the appellant provide recent medical documentation which addressed his duties and showed that he has fully recovered from the on-the-job injury which has precluded him from working his full duties. The appellant did not respond to management.

The appellant was mailed a Notice of Proposed Removal on May 4, 2017. The appellant did not reply to the proposal notice.

Management provided as evidence: LWOP SF-50 and Letter of Intent and Duty Status Update, dated April 6, 2017.

On appeal, the appellant indicated that the reason for his unavailability is job related and that it is an ongoing process. The appellant argued that removal from his position due to the injury is a harsh penalty.

Management did not respond to the appeal.

The Board finds that management's decision to remove the appellant from the TSO position is supported by a preponderance of the evidence. The evidence clearly shows that the appellant has been unavailable for 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

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Debra S. Engel
Chair
OPR Appellate Board

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

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

(b)(6)

Lead Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

DOCKET NUMBER
OAB—17-083

August 2, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

On or about December 18, 2017, the Transportation Security Administration (TSA) placed the appellant, a Lead Transportation Security Officer, on an indefinite suspension without pay. On June 16, 2017, the appellant appealed the indefinite suspension to the TSA Office of Professional Responsibility Appellate Board (Board). On July 24, 2017, the appellant's representative withdrew the appeal before the Board.

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

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

FOR THE BOARD:

DEBRA S ENGEL

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Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Debra S. Engel
Chair
OPR Appellate Board

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

(b)(6)

Transportation Security Officer
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-081

August 1, 2017

Issue: *Misuse of SIDA Badge; Making a False Statement; Providing Misleading Information*

OPINION AND DECISION

On May 22, 2017, management removed the appellant from her position of Transportation Security Officer (TSO) with the Transportation Security Administration (TSA) based on three charges: *Misuse of SIDA Badge, Making a False Statement,* and *Providing Misleading Information*. The appellant filed a timely appeal of her removal to the Office of Professional Responsibility Appellate Board (Board). For the reasons discussed below, the appeal is DENIED.

ANALYSIS AND FINDINGS

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

The Board considered all of the evidence and arguments submitted by both parties. Management based Charge 1, *Misuse of a Security Identification Display Area (SIDA) Badge*, on one specification alleging that on March 29, 2017, at approximately 0938, the appellant used her airport SIDA badge to access the security checkpoint. The appellant was off duty and her shift did not begin until 1200. The appellant bypassed security screening and went through the Americans with Disabilities Act (ADA) gate to gain access to the sterile area. The appellant was not on duty and was not performing official duties; the appellant was accompanying her mother to the gate.

Management based Charge 2, *Making a False Statement*, on one specification alleging that on March 29, 2017, at approximately 1210, a Transportation Security Inspector (TSI) was conducting a civil enforcement investigation and spoke to the appellant about her entry into the sterile area that morning. The appellant stated that she entered the sterile area to get coffee. The TSI asked who the appellant was accompanying and the appellant said that she was with another woman, but that she did not know who she was. The appellant told the TSI that she recognized the woman but did not know her and that she thought the woman looked confused at the airline ticket counter. The appellant stated that the woman only had cash which could not be accepted so the appellant offered to pay the woman's checked baggage fee with her personal credit card in exchange for the cash. The TSI asked the appellant if she knew the woman and the appellant replied that she was familiar but that she did not know her. The appellant stated that she thought maybe she had seen her when she was acting as a Passenger Support Specialist before. The appellant's claims that she did not know the woman were false – the woman was the appellant's mother.

Management based Charge 3, *Providing Misleading Information*, on one specification alleging that on March 29, 2017, at approximately 0938, the appellant used her airport SIDA badge to access the security checkpoint. The appellant was off duty and her shift did not begin until 1200. The Ticket Document Checker (TDC) TSO asked the reason the appellant was accessing the checkpoint, and the appellant stated that she was working doing Threat Awareness Countermeasures Training (TACT) team. When the appellant approached the Walk Through Metal Detector (WTMD), the appellant showed a TSO her SIDA badge and another TSO gave the appellant a strange look and the appellant replied that she was working on TACT Team duty stuff. The appellant bypassed security screening and went through the ADA gate to gain access to the sterile area. The appellant was not scheduled to be on duty until 1200 and was not performing official TACT duties when she made the statement. In fact, the appellant was simply accompanying her mother to the gate.

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 states that TSA employees are responsible for behaving in a way that does not bring discredit upon the Federal Government or TSA, and for observing basic on-the-job rules: (7) observing and abiding by all laws, rules, regulations and other authoritative polices and guidance.

Management alleged that the appellant's conduct violated the Handbook to TSA MD 1100.73-5, Section D., Use of Federal Equipment, Property, and Personnel, which states that employees may not use or permit others to use federal equipment, property, time, or personnel . . . for other than official business or officially approved or sponsored activities or purposes. Section D. (9) refers to Employee Identification Cards, Uniform Items, Badges, Credentials, Facility Access Cards (including Security Identification Display Area (SIDA) badges), and other Similar Media and (b) states that employees are prohibited from using private identification media issued by a non-governmental entity in connection with that entity's legitimate interests. For example, attempting to use an access card issued by a private employer to gain entrance to TSA space, although the user is a TSA employee, is prohibited.

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

Additionally, management referenced the SIDA Frequently Asked Questions (FAQs) training that the appellant completed on February 7, 2017. Management cited the FAQs regarding whether an employee is allowed to use his/her SIDA badge to access SIDA areas on his/her own time for non-work related reasons. The FAQs state, "No. If you are on official government travel or certain special circumstances then you may enter the break room, supervisor's office, etc. If you are in a situation of this nature, then ask a manager to clarify before accessing any areas."

On March 29, 2017, the appellant entered the sterile area through the ADA gate at the checkpoint using her SIDA badge at approximately 0938. The appellant was not scheduled to begin her shift until 1200. The appellant told multiple TSOs working at the checkpoint that she was there for TACT team duties. The TSO working at the TDC on the morning of March 29, 2017, submitted a statement in which she stated that between 0930 and 0940 the appellant approached the TDC with another person. The TSO stated that the other person showed her ticket and ID. The TSO also stated that it was the appellant's mother traveling. The TSO stated that the appellant started down the Pre-Check lane and that she stopped the appellant by calling her back and asked her if she was on duty or had a ticket. The TSO stated that the appellant replied that she was working doing TACT team.

In a statement from the TSO operating the WTMD on March 29, 2017, the TSO stated that the appellant approached the WTMD in plain clothes with a passenger. The TSO stated that he was unaware of the relation the appellant had with the passenger. The TSO stated that after the passenger went through the WTMD, the appellant showed him her SIDA badge and passed through the ADA gate and that as she passed through she stated that she was there for her TACT team stuff. The TSO that after the appellant passed through the checkpoint, she appeared to continue on to the concourses with the passenger. The TSO working in the load position submitted a statement on March 29, 2017, and stated that the appellant came through the Pre-Check lane with her mother. The TSO stated that the appellant stated that she was working on TACT Team Duty stuff and that she went through the ADA gate.

A Supervisory Transportation Security Officer (STSO) saw the appellant in the sterile area sitting at a gate with a female with whom the appellant had approached the TDC. The STSO stated in a written statement that she asked the appellant if she was on the clock and that the appellant replied that she was not but that she would be soon. The STSO stated that when she asked the appellant what time she started work, the appellant told her she started at noon. The STSO stated that she informed the appellant that since she was not clocked in and was not at the gate for work, it was a SIDA violation and she would have to escort her out. The STSO stated that the appellant stated that she was told by the airline ticket counter agent that she could come up without a gate pass and then asked if she had to leave even if she was going to be working on emails. The STSO stated that she told the appellant that since she was not on the clock conducting work business then she would have to leave and that she informed the appellant again that it was a SIDA violation.

The TSI met with the appellant regarding the incident on the same date at approximately 1210 hours. The TSI stated in her Inspector's Statement that she told the appellant she was investigating her entry into the sterile area that occurred earlier in the day. The TSI stated in her report that the appellant's shift started at noon and that the appellant was not on overtime at 0939 hours. The TSI stated that the appellant did not start her TACT duties until her shift started at noon. The TSI stated that the appellant told her that she came in early to view email because she was unable to view it from home. The TSI stated that the appellant told her that the reason she entered the sterile area was because she wanted to get a cup of coffee before she started checking her email.

The TSI stated that she told the appellant that she was confused with her explanation because a supervisor reported seeing the appellant accompany another female into the sterile area, and that there was no mention of coffee. The TSI stated that she asked the appellant for clarification on who she was accompanying and that the appellant told her that she was with another woman, but that she did not know who the woman was. The TSI stated that the appellant told her that she was familiar with the woman and that when she asked the appellant where she may have met the woman, the appellant stated that she thought she may have seen her when she was acting as a Passenger Support Specialist.

The appellant was issued a Notice of Proposed Removal (NOPR) on April 14, 2017. The NOPR advised the appellant of her right to reply orally and/or in writing within seven days of receipt of the NOPR. The appellant requested an extension to respond which was granted by management. The appellant provided a written response on April 28, 2017.

Management included as evidence: TSI Inspection Report, dated March 30, 2017, with attachments; Supplemental statement from a TSO, dated April 12, 2017; SIDA FAQ Training documentation; Appellant's Acknowledgment of MD 1100.73-5, dated November 4, 2016; and Closed Circuit Television (CCTV) footage.

On appeal, the appellant argued that management did not prove the Charges by a preponderance of evidence. With regard to Charge 1, the appellant argued that although she had not officially clocked in yet, she was performing official duties on a scheduled work day. The appellant noted that management cited MD 1100.73-5, Section D, stating that employees may not use or permit others to use federal equipment for purposes other than official business or officially approved activities. The appellant argued that SIDA badges are not federal equipment and therefore, the provision is inapplicable to the facts of the case. The appellant argued that a SIDA badge is more appropriately classified as private identification media. The appellant stated that an Airport Operations Attendant who works in the SIDA badging office told her that it was okay to use her SIDA badge to enter the sterile area before her shift, as long as it was a work day, and not a day off. The appellant argued that if she had in fact violated SIDA policy, then the Airport Operations Attendant would have likely taken her badge, notified TSA management, or initiated corrective action. The appellant argued that instead the Airport Operations Attendant told her that her actions constituted an acceptable use of her SIDA badge.

The appellant argued that she did not use her SIDA badge to escort her mother to the gate. She argued that there is evidence that she accessed the area in a customary manner prior to working on her TACT assignments, which are official duties. The appellant argued that the statements of three TSOs reflect that she notified them that she was there to do TACT work. Additionally, she

argued that when an STSO saw her at 1110 hours in the training room, the appellant told her that she was doing TACT work, which included sending Standard Operating Procedures (SOP) questions to headquarters. The appellant argued that her mother went through all mandatory screening and was not aided in any manner by her. She stated that she did not escort her mother into the secured area and that the traveling public was never in any danger as a result of her actions. She argued that it is customary for TSOs to use their SIDA badges to access the sterile area before their shifts. She stated that typically officers will enter the sterile area in order to buy food or beverages before they clock in. The appellant stated that TSOs also use their SIDA badges to enter the sterile area during lunch and on breaks to purchase food from the food courts and that Transportation Security Managers (TSMs) and STSOs also regularly access the sterile area for food and beverages before and after their shifts. The appellant argued that as of March 2017, TSOs could no longer access their work emails from home and that ever since then, TSOs use their SIDA badge to come in before their works shifts to check and send emails in the training room. She argued that based on the information obtained from the SIDA badge office and multiple TSOs, management did not prove by preponderant evidence that she misused her SIDA badge.

With regard to Charge 2, the appellant argued that the Charge is not supported by preponderant evidence because it is based solely upon hearsay that is contradicted by substantial evidence to the contrary. The appellant stated that the TSI refused to take an official written statement from her and that even after she offered to provide one for the investigation, the TSI said that the written statement would not be necessary. The appellant argued that it is "unfathomable" that a trained investigator would not have asked for a statement if she thought something was wrong. She alleged that the TSI is accusing her of advancing a narrative that is inconsistent with stated substantial evidence and that she made no attempt to hide her mother's identity from TSA. She reiterated that three TSOs mentioned in their statements that they knew the woman with her was her mother. The appellant argued that since she had already told multiple coworkers that the woman was her mother, it would not make logical sense for her to deny her mother's identity a couple of hours later. The appellant also stated that she hugged her mother in front of the STSO.

With regard to Charge 3, the appellant argued that she did not mislead the TSOs at the checkpoint when she told them that she was at the airport for TACT duties. She argued that management's contention that she was not performing TACT duties at the time that she made the statement is too literal of an approach that does not take into account that the reason she made the statement was because she was in street clothes; the fact that officers regularly arrive to work early because they no longer have access to email from home; and the reality that officers regularly access the secure area for food and beverages prior to shifts and during breaks. The appellant argued that an STSO saw her working on her TACT assignments on the computer in the training room and that there is also record of the TACT work that she completed during that time. The appellant stated that she sent SOP questions to headquarters at 10:05 a.m. on March 29, 2017, and that she saved a TACT document at 11:03 a.m. on March 29, 2017. The appellant argued that she provided truthful information when she stated that she was at the airport in order to perform TACT duties. She argued that the fact that her mother was at the airport, a fact that she did not attempt to hide from her coworkers and management, does not negate in any way the "concrete facts" that show she was working.

Management responded and argued that the appellant admits that she used her SIDA badge to gain access to the sterile area and that she accompanied her mother to the gate without a gate

pass. Management stated that the appellant was at the airport more than two hours before the start of her shift. Management stated that the appellant accompanied her mother to the gate and sat down with her and that it was not until she was told by an STSO that it was a violation to use her SIDA to access the sterile area when not on official business that the appellant reluctantly proceeded to the training room to read emails and do TACT team business. Management argued that the appellant's claim that she was there to work on TACT and read emails is a preposterous story given the fact that the training room where the computers are located is on the non-sterile, public side of the airport and on a different level than the checkpoint. Management argued that there is absolutely no reason for the appellant to enter the sterile area to accomplish what she claims she was there to do. Management also dismissed the appellant's claim that she entered the sterile area to get coffee but didn't because her favorite barista was not there; questioning how any barista at the coffee shop could not prepare her coffee per her instructions. Management noted that there is a Dunkin' Donuts and coffee available on the non-sterile side opposite the training room. Management also noted that the appellant's story about coffee was first mentioned after it was suggested to her as a possible reason for entering the sterile area by an STSO. Management argued that when a TSA employee enters the sterile area off-duty for non-work purposes such as traveling on personal travel or accompanying someone to the gate under a gate pass, they must go through standard security screening. Management argued that the appellant had no business reason to use her SIDA badge to enter the sterile area. Management reiterated that the appellant could read her emails and get prepared for her TACT assignment in the training room which is on the non-sterile side of the airport. Management argued that while it may be permissible to enter the sterile area to get a cup of coffee prior to starting one's shift, it is clear that the appellant did not arrive two and a half hours before her shift to read emails and work on her TACT duties before her shift. Management argued that the appellant was there to accompany her mother to the gate for her flight and that this is not comparable to entering the sterile area during lunch break to get a cup of coffee. Management argued that the appellant was not on duty, was not scheduled to be on duty for two more hours, and that the preponderance of the evidence supports the conclusion that she improperly used her SIDA to enter the sterile area to accompany her mother to the gate because she did not have a gate pass. Management argued that although the appellant alleges that she was charged with using her SIDA badge to "escort" her mother, nowhere in the proposal or decision letter was the appellant accused of escorting her mother into the sterile area. Management argued that the proposing and deciding official both referred to her conduct as "accompanying" her mother into the sterile area. Management argued that it was not alleged that the appellant assisted her mother to bypass security. Management stated that had the appellant properly obtained a gate pass, the appellant would have been subjected to standard screening. Management argued that by using her SIDA and claiming she was "doing TACT work" the appellant avoided having to be screened herself.

Regarding the appellant's claims that the TSI was "not listening intently" to her statement and questions as to why the TSI did not request a written statement, management argued that the TSI's inquiry was a civil enforcement inquiry, investigating an alleged badging violation and that in such investigations it is not uncommon for the inspector to conduct oral interviews and not take a written statement from the subject. Management argued that the TSI was confused because the appellant's story did not make much sense and that the TSI took notes and then sought clarification from the other witnesses and CCTV. Management argued that the TSI's statement is not "hearsay" as alleged by the appellant. Management argued that the TSI was describing what the appellant said to her.

Management also argued that while the appellant claimed that she told the TDC officer that she was doing TACT stuff as a way to explain her civilian attire, the TDC officer did not ask her why she was in civilian clothes; she asked her if she had a boarding pass or was on duty. Management argued that the appellant's response that she was doing TACT implied that she was on duty, when she was not. Management argued that the appellant's misleading information caused the TSOs at the TDC and WTMD to allow the appellant into the sterile area through the ADA gate without any screening.

The appellant responded to management's reply and argued that the reason she arrived at work early was both to do her TACT duties and access emails in the training room and to transport her mother to the airport. She argued that the two are in no way mutually exclusive. She argued that the fact that she was there to do TACT duties is supported by the fact that she told three TSOs that she was there to do TACT work well before her encounter with the STSO. She also argued that the time she was with her mother is small compared to the amount of time she was doing work.

The appellant also argued that she never asserted that she planned to do TACT work in the sterile area. She argued that she accessed the sterile area in a customary manner to get coffee, prior to beginning her TACT assignments.

The appellant further argued that prior to management's response, management did not submit any documentation or even mention that the TSI was conducting a civil enforcement inquiry for an enforcement investigation report. She also argued that she was not given an opportunity to provide a statement even though management had every opportunity to ask her for a statement.

The appellant alleged that management used "colorful and emotionally-charged words to shroud its inability to discredit [the appellant]."

Additionally, the appellant argued that the TSI's statement was unsigned and should be afforded little weight regardless if it does or does not contain legal hearsay. She argued that management relied on a second-hand account that is not corroborated by anything else in the record. She argued that there is substantial evidence that her colleagues knew the woman was her mother and that she did nothing to hide the fact from management and her colleagues. The appellant argued that it simply does not make sense that she would deny knowing her mother.

With respect to Charge 1, the Board found that it is clear that the appellant bypassed security screening and went through the ADA gate to access the sterile area more than two hours before her scheduled shift. Additionally, it is clear that she was not on duty and was not performing official duties when she bypassed screening and entered the sterile area through the ADA gate. There was no reason for the appellant to be in the sterile several hours before her shift. Even if she was checking or sending email as she claims, management pointed out that the appellant was able to access email from an area outside of the sterile area. The Board found no merit to the appellant's argument regarding the Airport Operations Attendant. There is no statement in the record from the Airport Operations Attendant. The SIDA FAQs make it clear that she was not to access the sterile area on her own time for non-work related reasons. The statements of the three TSOs working at the checkpoint at the time of the incident, which consistently describe the

appellant's actions, are preponderant evidence to support the Charge. Therefore, the Charge, *Misuse of SIDA Badge*, is SUSTAINED.

With respect to Charge 2, the Board found that the TSI's Investigative Report is preponderant evidence to support the Charge. The investigative report is not hearsay simply because it was not signed by the TSI. There is no evidence that the TSI spoke to the other witnesses prior to her interview of the appellant and was aware that the woman with the appellant was her mother. While the appellant may have told the TSOs at the checkpoint that the woman she was with was her mother, the TSOs were not asking the appellant an investigative question. It is clear that the appellant was aware that she was being asked questions by the TSI as part of an investigation. The TSI was not required to get a written statement from the appellant during her investigation. The description of the statements made by the appellant to the TSI, as described in the TSI's Investigation Report, is detailed and descriptive and the Board determined that the TSI's report is credible. Therefore, the Charge, *Making a False Statement*, is SUSTAINED.

With respect to Charge 3, the statements of the TSOs at the checkpoint are preponderant evidence that the appellant stated she was doing TACT duties. The appellant was not on duty at the time she made the statements to the employees at the checkpoint; her shift did not start until more than two hours after she accessed the sterile area. Additionally, the appellant did not perform any TACT duties while in the sterile area. The statements she made to her coworkers as to her reason for entering the sterile area were misleading and she was not screened properly as a result to the statements she made to her coworkers. Therefore, the Charge, *Providing Misleading Information*, is SUSTAINED.

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

On appeal, the appellant argued that management failed to prove that removal is reasonable. She argued that management failed to adequately consider the mitigating factors when making the penalty determination and completely ignored the *de minimis* nature of the alleged offense. The appellant argued that management portrayed the occurrence as if she accessed the sterile area in order to escort her mother to the gate, implying there was a security breach. She argued that her mother accessed the sterile area with her boarding pass and went through the standard security procedures and that the traveling public was never at risk. The appellant argued that she accessed the sterile area to get coffee before beginning her TACT duties, stating it was something she would have done regardless of her mother's presence. She argued that she did not use her credentials for personal gain because her mother already had a boarding pass and had submitted to screening. The appellant argued that it was an isolated and nonrecurring incident and that it was not malicious.

The appellant argued that the fact that she is not a supervisor or a law enforcement officer should be considered a mitigating factor. She also argued that the fact that she had no prior disciplinary actions should be a mitigating factor, as well as the fact that she has been an "exemplary employee" during her eight years at TSA. The appellant noted that she received excellent performance appraisals throughout her tenure as a TSO, as well as a TSA Model Officer Award

for FY 2016. The appellant cited various other awards she has received and programs for which she has volunteered.

The appellant argued that her alleged misconduct was never made public and that there is no evidence that her supervisors lost confidence in her. She also argued that the allegations do not relate to her assigned duties. She argued that she is fully capable of carrying out her TSO duties with integrity and competence.

The appellant argued that she was not on notice that she was unable to use her SIDA badge to access the sterile area for coffee while working on her TACT duties. She also argued that management never met with her to discuss the alleged misconduct prior to the issuance of the Proposal and Decision letters and that therefore, she was not given the opportunity to admit to her actions and explain the misunderstanding. Further, the appellant argued that management did not follow progressive discipline.

The appellant also argued that management failed to engage in mandatory, relevant fact-finding; stating that management did not interview her, ask her to write a statement or investigate to see whether Airport Operations considered her actions improper. The appellant stated that considering the severity of the allegations and their nature, management's decision not to meet with her, interview her, or ask her for a statement is a "fundamental investigative flaw that violates the pre-decisional requirements established in the Handbook." The appellant stated that she recognizes that a pre-decisional meeting was not required, but argued that it is highly irregular to propose an adverse action without conducting a pre-decisional meeting

Management replied and argued that the penalty of removal is reasonable and consistent with the guidelines listed in the Table. Management argued that while the appellant claimed to be an exemplary employee during her eight years with TSA and supplied letters of recommendation from her supervisors from her previous airport, they are of little relevance to the confidence her current supervisors at her current airport have regarding her ability to perform her duties with honesty and integrity. Management stated that on May 1, 2017, the appellant received a 14-day suspension for inappropriate conduct and lack of candor. Management argued that an "exemplary" employee does not have a 14-day suspension on her record. Management stated that while the Deciding Official acknowledged her good work performance, it was far outweighed by each of the three specifications in the removal action that indicated that the appellant lacks integrity and cannot be trusted. Management argued that allowing employees to access the sterile area immediately before and after their shift to get coffee is not analogous to arriving two hours prior to her shift, entering the sterile area and not getting coffee, but instead accompanying her mother to the gate and sitting with her until the appellant was confronted by a supervisor and told it is not permissible.

The appellant responded and argued that management brought up a suspension in its response that was not considered as a penalty determination factor in either the Proposal or Decision. She argued that the fact that the Deciding Official did not mention the previously issued suspension is further evidence that management did not conduct a thorough investigation and thus, did not make an informed decision.

The Deciding Official considered the nature and seriousness of the appellant's offenses and the relationship to the duties of her position. The Deciding Official stated that as a TSO, the

appellant is required to comply with directives and policy and that the appellant is looked upon by the public as a trusted public servant as she carries out the security functions of her position. The Deciding Official considered that the successful operation of TSA security screening depends upon every officer treating others with respect. He stated that the appellant's conduct caused him great concern and that he has no confidence in the appellant's ability to carry out the wide range of responsibilities required of her position with integrity. The Deciding Official stated that it is important that both TSA and the public have complete trust and confidence that the appellant will perform her duties with honesty and integrity. The Deciding Official considered that integrity is the first core value of TSA and that the appellant's efforts to hide the fact that she was accompanying her mother demonstrates a lack of integrity. The Deciding Official found that the appellant's actions have negatively affected her supervisor's confidence in her ability to behave professionally and be forthcoming.

The Deciding Official also considered that the appellant is familiar with TSA's policy as indicated by her completion of TSA's policy on Employee Responsibilities and Code of Conduct via the Online Learning Center (OLC) on November 10, 2016. The Deciding Official considered that the appellant also knew or should have known the airport SIDA rules noting that on February 7, 2017, she completed the SIDA Frequently Asked Questions (FAQs) training which covered the use of her SIDA badge. The Deciding Official noted that the appellant initialed the training tracking sheet which stated: "My initials certify that I have received and understand this training."

As mitigating factors, the Deciding Official considered the appellant's length of service with TSA which began on April 26, 2009, that she had no prior disciplinary actions, and that her performance rating has consistently been "Achieved Excellence." The Deciding Official also considered that the appellant received the TSA, Model Officer award for FY2016. The Deciding Official found however, that the nature of seriousness of the misconduct far outweighs the mitigating factors and warrants removal.

The Deciding Official considered that the appellant's offenses are serious in nature and relate directly to her duties and responsibilities as a TSO. The Deciding Official stated that as a TSO, the appellant is expected to follow all guidance, direction and to provide truthful and accurate statements. The Deciding Official stated that the appellant's use of her SIDA badge was for personal gain, so that she could accompany her mother to the gate without getting a gate pass or submitting to screening. The Deciding Official stated that the appellant's false statements were intentional, to avoid admitting that her purpose was to accompany her mother to the gate. The Deciding Official considered that the appellant is a full-time TSO and is expected to adhere to all TSA rules, regulations, policies, and directives, which includes showing integrity and honestly. The Deciding Official considered that as a Model Officer, and TACT team member, the appellant is held to a high standard but no more than any other TSO. The Deciding Official considered that during the appellant's FY17 Employee Performance Plan sit-down on November 4, 2016, she was provided goals and expectations and that one of those goals was Integrity/Honesty. The Deciding Official considered that integrity is the first Core Value of TSA and that the appellant's conduct has not demonstrated integrity. The Deciding Official considered that the appellant's actions have negatively affected her supervisors' confidence in her ability to show integrity and honesty as well to follow guidance and directions.

Under Section G.4, pertaining to misuse of a SIDA badge, the recommended penalty range is a 5-day to 14-day suspension. The Table notes under the recommended range that "removal is permissible for TSOs, inspectors and law enforcement officers." The aggravated penalty range under G.4 is a 15-day suspension to removal. Under Section E.1 of the Table, for making a false statement, the recommended penalty is removal. Under Section E.2, for providing misleading information, the recommended penalty is removal. The Table also states that in cases where an employee commits more than one offense, the Proposing and Deciding Official may consider whether the penalty should be in the "Aggravated Penalty Range" column corresponding to the most serious offense being charged.

The Board notes that the Proposing and Deciding Officials did not mention or consider the appellant's prior discipline mentioned in the response to the appellant's appeal, nor was it considered by the Board. The Board sustained all three charges and removal is within the recommended penalty range and aggravated penalty range for each of the three charges. Even without any prior discipline considered, the Board finds that management's decision to remove the appellant from her position as a TSO was within the bounds of reasonableness.

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

FOR THE BOARD:

DEBRA S ENGEL

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Date: 2017.08.01 15:58:22 -04'00'

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—17-081

August 30, 2017

***Issue**: Misuse of SIDA badge; Making a False Statement; Providing Misleading Information*

DECISION ON RECONSIDERATION

On August 1, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On August 7, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On August 8, 2017, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Transportation Security Officer,
Appellant,

v.

TRANSPORTATION SECURITY ADMINISTRATION,
Management.

DOCKET NUMBER
OAB—17-080

August 11, 2017

Issue: *Jurisdiction*

OPINION AND DECISION

On or about May 22, 2017, the appellant was removed from her position as a Transportation Security Officer (TSO) with the Transportation Security Administration (TSA). On or about June 21, 2017, the appellant appealed her removal to the TSA Office of Professional Responsibility Appellate Board (Board). On July 20, 2017, management rescinded the removal action. On July 21, 2017, the Board dismissed the appellant's appeal based on jurisdiction.

On August 4, 2017, the appellant filed a request for reconsideration arguing that she has not been reinstated to Federal service. Management provided an SF 52 indicating that the appellant's removal action was cancelled and have indicated that the appellant has a return to duty date of August 15, 2017. Based on the foregoing facts, the Board is divested of jurisdiction to consider the appellant's appeal.

Decision. Because the Board lacks jurisdiction to decide the appeal, the request for reconsideration, is DENIED.

FOR THE BOARD:

DEBRA S ENGEL

Digitally signed by DEBRA S ENGEL
DN: c=US, o=U.S. Government, ou=Department of Homeland Security, ou=TSA, ou=People, cn=DEBRA S ENGEL, 0.9.2342.19200300.100.1.1=0876087875.TSA
Date: 2017.08.11 15:38:05 -04'00'

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—17-077

August 7, 2017

***Issue**: Positive Drug Test*

DECISION ON RECONSIDERATION

On July 21, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On August 1, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board.* After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation Security Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-073

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

August 7, 2017

***Issue**: Conduct Unbecoming a Supervisory Transportation Security Officer*

DECISION ON RECONSIDERATION

On July 6, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On July 19, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On July 25, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility

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

(b)(6)

Supervisory Transportation Security Officer
Appellant,

DOCKET NUMBER
OAB—17-073

v.

TRANSPORTATION SECURITY
ADMINISTRATION,
Management.

August 7, 2017

***Issue**: Conduct Unbecoming a Supervisory Transportation Security Officer*

DECISION ON RECONSIDERATION

On July 6, 2017, the Office of Professional Responsibility Appellate Board (Board) issued a decision upholding the appellant's removal from the Transportation Security Administration (TSA). On July 19, 2017, the appellant filed a request for reconsideration, pursuant to Section 6.J of TSA Management Directive 1100.77-1, *OPR Appellate Board*. On July 25, management submitted a response arguing that the request for reconsideration should be denied. After considering the underlying record and the request for reconsideration, the evidence does not support the argument that the Board either misinterpreted the facts or misapplied TSA policy. Accordingly, the request for reconsideration is DENIED and the initial Board decision shall remain in effect.

FOR THE BOARD:

Transportation
Security
Administration

OFFICIAL: Office of Professional Responsibility
Arlington, VA 20598

Deborah Kearse

Deborah Kearse
Acting Assistant Administrator
Office of Professional Responsibility